UNITED STATES

REPORTS

560

OCT. TERM 2009

UNITED STATES REPORTS

VOLUME 560

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 2009

MAY 17 THROUGH JUNE 17, 2010

FRANK D. WAGNER

REPORTER OF DECISIONS

WASHINGTON : 2015

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

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ANTONIN SCALIA, ASSOCIATE JUSTICE.
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*Mr. Katyal became Acting Solicitor General effective May 17, 2010.

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 August 17, 2009, 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, JOHN PAUL STEVENS, Associate Justice.

For the Seventh Circuit, JOHN PAUL STEVENS, 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.

August 17, 2009.

(For next previous allotment, see 557 U. S., p. VI.)

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 2009

ABBOTT *v.* ABBOTT

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

No. 08–645. Argued January 12, 2010—Decided May 17, 2010

After the Abbotts, a married couple, moved to Chile and separated, the Chilean courts granted respondent wife daily care and control of their minor son, A. J. A., while awarding petitioner husband visitation rights. Mr. Abbott also had a *ne exeat* right to consent before Ms. Abbott could take A. J. A. out of the country under Chile Minors Law 16,618 (Minors Law 16,618), Art. 49. When Ms. Abbott brought A. J. A. to Texas without permission from Mr. Abbott or the Chilean family court, Mr. Abbott filed this suit in the Federal District Court, seeking an order requiring his son's return to Chile under the Hague Convention on the Civil Aspects of International Child Abduction (Convention) and the implementing statute, the International Child Abduction Remedies Act (ICARA), 42 U. S. C. § 11601 *et seq.* Among its provisions, the Convention seeks "to secure the prompt return of children wrongfully removed or retained in any Contracting State," Art. 1; provides that such "removal or retention . . . is to be considered wrongful where" "it is in breach of rights of custody attributed to a person . . . under the law of the State in which the child was [theretofore] habitually resident," Art. 3*(a)*, and where "those rights [had been] actually exercised . . . or would have been so exercised but for the removal or retention," Art. 3*(b);* and defines "rights of custody" to "include . . . the right to determine the child's place of residence," Art. 5*(a)*. The District Court denied relief, holding that the father's *ne exeat* right did not constitute a "righ[t] of custody"

under the Convention and, thus, that the return remedy was not authorized. The Fifth Circuit affirmed.

Held: A parent has a right of custody under the Convention by reason of that parent's *ne exeat* right. Pp. 8–22.

(a) The Convention applies because A. J. A. is under 16; he was a habitual resident of Chile; and both Chile and the United States are contracting states. The ICARA instructs the state or federal court in which a petition alleging international child abduction has been filed to "decide the case in accordance with the Convention." §§ 11603(b), (d). Pp. 9–10.

(b) That A. J. A. was wrongfully removed from Chile in violation of a "righ[t] of custody" is shown by the Convention's text, by the U. S. State Department's views, by contracting states' court decisions, and by the Convention's purposes. Pp. 10–22.

(1) Chilean law determines the content of Mr. Abbott's right, while the Convention's text and structure resolve whether that right is a "righ[t] of custody." Minors Law 16,618, Art. 49, provides that "[o]nce the court has decreed" that one of the parents has visitation rights, that parent's "authorization" generally "shall also be required" before the child may be taken out of the country. Because Mr. Abbott has direct and regular visitation rights, it follows that he has a *ne exeat* right under Article 49. The Convention recognizes that custody rights can be decreed jointly or alone, see Art. 3*(a)*, and Mr. Abbott's *ne exeat* right is best classified as a "joint right of custody," which the Convention defines to "include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence," Art. 5*(a)*. Mr. Abbott's right to decide A. J. A.'s country of residence allows him to "determine the child's place of residence," especially given the Convention's purpose to prevent wrongful removal across international borders. It also gives him "rights relating to the care of the person of the child," in that choosing A. J. A.'s residence country can determine the shape of his early and adolescent years and his language, identity, and culture and traditions. That a *ne exeat* right does not fit within traditional physical-custody notions is beside the point because the Convention's definition of "rights of custody" controls. This uniform, text-based approach ensures international consistency in interpreting the Convention, foreclosing courts from relying on local usage to undermine recognition of custodial arrangements in other countries and under other legal traditions. In any case, this country has adopted modern conceptions of custody, *e. g.*, joint legal custody, that accord with the Convention's broad definition. Ms. Abbott mistakenly claims that a *ne exeat* right cannot qualify as a right of custody because the Conven-

tion requires that any such right be capable of "exercis[e]." When one parent removes a child without seeking the *ne exeat* holder's consent, it is an instance where the right would have been "exercised but for the removal or retention," Art. 3*(b)*. The Fifth Circuit's conclusion that a breach of a *ne exeat* right does not give rise to a return remedy would render the Convention meaningless in many cases where it is most needed. Any suggestion that a *ne exeat* right is a right of access is atextual, as a *ne exeat* right is not even arguably a "right to take a child for a limited period of time." Art. 5*(b)*. Ms. Abbott's argument that the *ne exeat* order in this case cannot create a right of custody is not dispositive because Mr. Abbott asserts rights under Minors Law 16,618, which do not derive from the order. Pp. 10–15.

(2) This Court's conclusion is strongly supported and informed by the longstanding view of the State Department's Office of Children's Issues, this country's Convention enforcement entity, that *ne exeat* rights are rights of custody. The Court owes deference to the Executive Branch's treaty interpretations. See *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U. S. 176, 185. There is no reason to doubt this well-established canon here. The Executive, when dealing with delicate foreign relations matters like international child abductions, possesses a great store of information on practical realities such as the reactions from treaty partners to a particular treaty interpretation and the impact that interpretation may have on the State Department's ability to reclaim children abducted from this country. P. 15.

(3) The Court's view is also substantially informed by the views of other contracting states on the issue, see *El Al Israel Airlines, Ltd.* v. *Tsui Yuan Tseng*, 525 U. S. 155, 176, particularly because the ICARA directs that "uniform international interpretation" of the Convention is part of its framework, see § 11601(b)(3)(B). While the Supreme Court of Canada has reached an arguably contrary view, and French courts are divided, a review of the international law confirms that courts and other legal authorities in England, Israel, Austria, South Africa, Germany, Australia, and Scotland have accepted the rule that *ne exeat* rights are rights of custody within the Convention's meaning. Scholars agree that there is an emerging international consensus on the matter. And the Convention's history is fully consistent with the conclusion that *ne exeat* rights are just one of the many ways in which custody of children can be exercised. Pp. 16–20.

(4) The Court's holding also accords with the Convention's objects and purposes. There is no reason to doubt the ability of other contracting states to carry out their duty to make decisions in the best interests of the children. To interpret the Convention to permit an abducting parent to avoid a return remedy, even when the other parent holds a

Syllabus

ne exeat right, runs counter to the Convention's purpose of deterring child abductions to a country that provides a friendlier forum. Denying such a remedy would legitimize the very action, removal of the child, that the Convention was designed to prevent, while requiring return of the child in cases like this one helps deter abductions and respects the Convention's purpose to prevent harms to the child resulting from abductions. Pp. 20–22.

(c) While a parent possessing a *ne exeat* right has a right of custody and may seek a return remedy, return will not automatically be ordered if the abducting parent can establish the applicability of a Convention exception, such as "a grave risk that . . . return would expose the child to . . . harm or [an] otherwise . . . intolerable situation," or the objection to removal by a child who has reached a sufficient "age and degree of maturity" to state a preference, Art. 13*(b)*. The proper interpretation and application of exceptions may be addressed on remand. P. 22.

542 F. 3d 1081, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, GINSBURG, ALITO, and SOTOMAYOR, JJ., joined. STEVENS, J., filed a dissenting opinion, in which THOMAS and BREYER, JJ., joined, *post*, p. 23.

Amy Howe argued the cause for petitioner. With her on the briefs were *Kevin K. Russell*, *Thomas C. Goldstein*, *Adair Dyer*, *Jr.*, *Pamela S. Karlan*, and *Jeffrey L. Fisher*.

Ginger D. Anders argued the cause for the United States as *amicus curiae* urging reversal. With her on the brief were *Solicitor General Kagan*, *Deputy Solicitor General Kneedler*, *Assistant Attorney General West*, *Michael J. Singer*, *Howard S. Scher*, *Harold Hongju Koh*, and *Mary Helen Carlson*.

Karl E. Hays argued the cause for respondent. With him on the brief were *Stephen B. Kinnaird*, *Alexander M. R. Lyon*, *Sean D. Unger*, and *Stephanos Bibas*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of California by *Edmund G. Brown, Jr.*, Attorney General, *Dane R. Gillette*, Chief Assistant Attorney General, *Donald E. de Nicola*, Deputy State Solicitor General, and *Bridget Billeter* and *Elaine F. Tumonis*, Deputy Attorneys General; for the Permanent Bureau of the Hague Conference on Private International Law by *Stephen J. Cullen* and *Kelly A. Powers;*

JUSTICE KENNEDY delivered the opinion of the Court.

This case presents, as it has from its inception in the United States District Court, a question of interpretation under the Hague Convention on the Civil Aspects of International Child Abduction (Convention), Oct. 25, 1980, T. I. A. S. No. 11670, S. Treaty Doc. No. 99–11. The United States is a contracting state to the Convention; and Congress has implemented its provisions through the International Child Abduction Remedies Act (ICARA), 102 Stat. 437, 42 U. S. C. § 11601 *et seq.* The Convention provides that a child abducted in violation of "rights of custody" must be returned to the child's country of habitual residence, unless certain exceptions apply. Art. 1, S. Treaty Doc. No. 99–11, at 7 (Treaty Doc.). The question is whether a parent has a "righ[t] of custody" by reason of that parent's *ne exeat* right: the authority to consent before the other parent may take the child to another country.

I

Timothy Abbott and Jacquelyn Vaye Abbott married in England in 1992. He is a British citizen, and she is a citizen of the United States. Mr. Abbott's astronomy profession took the couple to Hawaii, where their son A. J. A. was born in 1995. The Abbotts moved to La Serena, Chile, in 2002.

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and by the S&W International ChildFind Program et al. by *Barry S. Pollack*, *Laura A. Steinberg*, *Kevin Colmey*, *Nicholas M. O'Donnell*, *Joshua L. Solomon*, *Lindsay Barna*, and *Franklin B. Velie*.

Briefs of *amici curiae* urging affirmance were filed for the Domestic Violence Legal Empowerment and Appeals Project et al. by *Leonard O. Evans III*, *Donald B. Mitchell*, *Deanne M. Ottaviano*, and *Joan S. Meier;* for the University of Cincinnati College of Law Domestic Violence and Civil Protection Order Clinic by *Margaret Bell Drew;* and for Lawrence H. Stotter et al. by *E. Joshua Rosenkranz* and *Lisa T. Simpson*.

Briefs of *amici curiae* were filed for Eleven Law Professors by *Carol S. Bruch*, *Nicole M. Moen*, and *Sarah C. S. McLaren;* for the National Center for Missing and Exploited Children by *Benjamin S. Halasz;* and for Reunite International Child Abduction Centre by *Robert A. Long, Jr.*

There was marital discord, and the parents separated in March 2003. The Chilean courts granted the mother daily care and control of the child, while awarding the father "direct and regular" visitation rights, including visitation every other weekend and for the whole month of February each year. App. 9.

Chilean law conferred upon Mr. Abbott what is commonly known as a *ne exeat* right: a right to consent before Ms. Abbott could take A. J. A. out of Chile. See Minors Law 16,618, Art. 49, App. to Pet. for Cert. 61a (granting a *ne exeat* right to any parent with visitation rights). In effect a *ne exeat* right imposes a duty on one parent that is a right in the other. After Mr. Abbott obtained a British passport for A. J. A., Ms. Abbott grew concerned that Mr. Abbott would take the boy to Britain. She sought and obtained a "*ne exeat* of the minor" order from the Chilean family court, prohibiting the boy from being taken out of Chile. App. to Pet. for Cert. 68a–69a.

In August 2005, while proceedings before the Chilean court were pending, the mother removed the boy from Chile without permission from either the father or the court. A private investigator located the mother and the child in Texas. In February 2006, the mother filed for divorce in Texas state court. Part of the relief she sought was a modification of the father's rights, including full power in her to determine the boy's place of residence and an order limiting the father to supervised visitation in Texas. This litigation remains pending.

Mr. Abbott brought an action in Texas state court, asking for visitation rights and an order requiring Ms. Abbott to show cause why the court should not allow Mr. Abbott to return to Chile with A. J. A. In February 2006, the court denied Mr. Abbott's requested relief but granted him "liberal periods of possession" of A. J. A. throughout February 2006, provided Mr. Abbott remained in Texas. App. 42.

In May 2006, Mr. Abbott filed the instant action in the United States District Court for the Western District of Texas. He sought an order requiring his son's return to Chile pursuant to the Convention and enforcement provisions of the ICARA. In July 2007, after holding a bench trial during which only Mr. Abbott testified, the District Court denied relief. The court held that the father's *ne exeat* right did not constitute a right of custody under the Convention and, as a result, that the return remedy was not authorized. 495 F. Supp. 2d 635, 640.

The United States Court of Appeals for the Fifth Circuit affirmed on the same rationale. The court held the father possessed no rights of custody under the Convention because his *ne exeat* right was only "a veto right over his son's departure from Chile." 542 F. 3d 1081, 1087 (2008). The court expressed substantial agreement with the Court of Appeals for the Second Circuit in *Croll* v. *Croll*, 229 F. 3d 133 (2000). Relying on American dictionary definitions of "custody" and noting that *ne exeat* rights cannot be "'actually exercised'" within the meaning of the Convention, *Croll* held that *ne exeat* rights are not rights of custody. *Id.*, at 138–141 (quoting Art. 3*(b)*). A dissenting opinion in *Croll* was filed by then-Judge Sotomayor. The dissent maintained that a *ne exeat* right is a right of custody because it "provides a parent with decisionmaking authority regarding a child's international relocation." *Id.*, at 146.

The Courts of Appeals for the Fourth and Ninth Circuits adopted the conclusion of the *Croll* majority. See *Fawcett* v. *McRoberts*, 326 F. 3d 491, 500 (CA4 2003); *Gonzalez* v. *Gutierrez*, 311 F. 3d 942, 949 (CA9 2002). The Court of Appeals for the Eleventh Circuit has followed the reasoning of the *Croll* dissent. *Furnes* v. *Reeves*, 362 F. 3d 702, 720, n. 15 (2004). Certiorari was granted to resolve the conflict. 557 U. S. 933 (2009).

II

The Convention was adopted in 1980 in response to the problem of international child abductions during domestic disputes. The Convention seeks "to secure the prompt return of children wrongfully removed to or retained in any Contracting State," and "to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States." Art. 1, Treaty Doc., at 7.

The provisions of the Convention of most relevance at the outset of this discussion are as follows:

> "Article 3: The removal or the retention of the child is to be considered wrongful where—
>
> "*a* it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
>
> "*b* at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.
>
> . . . . .
>
> "Article 5: For the purposes of this Convention—
>
> "*a* 'rights of custody' shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;
>
> "*b* 'rights of access' shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.
>
> . . . . .
>
> "Article 12: Where a child has been wrongfully removed or retained in terms of Article 3 . . . the authority concerned shall order the return of the child forthwith." *Id.*, at 7, 9.

The Convention's central operating feature is the return remedy. When a child under the age of 16 has been wrongfully removed or retained, the country to which the child has been brought must "order the return of the child forthwith," unless certain exceptions apply. See, *e. g.*, Arts. 4, 12, *ibid.* A removal is "wrongful" where the child was removed in violation of "rights of custody." The Convention defines "rights of custody" to "include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence." Art. 5*(a)*, *id.*, at 7. A return remedy does not alter the preabduction allocation of custody rights but leaves custodial decisions to the courts of the country of habitual residence. Art. 19, *id.*, at 11. The Convention also recognizes "rights of access," but offers no return remedy for a breach of those rights. Arts. 5*(b)*, 21, *id.*, at 7, 11.

The United States has implemented the Convention through the ICARA. The statute authorizes a person who seeks a child's return to file a petition in state or federal court and instructs that the court "shall decide the case in accordance with the Convention." 42 U. S. C. §§ 11603(a), (b), (d). If the child in question has been "wrongfully removed or retained within the meaning of the Convention," the child shall be "promptly returned," unless an exception is applicable. § 11601(a)(4).

III

As the parties agree, the Convention applies to this dispute. A. J. A. is under 16 years old; he was a habitual resident of Chile; and both Chile and the United States are contracting states. The question is whether A. J. A. was "wrongfully removed" from Chile, in other words, whether he was removed in violation of a right of custody. This Court's inquiry is shaped by the text of the Convention; the views of the United States Department of State; decisions addressing the meaning of "rights of custody" in courts of

other contracting states; and the purposes of the Convention. After considering these sources, the Court determines that Mr. Abbott's *ne exeat* right is a right of custody under the Convention.

A

"The interpretation of a treaty, like the interpretation of a statute, begins with its text." *Medellín* v. *Texas*, 552 U. S. 491, 506 (2008). This Court consults Chilean law to determine the content of Mr. Abbott's right, while following the Convention's text and structure to decide whether the right at issue is a "righ[t] of custody."

Chilean law granted Mr. Abbott a joint right to decide his child's country of residence, otherwise known as a *ne exeat* right. Minors Law 16,618, Art. 49, App. to Pet. for Cert. 61a, 62a, provides that "[o]nce the court has decreed" that one of the parents has visitation rights, that parent's "authorization . . . shall also be required" before the child may be taken out of the country, subject to court override only where authorization "cannot be granted or is denied without good reason." Mr. Abbott has "direct and regular" visitation rights, and it follows from Chilean law that he has a shared right to determine his son's country of residence under this provision. App. 9. To support the conclusion that Mr. Abbott's right under Chilean law gives him a joint right to decide his son's country of residence, it is notable that a Chilean agency has explained that Minors Law 16,618 is a "'right to authorize the minors' exit'" from Chile and that this provision means that neither parent can "unilaterally" "establish the [child's] place of residence." Letter from Paula Strap Camus, Director General, Corporation of Judicial Assistance of the Region Metropolitana, to National Center for Missing and Exploited Children (Jan. 17, 2006), App. to Pet. for Cert. in *Villegas Duran* v. *Arribada Beaumont,* No. 08–775, pp. 35a–37a, cert. pending [REPORTER'S NOTE: See *post*, p. 921].

The Convention recognizes that custody rights can be decreed jointly or alone, see Art. 3*(a)*, Treaty Doc., at 7; and Mr. Abbott's joint right to determine his son's country of residence is best classified as a joint right of custody, as the Convention defines that term. The Convention defines "rights of custody" to "include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence." Art. 5*(a)*, *ibid.* Mr. Abbott's *ne exeat* right gives him both the joint "right to determine the child's place of residence" and joint "rights relating to the care of the person of the child."

Mr. Abbott's joint right to decide A. J. A.'s country of residence allows him to "determine the child's place of residence." The phrase "place of residence" encompasses the child's country of residence, especially in light of the Convention's explicit purpose to prevent wrongful removal across international borders. See Convention Preamble, Treaty Doc., at 7. And even if "place of residence" refers only to the child's street address within a country, a *ne exeat* right still entitles Mr. Abbott to "determine" that place. "[D]etermine" can mean "[t]o fix conclusively or authoritatively," Webster's New International Dictionary 711 (2d ed. 1954) (2d definition), but it can also mean "[t]o set bounds or limits to," *ibid.* (1st definition), which is what Mr. Abbott's *ne exeat* right allows by ensuring that A. J. A. cannot live at any street addresses outside of Chile. It follows that the Convention's protection of a parent's custodial "right to determine the child's place of residence" includes a *ne exeat* right.

Mr. Abbott's joint right to determine A. J. A.'s country of residence also gives him "rights relating to the care of the person of the child." Art. 5*(a)*, Treaty Doc., at 7. Few decisions are as significant as the language the child speaks, the identity he finds, or the culture and traditions she will come to absorb. These factors, so essential to self-definition, are linked in an inextricable way to the child's country of residence. One need only consider the different childhoods

an adolescent will experience if he or she grows up in the United States, Chile, Germany, or North Korea, to understand how choosing a child's country of residence is a right "relating to the care of the person of the child." The Court of Appeals described Mr. Abbott's right to take part in making this decision as a mere "veto," 542 F. 3d, at 1087; but even by that truncated description, the father has an essential role in deciding the boy's country of residence. For example, Mr. Abbott could condition his consent to a change in country on A. J. A.'s moving to a city outside Chile where Mr. Abbott could obtain an astronomy position, thus allowing the father to have continued contact with the boy.

That a *ne exeat* right does not fit within traditional notions of physical custody is beside the point. The Convention defines "rights of custody," and it is that definition that a court must consult. This uniform, text-based approach ensures international consistency in interpreting the Convention. It forecloses courts from relying on definitions of custody confined by local law usage, definitions that may undermine recognition of custodial arrangements in other countries or in different legal traditions, including the civil-law tradition. And, in any case, our own legal system has adopted conceptions of custody that accord with the Convention's broad definition. Joint legal custody, in which one parent cares for the child while the other has joint decisionmaking authority concerning the child's welfare, has become increasingly common. See Singer, Dispute Resolution and the Postdivorce Family: Implications of a Paradigm Shift, 47 Family Ct. Rev. 363, 366 (2009) ("[A] recent study of child custody outcomes in North Carolina indicated that almost 70% of all custody resolutions included joint legal custody, as did over 90% of all mediated custody agreements"); E. Maccoby & R. Mnookin, Dividing the Child: Social and Legal Dilemmas of Custody 107 (1992) ("[F]or 79 percent of our entire sample, the [California] divorce decree provided for joint legal custody"); see generally Elrod, Reforming the System To Protect Children

in High Conflict Custody Cases, 28 Wm. Mitchell L. Rev. 495, 505–508 (2001).

Ms. Abbott gets the analysis backwards in claiming that a *ne exeat* right is not a right of custody because the Convention requires that any right of custody must be capable of exercise. The Convention protects rights of custody when "at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention." Art. 3*(b)*, Treaty Doc., at 7. In cases like this one, a *ne exeat* right is by its nature inchoate and so has no operative force except when the other parent seeks to remove the child from the country. If that occurs, the parent can exercise the *ne exeat* right by declining consent to the exit or placing conditions to ensure the move will be in the child's best interests. When one parent removes the child without seeking the *ne exeat* holder's consent, it is an instance where the right would have been "exercised but for the removal or retention." *Ibid.*

The Court of Appeals' conclusion that a breach of a *ne exeat* right does not give rise to a return remedy would render the Convention meaningless in many cases where it is most needed. The Convention provides a return remedy when a parent takes a child across international borders in violation of a right of custody. The Convention provides no return remedy when a parent removes a child in violation of a right of access but requires contracting states "to promote the peaceful enjoyment of access rights." Art. 21, *id.*, at 11. For example, a court may force the custodial parent to pay the travel costs of visitation, see, *e. g.*, *Viragh* v. *Foldes*, 415 Mass. 96, 109–111, 612 N. E. 2d 241, 249–250 (1993), or make other provisions for the noncustodial parent to visit his or her child, see § 11603(b) (authorizing petitions to "secur[e] the effective exercise of rights of access to a child"). But unlike rights of access, *ne exeat* rights can only be honored

with a return remedy because these rights depend on the child's location being the country of habitual residence.

Any suggestion that a *ne exeat* right is a "righ[t] of access" is illogical and atextual. The Convention defines "rights of access" as "includ[ing] the right to take a child for a limited period of time to a place other than the child's habitual residence," Art. 5*(b)*, Treaty Doc., at 7, and the ICARA defines that same term as "visitation rights," § 11602(7). The joint right to decide a child's country of residence is not even arguably a "right to take a child for a limited period of time" or a "visitation righ[t]." Reaching the commonsense conclusion that a *ne exeat* right does not fit these definitions of "rights of access" honors the Convention's distinction between rights of access and rights of custody.

Ms. Abbott argues that the *ne exeat* order in this case cannot create a right of custody because it merely protects a court's jurisdiction over the child. Even if this argument were correct, it would not be dispositive. Ms. Abbott contends the Chilean court's *ne exeat* order contains no parental consent provision and so awards the father no rights, custodial or otherwise. See Brief for Respondent 22; but see 495 F. Supp. 2d, at 638, n. 3 (the District Court treating the order as containing a consent provision); 542 F. 3d, at 1084 (same for the Court of Appeals). Even a *ne exeat* order issued to protect a court's jurisdiction pending issuance of further decrees is consistent with allowing a parent to object to the child's removal from the country. This Court need not decide the status of *ne exeat* orders lacking parental consent provisions, however; for here the father relies on his rights under Minors Law 16,618. Mr. Abbott's rights derive not from the order but from Minors Law 16,618. That law requires the father's consent before the mother can remove the boy from Chile, subject only to the equitable power family courts retain to override any joint custodial arrangements in times of disagreement. Minors Law 16,618; see 1 J. Atkinson, Modern Child Custody Practice § 6–11, p. 6–21 (2d ed.

2009) ("[T]he court remains the final arbiter and may resolve the [dispute between joint custodians] itself or designate one parent as having final authority on certain issues affecting the child"); *Lombardo* v. *Lombardo*, 202 Mich. App. 151, 159, 507 N. W. 2d 788, 792 (1993) ("[W]here the parents as joint custodians cannot agree on important matters such as education, it is the court's duty to determine the issue in the best interests of the child"). The consent provision in Minors Law 16,618 confers upon the father the joint right to determine his child's country of residence. This is a right of custody under the Convention.

B

This Court's conclusion that Mr. Abbott possesses a right of custody under the Convention is supported and informed by the State Department's view on the issue. The United States has endorsed the view that *ne exeat* rights are rights of custody. In its brief before this Court the United States advises that "the Department of State, whose Office of Children's Issues serves as the Central Authority for the United States under the Convention, has long understood the Convention as including *ne exeat* rights among the protected 'rights of custody.' " Brief for United States as *Amicus Curiae* 21; see *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U. S. 176, 184, n. 10 (1982) (deferring to the Executive's interpretation of a treaty as memorialized in a brief before this Court). It is well settled that the Executive Branch's interpretation of a treaty "is entitled to great weight." *Id.*, at 185. There is no reason to doubt that this well-established canon of deference is appropriate here. The Executive is well informed concerning the diplomatic consequences resulting from this Court's interpretation of "rights of custody," including the likely reaction of other contracting states and the impact on the State Department's ability to reclaim children abducted from this country.

C

This Court's conclusion that *ne exeat* rights are rights of custody is further informed by the views of other contracting states. In interpreting any treaty, "[t]he 'opinions of our sister signatories' . . . are 'entitled to considerable weight.'" *El Al Israel Airlines, Ltd.* v. *Tsui Yuan Tseng*, 525 U. S. 155, 176 (1999) (quoting *Air France* v. *Saks*, 470 U. S. 392, 404 (1985)). The principle applies with special force here, for Congress has directed that "uniform international interpretation of the Convention" is part of the Convention's framework. See § 11601(b)(3)(B).

A review of the international case law confirms broad acceptance of the rule that *ne exeat* rights are rights of custody. In an early decision, the English Court of Appeal explained that a father's "right to ensure that the child remain[ed] in Australia or live[d] anywhere outside Australia only with his approval" is a right of custody requiring return of the child to Australia. *C.* v. *C.*, [1989] 1 W. L. R. 654, 658 (C. A.). Lords of the House of Lords have agreed, noting that *C.* v. *C.*'s conclusion is "settled, so far as the United Kingdom is concerned" and "appears to be the majority [view] of the common law world." See *In re D (A Child)*, [2007] 1 A. C. 619, ¶¶ 14, 31, 37 (2006).

The Supreme Court of Israel follows the same rule, concluding that "the term 'custody' should be interpreted in an expansive way, so that it will apply [i]n every case in which there is a need for the consent of one of the parents to remove the children from one country to another." CA 5271/92 *Foxman* v. *Foxman*, [1992], §§ 3(D), 4 (K. Chagall transl.). The High Courts of Austria, South Africa, and Germany are in accord. See Oberster Gerichtshof [OGH] [Supreme Court] Feb. 5, 1992, 2 Ob 596/91 (Austria) (Dept. of State transl.) ("Since the English Custody Court had ordered that the children must not be removed from England and Wales without the father's written consent, both parents had, in effect, been granted joint custody concerning the children's

place of residence"); *Sonderup* v. *Tondelli*, 2001 (1) SA 1171, 1183 (Constitutional Ct., S. Afr. 2000) ("[The mother's] failure to return to British Columbia with the child . . . was a breach of the conditions upon which she was entitled to exercise her rights of custody and . . . therefore constituted a wrongful retention . . . as contemplated by [Article 3] of the Convention"); Bundesverfassungsgericht [BVerfG] [Fed. Constitutional Ct.] July 18, 1997, 2 BvR 1126/97, ¶ 15 (Ger.) (Dept. of State transl.) (the Convention requires a return remedy for a violation of the "right to have a say in the child's place of residence"). Appellate courts in Australia and Scotland agree. See *In the Marriage of Resina*, [1991], FamCA 33, ¶¶ 18–27 (Austl.); *A. J.* v. *F. J.*, [2005] CSIH 36, 2005 1 S. C. 428, 435–436.

It is true that some courts have stated a contrary view, or at least a more restrictive one. The Canadian Supreme Court has said *ne exeat* orders are "usually intended" to protect access rights. *Thomson* v. *Thomson*, [1994] 3 S. C. R. 551, 589–590, 119 D. L. R. (4th) 253, 281; see *D. S.* v. *V. W.*, [1996] 2 S. C. R. 108, 134 D. L. R. (4th) 481. But the Canadian cases are not precisely on point here. *Thomson* ordered a return remedy based on an interim *ne exeat* order, and only noted in dicta that it may not order such a remedy pursuant to a permanent *ne exeat* order. See [1994] 3 S. C. R., at 589–590, 119 D. L. R. (4th), at 281. *D. S.* involved a parent's claim based on an implicit *ne exeat* right and, in any event, the court ordered a return remedy on a different basis. See [1996] 2 S. C. R., at 140–141, 142, 134 D. L. R. (4th), at 503–504, 505.

French courts are divided. A French Court of Appeals held that "the right to accept or refuse the removal of the children's residence" outside of a region was "a joint exercise of rights of custody." *Ministère public* v. *M. B.* (CA, Aix-en-Provence, 6e ch., Mar. 23, 1989), in 79 revue critique de droit international privé 529, 533–535 (July–Sept. 1990). A trial court in a different region of France rejected this

view, relying on the mother's "fundamental liberty" to establish her domicile. See *Procureur de la République de Périgueux* v. *Mme S.* (TGI, Périgueux, Mar. 17, 1992), in 82 Revue Critique de Droit International Privé 650, 651–653 (Oct.–Dec. 1993).

Scholars agree that there is an emerging international consensus that *ne exeat* rights are rights of custody, even if that view was not generally formulated when the Convention was drafted in 1980. At that time, joint custodial arrangements were unknown in many of the contracting states, and the status of *ne exeat* rights was not yet well understood. See 1980 Conférence de La Haye de droit international privé, Enlèvement d'enfants, morning meeting of Wed., Oct. 8, 1980 (discussion by Messrs. Leal & van Boeschoten), in 3 Actes et Documents de la Quatorzième Session, pp. 263–266 (1982) (Canadian and Dutch delegates disagreeing whether the Convention protected *ne exeat* rights, while agreeing that it should protect such rights). Since 1980, however, joint custodial arrangements have become more common. See *supra*, at 12. And, within this framework, most contracting states and scholars now recognize that *ne exeat* rights are rights of custody. See, *e. g.*, Hague Conference on Private International Law: Transfrontier Contact Concerning Children: General Principles and Guide to Good Practice § 9.3, p. 43 (2008) ("[P]reponderance of the case law supports the view" that *ne exeat* rights are "rights of custody" (footnote omitted)); Hague Conference on Private International Law: Overall Conclusions of the Special Commission of Oct. 1989 on the Operation of the Hague Convention of 25 Oct. 1980 on the Civil Aspects of International Child Abduction, reprinted in 29 I. L. M. 219, 222, ¶ 9 (1990); Hague Conference on Private International Law: Report of the Second Special Commission Meeting To Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction 11 (1993), reprinted in 33 I. L. M. 225 (1994); Silberman, The Hague Child Abduction Convention Turns

Twenty: Gender Politics and Other Issues, 33 N. Y. U. J. Int'l L. & Politics 221, 226–232, and n. 13 (2000); Whitman, *Croll v. Croll:* The Second Circuit Limits "Custody Rights" Under the Hague Convention on the Civil Aspects of International Child Abduction, 9 Tulane J. Int'l & Comp. L. 605, 611–616 (2001).

A history of the Convention, known as the Pérez-Vera Report, has been cited both by the parties and by Courts of Appeals that have considered this issue. See 1980 Conférence de La Haye de droit international privé, Enlèvement d'enfants, E. Pérez-Vera, Explanatory Report (Pérez-Vera Report or Report), in 3 Actes et Documents de la Quatorzième Session, pp. 425–473 (1982). We need not decide whether this Report should be given greater weight than a scholarly commentary. Compare Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. 10503–10506 (1986) (identifying the Report as the "official history" of the Convention and "a source of background on the meaning of the provisions of the Convention"), with Pérez-Vera Report ¶ 8, at 427–428 ("[The Report] has not been approved by the Conference, and it is possible that, despite the Rapporter's *[sic]* efforts to remain objective, certain passages reflect a viewpoint which is in part subjective"). It suffices to note that the Report supports the conclusion that *ne exeat* rights are rights of custody. The Report explains that rather than defining custody in precise terms or referring to the laws of different nations pertaining to parental rights, the Convention uses the unadorned term "rights of custody" to recognize "*all* the ways in which custody of children can be exercised" through "a flexible interpretation of the terms used, which allows the greatest possible number of cases to be brought into consideration." *Id.*, ¶¶ 67, 71, at 446, 447–448. Thus the Report rejects the notion that because *ne exeat* rights do not encompass the right to make medical or some other important decisions about a child's life they cannot be rights of custody. Indeed, the Re-

port is fully consistent with the conclusion that *ne exeat* rights are just one of the many "ways in which custody of children can be exercised." *Id.*, ¶ 71, at 447.

D

Adopting the view that the Convention provides a return remedy for violations of *ne exeat* rights accords with its objects and purposes. The Convention is based on the principle that the best interests of the child are well served when decisions regarding custody rights are made in the country of habitual residence. See Convention Preamble, Treaty Doc., at 7. Ordering a return remedy does not alter the existing allocation of custody rights, Art. 19, *id.*, at 11, but does allow the courts of the home country to decide what is in the child's best interests. It is the Convention's premise that courts in contracting states will make this determination in a responsible manner.

Custody decisions are often difficult. Judges must strive always to avoid a common tendency to prefer their own society and culture, a tendency that ought not interfere with objective consideration of all the factors that should be weighed in determining the best interests of the child. This judicial neutrality is presumed from the mandate of the Convention, which affirms that the contracting states are "[f]irmly convinced that the interests of children are of paramount importance in matters relating to their custody." Convention Preamble, *id.*, at 7. International law serves a high purpose when it underwrites the determination by nations to rely upon their domestic courts to enforce just laws by legitimate and fair proceedings.

To interpret the Convention to permit an abducting parent to avoid a return remedy, even when the other parent holds a *ne exeat* right, would run counter to the Convention's purpose of deterring child abductions by parents who attempt to find a friendlier forum for deciding custodial disputes. Ms. Abbott removed A. J. A. from Chile while Mr. Abbott's

request to enhance his relationship with his son was still pending before Chilean courts. After she landed in Texas, the mother asked the state court to diminish or eliminate the father's custodial and visitation rights. The Convention should not be interpreted to permit a parent to select which country will adjudicate these questions by bringing the child to a different country, in violation of a *ne exeat* right. Denying a return remedy for the violation of such rights would "legitimize the very action—removal of the child—that the home country, through its custody order [or other provision of law], sought to prevent" and would allow "parents to undermine the very purpose of the Convention." *Croll*, 229 F. 3d, at 147 (Sotomayor, J., dissenting). This Court should be most reluctant to adopt an interpretation that gives an abducting parent an advantage by coming here to avoid a return remedy that is granted, for instance, in the United Kingdom, Israel, Germany, and South Africa. See *supra*, at 16.

Requiring a return remedy in cases like this one helps deter child abductions and respects the Convention's purpose to prevent harms resulting from abductions. An abduction can have devastating consequences for a child. "Some child psychologists believe that the trauma children suffer from these abductions is one of the worst forms of child abuse." H. R. Rep. No. 103–390, p. 2 (1993). A child abducted by one parent is separated from the second parent and the child's support system. Studies have shown that separation by abduction can cause psychological problems ranging from depression and acute stress disorder to posttraumatic stress disorder and identity-formation issues. See N. Faulkner, Parental Child Abduction is Child Abuse (1999–2006), http://www.prevent-abuse-now.com/unreport.htm (as visited May 13, 2010, and available in Clerk of Court's case file). A child abducted at an early age can experience loss of community and stability, leading to loneliness, anger, and fear of abandonment. See Huntington, Parental Kidnapping: A New

Form of Child Abuse (1984), in American Prosecutors Research Institute's National Center for Prosecution of Child Abuse, Parental Abduction Project, Investigation and Prosecution of Parental Abduction (1995) (App. A). Abductions may prevent the child from forming a relationship with the left-behind parent, impairing the child's ability to mature. See Faulkner, *supra*, at 5.

IV

While a parent possessing a *ne exeat* right has a right of custody and may seek a return remedy, a return order is not automatic. Return is not required if the abducting parent can establish that a Convention exception applies. One exception states return of the child is not required when "there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation." Art. 13*(b)*, Treaty Doc., at 10. If, for example, Ms. Abbott could demonstrate that returning to Chile would put her own safety at grave risk, the court could consider whether this is sufficient to show that the child too would suffer "psychological harm" or be placed "in an intolerable situation." See, *e. g.*, *Baran* v. *Beaty*, 526 F. 3d 1340, 1352–1353 (CA11 2008); *Walsh* v. *Walsh*, 221 F. 3d 204, 220–221 (CA1 2000). The Convention also allows courts to decline to order removal if the child objects, if the child has reached a sufficient "age and degree of maturity at which it is appropriate to take account of its views." Art. 13*(b)*, Treaty Doc., at 10. The proper interpretation and application of these and other exceptions are not before this Court. These matters may be addressed on remand.

* * *

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

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE THOMAS and JUSTICE BREYER join, dissenting.

Petitioner Timothy Abbott, the father of A. J. A., has no authority to decide whether his son undergoes a particular medical procedure; whether his son attends a school field trip; whether and in what manner his son has a religious upbringing; or whether his son can play a videogame before he completes his homework. These are all rights and responsibilities of A. J. A.'s mother, respondent Jacquelyn Abbott. It is she who received sole custody, or "daily care and control," of A. J. A. when the expatriate couple divorced while living in Chile in 2004. 495 F. Supp. 2d 635, 637, and n. 2 (WD Tex. 2007). Mr. Abbott possesses only visitation rights.

On Ms. Abbott's custodial rights, Chilean law placed a restriction: She was not to travel with her son outside of Chile without either Mr. Abbott's or the court's consent. Put differently, Mr. Abbott had the opportunity to veto Ms. Abbott's decision to remove A. J. A. from Chile unless a Chilean court overrode that veto. The restriction on A. J. A.'s and Ms. Abbott's travel was an automatic, default provision of Chilean law operative upon the award of visitation rights under Article 48 of Chile's Minors Law 16,618. It is this travel restriction—also known as a *ne exeat* clause—that the Court today declares is a "'righ[t] of custody'" within the meaning of the Hague Convention on the Civil Aspects of International Child Abduction (Convention), Oct. 25, 1980, T. I. A. S. No. 11670, S. Treaty Doc. No. 99–11. *Ante*, at 5.

Because the Court concludes that this travel restriction constitutes a right of custody, and because Ms. Abbott indisputably violated the restriction when she took A. J. A. from Chile without either Mr. Abbott's or the court's permission, Mr. Abbott is now entitled to the return of A. J. A. to Chile under the terms of the Convention. Thus, absent a finding of an exception to the Convention's powerful return remedy, see *ante*, at 22, and even if the return is contrary to the

child's best interests, an American court *must* now order the return of A. J. A. to Mr. Abbott, who has no legal authority over A. J. A., based solely on his possessing a limited veto power over Ms. Abbott's ability to take A. J. A. from Chile. As I shall explain, use of the Convention's return remedy under these circumstances is contrary to the Convention's text and purpose.

I

When the drafters of the Convention gathered in 1980, they sought an international solution to an emerging problem: transborder child abductions perpetrated by noncustodial parents "to establish artificial jurisdictional links . . . with a view to obtaining custody of a child." 1980 Conférence de La Haye de droit international privé, Enlèvement d'enfants, E. Pérez-Vera, Explanatory Report ¶ 11 (Pérez-Vera Report), in 3 Actes et Documents de la Quatorzième Session pp. 426, 428 (1982);[1] see also Convention Analysis 10504 ("[F]undamental purpose" of the Convention is "to protect children from wrongful international removals or retentions by persons bent on obtaining their physical and/or legal custody"). The drafters' primary concern was to remedy abuses by noncustodial parents who attempt to circumvent adverse custody decrees (*e. g.*, those granting sole custodial rights to the other parent) by seeking a more favorable judgment in a second nation's family court system. Pérez-Vera Report ¶ 14, at 429.

The drafters determined that when a *noncustodial* parent abducts a child across international borders, the best remedy is return of that child to his or her country of habitual residence—or, in other words, the best remedy is return of the

[1] As the Court recognizes, see *ante*, at 19, the Executive Branch considers the Pérez-Vera Report "the official history" for the Convention and "a source of background on the meaning of the provisions of the Convention available to all States becoming parties to it." Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. 10503 (1986) (hereinafter Convention Analysis).

child to his or her *custodial* parent. *Id.*, ¶ 18, at 430. The drafters concluded that the same remedy should not follow, however, when a *custodial* parent takes a child from his or her country of habitual residence in breach of the other parent's visitation rights, or "rights of access" in the Convention's parlance. *Id.*, ¶ 65, at 444–445. The distinction between rights of custody and rights of access, therefore, is critically important to the Convention's scheme and purpose. It defines the scope of the available Convention remedies.

Article 5 defines these rights as follows:

> "For the purposes of this Convention—
>
> "*a* 'rights of custody' shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;
>
> "*b* 'rights of access' shall include the right to take a child for a limited period of time to a place other than the child's habitual residence." S. Treaty Doc. No. 99–11, at 7 (hereinafter Treaty Doc.).

Article 3 of the Convention provides that the removal or retention of a child is "wrongful," and thus in violation of the Convention, only when the removal "is in breach of rights of custody." Art. 3*(a)*, *ibid.* The fact that a removal may be "wrongful" in the sense that it violates domestic law or violates only "rights of access" does not make it "wrongful" within the meaning of the Convention.

Only when a removal is "wrongful" under Article 3 may the parent who possesses custody rights force the child's return to the country of habitual residence under the Convention's remedial procedures, pursuant to Articles 8 through 20. For those removals that frustrate a noncustodial parent's "rights of access," the Convention provides that the noncustodial parent may file an application "to make arrangements for organizing or securing the effective exercise of rights of access"; but he may not force the child's return. Art. 21, *id.*, at 11. A parent without "rights of custody,"

therefore, does not have the power granted by Article 3 to compel the child's return to his or her country of habitual residence. His rights are limited to those set forth in Article 21.

II

Mr. Abbott, claiming "rights of custody" by virtue of the travel restriction Chilean law places on Ms. Abbott, seeks the return of A. J. A. to Chile. Such relief is warranted only if A. J. A.'s removal was "wrongful" within the meaning of the Convention; as such, it must have been "in breach of [Mr. Abbott's] rights of custody."[2] Art. 3, *id.*, at 7. Putting aside the effect of the travel restriction, it is undisputed that Ms. Abbott possesses "rights of custody" over A. J. A. while Mr. Abbott would possess "rights of access," as those terms are used in the Convention. Brief for Petitioner 6; Brief for Respondent 6. The only issue in this case, therefore, is whether Mr. Abbott also possesses "rights of custody" within the meaning of the Convention by virtue of the travel restriction, or *ne exeat* clause,[3] that Chilean law imposes on

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[2] Indisputably, Ms. Abbott's removal of A. J. A. from Chile was wrongful in the generic sense of the word. She violated Chilean law when she took A. J. A. to Texas because she sought neither Mr. Abbott's permission nor the court's authorization before doing so. She violated both the existing *"ne exeat"* order imposed by judicial decree in the couple's custody dispute, see *ante*, at 6, as well as Chilean statutory law defining the access rights of noncustodial parents, see Minors Law 16,618, Art. 49, App. to Pet. for Cert. 61a. The removal was illegal, then, but it was only wrongful within the meaning of the Convention if it was in breach of Mr. Abbott's rights of custody. Unfortunately, I fear the Court's preoccupation with deterring parental misconduct—even, potentially, at the sake of the best interests of the child—has caused it to minimize this important distinction.

[3] The Court repeatedly refers to "*ne exeat* rights," *ante*, at 7, 13, 15, 16, 18, 19, and 20, as if the single travel restriction at issue in this case were on a par with the multiple rights commonly exercised by custodial parents. Chile's statutory *ne exeat* provision is better characterized as a restriction on the travel of both the minor and the custodial parent than as a bundle of "rights" possessed by the noncustodial parent.

Ms. Abbott. In other words, the question is whether the "right" of one parent to veto the other parent's decision to remove a child from the country, subject to judicial override, belongs in the category of "rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence." Art. 5*(a)*, Treaty Doc., at 7. In my judgment, it clearly does not, and I need look no further than to the Convention's text to explain why. See *Medellín* v. *Texas*, 552 U. S. 491, 506 (2008) ("The interpretation of a treaty, like the interpretation of a statute, begins with its text").

Rights relating to the care of the child. The Court concludes that the veto power Mr. Abbott has over Ms. Abbott's travel plans is equivalent to those rights "'relating to the care of the person of the child.'" *Ante*, at 11. This is so, the Court tells us, because Mr. Abbott has a limited power to keep A. J. A. within Chile's bounds and, therefore, indirectly to influence "the language the child speaks, the identity he finds, or the culture and traditions she will come to absorb." *Ibid.* It is not nearly as self-evident as the Court assumes that Mr. Abbott's veto power carries with it any ability to decide the language A. J. A. speaks or the cultural experiences he will have, *ante*, at 11–12. A. J. A.'s mere presence in Chile does not determine any number of issues, including: whether A. J. A. learns Spanish while there; whether he attends an American school or a British school or a local school; whether he participates in sports; whether he is raised Catholic or Jewish or Buddhist or atheist; whether he eats a vegetarian diet; and on and on. The travel restriction does *not* confer upon Mr. Abbott affirmative power to make any number of decisions that are vital to A. J. A.'s physical, psychological, and cultural development. To say that a limited power to veto a child's travel plans confers, also, a right "relating to the care" of that child devalues the great wealth of decisions a custodial parent makes on a daily basis to attend to a child's needs and development.

The Court's interpretation depends entirely on a broad reading of the phrase "relating to" in the Convention's definition of "rights of custody." It is, undeniably, broad language. But, as the Court reads the term, it is so broad as to be utterly unhelpful in interpreting what "rights of custody" means. We "cannot forget that we ultimately are determining the meaning of the term" rights of custody in this case, and we should not lose sight of the import of this term in construing the broad words that follow in its wake. *Leocal* v. *Ashcroft*, 543 U. S. 1, 11 (2004). I suppose it could be said that Mr. Abbott's ability to decide whether A. J. A. spends the night with one of his friends during a Saturday visit is also a "right relating to the care of the child." Taken in the abstract—and to its most absurd—*any* decision on behalf of a child could be construed as a right "relating to" the care of a child.

Such a view of the text obliterates the careful distinction the drafters drew between the rights of custody and the rights of access. Undoubtedly, they were aware of the concept of joint custody. See Pérez-Vera Report ¶ 71, at 447 ("[C]ustody rights may have been awarded . . . to that person in his own right or jointly. It cannot be otherwise in an era when types of joint custody, regarded as best suited to the general principle of sexual non-discrimination, are gradually being introduced into internal law"). But just because rights of custody can be shared by two parents, it does not follow that the drafters intended this limited veto power to be a right of custody. And yet this, it seems, is how the Court understands the case: Because the drafters intended to account for joint custodial arrangements, they intended for *this* travel restriction to be joint custody because it could be said, in some abstract sense, to relate to care of the child. I fail to understand how the Court's reading is faithful to the Convention's text and purpose, given that the text expressly contemplates two distinct classes of parental rights. Today's decision converts every noncustodial parent with ac-

cess rights—at least in Chile—into a custodial parent for purposes of the Convention.

On this point, it is important to observe the effect of the Court's decision to classify the travel restriction as a right "relating to" A. J. A.'s care. Mr. Abbott possesses no legal authority presently to exercise care or control of A. J. A., or to make decisions on his behalf. The Court would nevertheless read the Convention to require A. J. A.'s return to a parent without such rights merely because the travel restriction, in an abstract sense, could be said to relate to A. J. A.'s care. The Court fails to explain how a parent who otherwise possesses no legal authority to exercise "charge," "supervision," or "management" over a child, see Webster's Third New International Dictionary 338 (1986) (hereinafter Webster's 3d) (5th definition of "care"), can become a joint custodian of a child merely because he can attempt to veto one of the countless decisions the child's other parent has sole legal authority to make on the child's behalf.

The right to determine the child's place of residence. The Court also concludes that Mr. Abbott's veto power satisfies the Convention's definition of custodial rights because it is, in the Court's view, a "right to determine the child's place of residence." Art. 5*(a)*, Treaty Doc., at 7. I disagree with the Court's assessment of the significance and meaning of this phrase, both on its face and within the context of the Convention's other provisions.

As an initial matter, the Court's reading of the Convention depends on isolating the phrase "and, in particular, the right to determine the child's place of residence" to refer to a free-standing right separate and apart from the rights related to the care of the child. I do not agree with this view of the text, nor did the Convention's drafters:

> "The Convention seeks to be more precise by emphasizing, as an *example* of the 'care' referred to [in the '"rights of custody"' clause, Art. 5*(a)*], the right to determine the child's place of residence. However, if

> the child, although still a minor at law, has the right itself to determine its own place of residence, the *substance* of the custody rights will have to be determined in the context of other rights concerning the person of the child." Pérez-Vera Report ¶ 84, at 452 (emphasis added).

The drafters thus intended the "right to determine the child's place of residence" to be an "example" of what the Convention means by "care of the person of the child." It is indicative of the "substance" of what it means to be a custodial parent. The definition is not, as the Court would have it, one stick in the bundle that may be parsed as a singular "'righ[t] of custody,'" *ante,* at 5; rather, it is a shorthand method to assess what types of rights a parent may have. The parent responsible for determining where and with whom a child resides, the drafters assumed, would likely *also* be the parent who has the responsibility to "care" for the child.

Yet even assuming, as the Court does, that the "right to determine the child's place of residence," Art. 5*(a),* Treaty Doc., at 7, is divisible from the "care" of the child, *ibid.*, I still fail to understand how a travel restriction on one parent's exercise of her custodial rights is equivalent to an affirmative "*right to determine* the child's place of residence." Analyzing its text, in the context of the Convention's focus on distinguishing custodial parents from noncustodial ones, leads me to conclude that the "right to determine the child's place of residence" means the power to set or fix the location of the child's home. It does not refer to the more abstract power to keep a child within one nation's borders.

To "determine" means "to fix conclusively or authoritatively" or "to settle a question or controversy."[4] Webster's

[4] To "determine" can also mean, as the Court observes, "'[t]o set bounds or limits to,'" *ante,* at 11 (quoting Webster's New International Dictionary 711 (2d ed. 1954) (hereinafter Webster's 2d) (1st definition)). However, this definition of "to determine" makes little functional sense as applied

3d, at 616. A "place" is a "physical environment" or "a building or locality used for a special purpose." *Id.*, at 1727. "Residence," even standing alone, refers to a particular location—and not, more generally, to a nation or country. In the law, "residence" can mean: "[t]he act or fact of living in a given place for some time"; "[t]he place where one actually lives"; or "[a] house or other fixed abode; a dwelling." Black's Law Dictionary 1423 (9th ed. 2009).[5] Lay definitions of "residence" similarly describe a specific location: "the act or fact of abiding or dwelling in a place for some time"; "the place where one actually lives or has his home"; or "a temporary or permanent dwelling place, abode, or habitation." Webster's 3d, at 1931. It follows that a "place of residence" describes a "physical" location in which a child "actually lives."

The Court's reading of this text depends on its substitution of the word "country" for the word "place." Such a substitution is not illogical, of course, in light of the Convention's international focus. See *Croll* v. *Croll*, 229 F. 3d 133, 147, 148 (CA2 2000) (Sotomayor, J., dissenting) (reading "place of residence" to mean "authority over the child's more specific

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to this treaty. In the context of understanding the meaning of rights of custody, the phrase "to determine" cannot be so indeterminate as to merely set "limits to" a child's place of residence.

Although the Court emphasizes that the definition of "to determine" on which it relies is the first such entry in Webster's, *ante*, at 11, it is worth noting that surely the Court would not rely on the first such definition of the word "care" in that source ("[s]uffering of mind; grief; sorrow") to understand the Convention's use of that word, see Webster's 2d, at 405. Instead, the fifth definition of that word—"[c]harge, oversight, or management"—is clearly the relevant one. The point is only that context, as well as common sense, matters when selecting among possible definitions.

[5] "Residence" can also refer to "[t]he place where a corporation or other enterprise does business or is registered to do business." Black's Law Dictionary 1423. Earlier this Term, we recognized the self-evident principle that a corporation's principal "place" of business for diversity jurisdiction purposes is a single location "*within* a State" and "not the State itself." *Hertz Corp.* v. *Friend*, 559 U. S. 77, 93 (2010).

living arrangements" "ignores the basic international character of the Hague Convention"). But it is inconsistent with the Convention's text and purpose.

When the drafters wanted to refer to country, they did. For example, in Article 3, the drafters explained that rights of custody should be defined by looking to "the law of the State in which the child was habitually resident." Art. 3*(a)*, Treaty Doc., at 7. Had the drafters intended the definition of the child's "place of residence" in Article 5 to refer to his or her "State" or country of "residence," they could have defined the "right" at issue as "the right to determine the child's State of habitual residence." But they did not, even though they used the phrase "State of habitual residence" no fewer than four other times elsewhere within the Convention's text.[6] Moreover, the drafters also explained that "reference[s] to habitual residence in [a] State shall be construed as referring to habitual residence in a *territorial unit of that State*." Art. 31*(a)*, *id.*, at 13 (emphasis added). The point is: When the drafters wanted to refer to a particular geographic unit, they did so.

Instead, the drafters elected the formulation "place of residence," which is also utilized similarly in the definition of "rights of access." See Art. 5*(b)*, *id.*, at 7 (defining " 'rights of access' " to include "the right to take a child for a limited

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[6] See, *e. g.*, Preamble, Treaty Doc., at 7 ("[d]esiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the *State of their habitual residence*" (emphasis added)); Art. 8*(f)*, *id.*, at 9 (stating that an application for return may be accompanied by "a certificate . . . emanating from . . . competent authority of the *State of the child's habitual residence*" (emphasis added)); Art. 14, *id.*, at 10 (explaining that when determining whether a removal is wrongful, a contracting state "may take notice directly of the law of . . . the *State of the habitual residence of the child*" (emphasis added)); Art. 15, *ibid.* (authorizing contracting state to obtain a decree from "the authorities of the *State of the habitual residence of the child*" a decision on whether removal was wrongful before ordering return (emphasis added)).

period of time to a *place* other than the child's habitual residence" (emphasis added)). And they utilized this phrase only within one particular article, as opposed to their more frequent use of "State of habitual residence" throughout the Convention. In interpreting statutory text, we ordinarily presume that the use of different words is purposeful and evinces an intention to convey a different meaning. See, *e. g.*, *Russello* v. *United States*, 464 U. S. 16, 23 (1983) ("We refrain from concluding here that the differing language in the two subsections has the same meaning in each. We would not presume to ascribe this difference to a simple mistake in draftsmanship"). There is no reason we should presume otherwise in the context of treaties.

Accordingly, I would give "place of residence" the location-specific meaning its plain text connotes, irrespective of the fact that this Convention concerns international abduction. The right described by the Convention is the right to decide, conclusively, where a child's home will be. And this makes a good deal of sense. The child lives with the parent who has custodial rights or, in the language of the Convention, "care of the person of the child," Art. 5*(a)*, Treaty Doc., at 7. The child's home—his or her "place of residence"—is fixed by the custody arrangement.[7] This comports too with the Convention's decision to privilege the rights of custodians over the rights of those parents with only visitation rights.

Understanding the effect of a travel restriction. So, the question we confront is whether a travel restriction on one parent's right to embark on international travel with his or her child creates in the other parent a "right to determine the child's place of residence" or the ability "to fix conclu-

[7] I do not mean to suggest by my view of the significance of a travel restriction that there could not be a custody arrangement in which both parents have the "right to determine the child's place of residence." Art. 5*(a)*, *id.*, at 7. My view is only that the type of *ne exeat* provision at issue in this case does not, by itself, confer such an affirmative right.

sively" the child's "physical" "home." Before answering this question, it is important to understand the nature of the travel restriction we must classify.

The departure of a minor from Chile—including when that child lives in a married, two-parent household—is governed by Article 49 of that country's Minors Law 16,618. Under Chilean law, no minor is allowed outside of the country without his or her parents' authorization. Minors Law 16,618, Art. 49, App. to Pet. for Cert. 61a–62a. Ordinarily, if the judge has entrusted custody of a child to only one parent, the child may not leave without that parent's—the custodial parent's—permission. See *ibid.;* see also *id.*, at 61a ("If the judge has entrusted custody to one of the parents or to a third party, the legitimate child may not leave except under authorization of the person to whom he has been entrusted"). But the statute further provides that if the noncustodial parent has been granted visitation rights, the authorization of the parent with visitation rights shall also be required: "Once the court has decreed the obligation to allow visits pursuant to the preceding article,[8] authorization of the father or mother who has the right to visit a child shall also be required." *Ibid.* The statute provides, also, an important backstop in the event a noncustodial parent denies authorization "without good reason": A Chilean court may grant the minor or his parent permission to leave the country. *Id.*, at

[8] The "preceding article" referred to, Article 48, simply provides: "Each time a minor is entrusted to one of the parents or a third person, such decision must include the obligation to allow the non-custodial parent to exercise his or her right to visit. The decision should also specify the way in which this right will be exercised. The judge may order, ex officio, upon the parties petition or in special cases, that the same authorization be extended, to the minor's ascendants or siblings, through the means and under the conditions set by the judge. Ascendants and siblings should be identified." Memorandum from Graciela I. Rodriguez-Ferrand, Senior Legal Specialist, Law Library of Congress, to Supreme Court Library (Apr. 1, 2010) (available in Clerk of Court's case file (containing English translation of Minors Law 16,618, Art. 48)).

62a. Finally, if the custodial parent does not return the child to Chile within the time authorized, "the judge may decree the suspension of alimony that may have been decreed." *Ibid.*

Returning, then, to the question at hand: By virtue of the restriction Chilean law places on Ms. Abbott's movement, Mr. Abbott has no "right to determine [A. J. A.'s] place of residence." He cannot "conclusively" "fix," "settle," or "determine" the place where A. J. A. "actually lives or has his home." See *supra*, at 30–31. True, the travel restriction bestows upon the noncustodial parent a limited power to prevent his child from leaving the country without his permission, but it does not grant an affirmative power to fix or set the location of the child's home. Mr. Abbott has no power whatever to determine where A. J. A. actually lives within the nearly 300,000 square miles that compose Chile. Even more important, Mr. Abbott has no power whatever to select another country in which A. J. A. would live, were Mr. Abbott's work to take him to another country altogether. In sum, a right to object to a proposed departure gives a parent far less authority than a right to determine where the child shall reside. Moreover, the right to determine where to live within a country, as well as what country to live in, is far broader than the limited right to object to a child's travel abroad.

In my view, the "right" Mr. Abbott has by virtue of the travel restriction is therefore best understood as relating to his "rights of access," as the Convention defines that term—and not as a standalone "'righ[t] of custody,'" as the Court defines it, *ante*, at 5. Chile's statutory travel restriction provision is plainly ancillary to the access rights the Chilean family court granted to him as the noncustodial parent. By its terms, the obligation on the custodial parent to seek the other parent's permission before removing the child from Chile only operates upon the award of *visitation rights;* it has nothing to do with *custody rights.* And it operates au-

tomatically to facilitate the noncustodial parent's ability to access the child and to exercise his visitation rights. In the best of all possible circumstances, Mr. Abbott's limited veto power assures him relatively easy access to A. J. A. so that he may continue a meaningful relationship with his son. But this power, standing alone, does not transform him into a *custodian* for purposes of the Convention's return remedy. Instead, it authorizes him, pursuant to Article 21, to seek assistance from this country in carrying out the Chilean family court's visitation order.

III

Although the Court recognizes, as it must, that "'[t]he interpretation of a treaty, like the interpretation of a statute, begins with its text,'" *ante*, at 10 (quoting *Medellín*, 552 U. S., at 506), the Court's analysis is atextual—at least as far as the Convention's text goes. The Court first relies on the text of the Chilean law at issue and a single Chilean administrator's alleged interpretation thereof.[9] See *ante*, at 10.

[9] Because differences in statutory provisions, as well as cultural differences and personal predilections, may affect the opinions of local officials, I would attach no weight to the letter from Paula Strap Camus, describing Article 49 of Chile's Minors Law 16,618 as establishing a shared right to determine the place of residence of a child. Moreover, we have no obligation to defer, on questions of treaty interpretation, to the nonjudicial decisions of another signatory state, let alone a return request—a piece of advocacy—filed on behalf of Chile in another case.

In any event, the letter cited offers much less support for the Court's position than meets the eye. Unlike in this case, in which a Chilean court has already decreed Ms. Abbott to be A. J. A.'s sole custodian, in *Villegas Duran* v. *Arribada Beaumont*, "no Judge of the Republic of Chile has granted the custody of the child to her mother . . . ." Letter from Paula Strap Camus, Director General, Corporation of Judicial Assistance of the Region Metropolitana to National Center for Missing and Exploited Children (Jan. 17, 2006), App. to Pet. for Cert. in *Villegas Duran* v. *Arribada Beaumont*, O. T. 2008, No. 08–775, p. 36a, cert. pending [REPORTER'S NOTE: See *post*, p. 921]. In other words, Ms. Camus' letter request for the child's return in that case depends on a provision of Article 49 not at

While it is true that the meaning of Chile's statute matters to our determining whether a parent has taken a child in "breach of rights of custody . . . under the law of the State in which the child was habitually resident immediately before the removal or retention," Art. 3*(a)*, Treaty Doc., at 7, it does not and should not inform what the Convention's definition of "rights of custody" means in the first place.

The Court also reminds us that the Convention's terms are to be broadly construed. See *ante*, at 19–20. To be sure, the Convention's leading interpretive authority informs us that the Convention's understanding of what constitutes "rights of custody" is broad and flexible. See Pérez-Vera Report ¶¶ 67, 71, 84, at 446, 447, 451–452. And we are to apply its terms to "allo[w] the greatest possible number of cases to be brought into consideration." *Id.*, ¶ 67, at 446. But such breadth should not circumvent the Convention's text in order to sweep a travel restriction under the umbrella of rights of custody.

A reading as broad and flexible as the Court's eviscerates the distinction the Convention draws between rights of custody and rights of access. Indeed, the Court's reading essentially voids the Convention's Article 21, which provides a separate remedy for breaches of rights of access. If a viola-

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issue in this case: "If the custody of a legitimate child has not been entrusted by the judge to any of his parents or to a third party, the child may not leave without authorization of both parents." App. to Pet. for Cert. 61a. The travel restriction that bound Ms. Abbott in this case, however, arose "[o]nce the court . . . decreed the obligation to allow visits" by Mr. Abbott. *Ibid.* Although not before us, there may be a sound basis for distinguishing the legal effect and significance of a travel restriction in effect *prior to* an award of custody to either or both parents, from one that occurs ancillary to the award of visitation rights to a parent who has no custodial rights. Moreover, the U. S. Department of State, at the time the Convention was ratified, believed that the Convention would require return in these circumstances: "Children who are wrongfully removed or retained prior to the entry of a custody order are protected by the Convention. There need not be a custody order in effect in order to invoke the Convention's return provisions." Convention Analysis 10505.

tion of this type of provision were not a breach of the rights of access, I find it quite difficult to imagine what the Convention's drafters had in mind when they created a second, lesser remedy for the breach of access rights. The drafters obviously contemplated that some removals might be in violation of the law of the child's home nation, but not "wrongful" within the meaning of the Convention—*i. e.*, not in breach of "rights of custody." This is precisely why Article 5 carefully delineates between the two types of parental rights in the first place. And this is precisely why Article 21 exists.

Nevertheless, the Court has now decreed that whenever an award of visitation rights triggers a statutory default travel restriction provision, or is accompanied by a travel restriction by judicial order, a parent possesses a right of custody within the meaning of the Convention. Such a bright-line rule surely will not serve the best interests of the child in many cases. See *id.*, ¶ 25, at 432. It will also have surprising results. In Chile, for example, as a result of this Court's decision, *all parents*—so long as they have the barest of visitation rights—now also have joint custody within the meaning of the Convention and the right to utilize the return remedy.[10]

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[10] In 2003, the latest year for which statistics appear available, Chile's Central Authority, which is the entity responsible for administering its obligations under the Hague Convention, made five outgoing "access applications" under Article 21. Hague Conference on Private International Law, International Child Abduction, N. Lowe, A Statistical Analysis of Applications Made in 2003 Under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part II–National Reports, p. 125 (Prelim. Doc. No. 3, 2006–2007) (hereinafter Lowe Analysis). Were the Court correct—and were the view the Court ascribes to Chile's interpretation of its own law also correct, see *ante*, at 10—all of Chile's outgoing applications under the Convention almost certainly should have been "return applications" because any person with rights of access under Chilean law, also has a right of custody by virtue of

It bears emphasis that such a result—treating the type of travel restriction at issue in this case as part of "rights of custody"—will undermine the Convention's careful balance between the "rights of custody and the "rights of access":

> "Although the problems which can arise from a *breach of access rights*, especially where the child is taken abroad by its custodian, were raised during the Fourteenth Session, the majority view was that *such situations could not be put in the same category as the wrongful removals which it is sought to prevent.*
>
> "This example, and others like it where breach of access rights profoundly upsets the equilibrium established by a judicial or administrative decision, certainly demonstrate that decisions concerning the custody of children should always be open to review. This problem however defied all efforts of the Hague Conference to coordinate views thereon. *A questionable result would have been attained had the application of the Convention, by granting the same degree of protection to custody and access rights, led ultimately to the substitution of the holders of one type of right by those who held the other.*" *Id.*, ¶ 65, at 444–445 (emphasis added; footnote omitted).

It seems the very same authority on which the Court relies to support its broad, flexible reading of the Convention's terms also tell us that the drafters *expressly rejected* the very outcome the Court reaches today. Far from "render[ing] the Convention meaningless," *ante,* at 13, a faithful reading of the Convention's text avoids the very "questionable result" its drafters foresaw and attempted to preclude

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the statutory *ne exeat* provision. It is plain that even Chilean officials have not thought correct the Court's interpretation of the intersection of the travel restriction in Article 49 of its Minors Law 16,618 and the Convention.

were they to extend "the same degree of protection" "to custody and access rights." Pérez-Vera Report ¶ 65, at 445.

IV

Hence, in my view, the Convention's language is plain and that language precludes the result the Court reaches. See *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U. S. 176, 180 (1982). In these circumstances, the "clear import of treaty language controls" the decision. *Ibid.* To support its reading of the text, however, the Court turns to authority we utilize to aid us in interpreting ambiguous treaty text: the position of the Executive Branch and authorities from foreign jurisdictions that have confronted the question before the Court.[11] *Ante*, at 15–18. Were I to agree with the Court that it is necessary to turn to these sources to resolve the question before us, I would not afford them the weight the Court does in this case.

Views of the Department of State. Without discussing precisely why, we have afforded "great weight" to "the meaning given [treaties] by the departments of government particularly charged with their negotiation and enforcement." *Kolovrat* v. *Oregon*, 366 U. S. 187, 194 (1961); see also *Sumitomo*, 457 U. S., at 184–185; *Factor* v. *Laubenheimer*, 290 U. S. 276, 294 (1933). We have awarded "great weight" to the views of a particular government department even when the views expressed by the department are newly memorialized, see *Sumitomo*, 457 U. S., at 184, n. 10, and even when the views appear contrary to those expressed by the department at the time of the treaty's signing and negotiation, *ibid.* In this case, it appears that both are true: The

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[11] See Vienna Convention on the Law of Treaties, Art. 32, May 23, 1969, S. Treaty Doc. No. 92–12, p. 20, 1155 U. N. T. S. 331, 340 ("Recourse may be had to supplementary means of interpretation . . . when the interpretation . . . (*a*) leaves the meaning ambiguous or obscure; or (*b*) leads to a result which is manifestly absurd or unreasonable").

Department of State's position, which supports the Court's conclusion, is newly memorialized, see Brief for United States as *Amicus Curiae* 21, n. 13, and is possibly inconsistent with the Department's earlier position, see Convention Analysis 10504–10505.[12]

Putting aside any concerns arising from the fact that the Department's views are newly memorialized and changing, I would not in this case abdicate our responsibility to interpret the Convention's language. This does not seem to be a matter in which deference to the Executive on matters of foreign policy would avoid international conflict, cf. *Itel Containers Int'l Corp.* v. *Huddleston*, 507 U. S. 60, 76 (1993) (acknowledging that "the nuances of foreign policy 'are much more the province of the Executive Branch and Congress than of this Court'" (quoting *Container Corp. of America*

[12] The State Department explained to the Senate at the time it sought ratification of the Convention that the "fundamental purpose of the Hague Convention" was "to protect children from wrongful international removals or retentions by persons bent on obtaining their physical and/or legal custody." Convention Analysis 10504. I find it quite unlikely, in light of its framing of the "fundamental purpose" of the Convention, that the State Department would have agreed at the time that a removal was "wrongful" within the meaning of the Convention when a parent *with physical custody* of a child took that child to another country, even when that removal was in violation of a restriction on the custodial parent's travel rights. See also Brief for Eleven Law Professors as *Amici Curiae* 4–5, n. 7. Even more telling, however, is the fact that, in a response to a questionnaire used by the Convention's drafters in preparing the treaty, the United States characterized a *ne exeat* right as one with "the purpose of preserving the jurisdiction of the state in the custody matter and of safeguarding the visitation rights of the other parent." 1980 Conférence de La Haye de droit international privé, Enlèvement d'enfants, Replies of the Governments to the Questionnaire, in 3 Actes et Documents de la Quatorzième Session, pp. 85, 88 (1982). Such a description is inconsistent with the Department's current position that a *ne exeat* clause is a freestanding right of custody within the meaning of the Convention. See Brief for United States as *Amicus Curiae* 7.

v. *Franchise Tax Bd.*, 463 U. S. 159, 196 (1983))); the State Department has made no such argument. Nor is this a case in which the Executive's understanding of the treaty's drafting history is particularly rich or illuminating.[13] See *Factor*, 290 U. S., at 294–295 (observing that "diplomatic history"—"negotiations and diplomatic correspondence of the contracting parties relating to the subject matter"—is entitled to weight). Finally, and significantly, the State Department, as the Central Authority for administering the Convention in the United States, has failed to disclose to the Court whether it has facilitated the return of children to America when the shoe is on the other foot.[14] See Brief for United States as *Amicus Curiae* 4, n. 3 (describing responsibilities of the Central Authority). Thus, we have no informed basis to assess the Executive's postratification conduct, or the conduct of other signatories, to aid us in understanding the accepted meaning of potentially ambiguous terms. See *Zicherman* v. *Korean Air Lines Co.*, 516 U. S. 217, 227–228 (1996) (considering "postratification conduct of the contracting parties"); *Charlton* v. *Kelly*, 229 U. S. 447, 468 (1913) (affording

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[13] This only underscores what seems quite clear: Whatever contemporary international consensus the Court claims has now emerged, "that view was not generally formulated when the Convention was drafted in 1980." *Ante*, at 18. I understand the Court's reference to contemporary consensus to depend on the views of contemporary scholars and individual signatory states developed postratification, including the views of the Special Commission, a voluntary *post hoc* collective body with no treaty-making authority, see *ante*, at 18–19. Even assuming that the Court is correct that consensus has emerged after the Convention was written and ratified that *ne exeat* rights *should* be "rights of custody," in my view this provides no support at all for the position that the Convention's drafters had these types of rights in mind and intended for the Convention to treat them as rights of custody. To the contrary, I think it tends to prove the opposite point.

[14] This is somewhat surprising given that in 1999 the Department made 183 outgoing applications for return of children to the United States and made 85 such requests in 2003. Lowe Analysis 479.

"much weight" to the fact that the "United States has always construed its obligation" under a treaty in a particular way and had acted in accord).

Instead, the Department offers us little more than its own reading of the treaty's text. Its view is informed by no unique vantage it has, whether as the entity responsible for enforcing the Convention in this country or as a participating drafter. The Court's perfunctory, one-paragraph treatment of the Department's judgment of this matter only underscores this point. *Ante*, at 15. I see no reason, therefore, to replace our understanding of the Convention's text with that of the Executive Branch.

Views of foreign jurisdictions. The Court believes that the views of other signatories to the Convention deserve special attention when, in a case like this, "Congress has directed that 'uniform international interpretation of the Convention' is part of the Convention's framework." *Ante*, at 16 (quoting 42 U. S. C. § 11601(b)(3)(B)). This may well be correct, but we should not substitute the judgment of other courts for our own. See *Olympic Airways* v. *Husain*, 540 U. S. 644, 655, n. 9 (2004). And the handful of foreign decisions the Court cites, see *ante*, at 16–17, provide insufficient reason to depart from my understanding of the meaning of the Convention, an understanding shared by many U. S. Courts of Appeals. See, *e. g.*, 542 F. 3d 1081 (CA5 2008) (case below); *Gonzalez* v. *Gutierrez*, 311 F. 3d 942, 949 (CA9 2002) (parent's right to "refuse permission for his children to leave Mexico" "hardly amounts to a right of custody, in the plainest sense of the term"); *Croll*, 229 F. 3d, at 140 ("If we were to enforce rights held pursuant to a *ne exeat* clause by the remedy of mandatory return, the Convention would become unworkable. . . . It does not contemplate return of a child to a parent whose sole right—to visit or veto—imposes no duty to give care"); *Fawcett* v. *McRoberts*, 326 F. 3d 491 (CA4 2003). Indeed, the interest in having our courts cor-

rectly interpret the Convention may outweigh the interest in having the *ne exeat* clause issue resolved in the same way that it is resolved in other countries. Cf. *Breard* v. *Greene*, 523 U. S. 371, 375 (1998) *(per curiam)* ("[W]hile we should give respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret such, it has been recognized in international law that, absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State").

I also fail to see the international consensus—let alone the "broad acceptance," *ante*, at 16—that the Court finds among those varied decisions from foreign courts that have considered the effect of a similar travel restriction within the Convention's remedial scheme. The various decisions of the international courts are, at best, in equipoise. Indeed, the Court recognizes that courts in Canada and France have concluded that travel restrictions are not "rights of custody" within the meaning of the Convention. *Ante*, at 17–18.

And those decisions supportive of the Court's position do not offer nearly as much support as first meets the eye. For example, the English Court of Appeal decision on which the Court primarily relies, *ante*, at 16, appears to have decided a different issue. True, that court considered the effect of a similar travel restriction on both parents following the award of "'custody'" to the child's mother. *C.* v. *C.*, [1989] 1 W. L. R. 654, 656 (C. A.). But the family court had also decreed, at the time it awarded "'custody'" to the mother, that both parents would remain "'joint guardians'" of the child. *Ibid.* Moreover, in the time between the mother's removal of the child and the father's petitioning for his return, the father had returned to the family court in Sydney, obtained an order for the child's return, and received immediate custody of the child. *Ibid.* Comparable facts do not exist in this case. Cf. *Olympic Airways*, 540 U. S., at 655, n. 9 (not-

ing that "we are hesitant" to follow decisions of other signatory courts when "there are substantial factual distinctions between" the cases). Similar factual distinctions—involving, typically, joint guardianship rights or shared decisionmaking rights—are present in other of the foreign cases relied upon by the Court and Mr. Abbott.[15]

Those foreign courts that have reached a position consistent with my own, the Court is right to point out, have also done so in slightly different factual scenarios. *Ante*, at 17. The Supreme Court of Canada, for example, first encountered a *ne exeat* provision as part of an interim custody order in *Thomson* v. *Thomson*, [1994] 3 S. C. R. 551, 589–590, 119 D. L. R. (4th) 253, 281. Although the Canadian high court concluded that a removal in breach of the temporary travel restriction was wrongful, it emphasized the interim nature of the provision, see n. 9, *supra*, and explained that the case would be different with a permanent order. See *Thomson*, [1994] 3 S. C. R., at 589, 119 D. L. R. (4th), at 281 ("Such a [permanent] clause raises quite different issues. It is usually intended to ensure permanent access to the noncustodial parent. The right of access is, of course, important but, as we have seen, it was not intended to be given the

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[15] See Bundesverfassungsgericht [BVerfG] [Fed. Constitutional Ct.] July 18, 1997, 2 BvR 1126/97, ¶¶ 13–15 (Ger.) (Dept. of State transl.) (considering *ne exeat* provision with respect to a noncustodial parent who also had joint authority to decide major life decisions for the child); *M. S. H.* v. *L. H.*, [2000] 3 I. R. 390, 401 (Sup. Ct., Ireland) (evaluating effect of *ne exeat* provision when parents had shared "rights of parental responsibility," including "'all the rights, duties, powers, responsibilities and authority which, by law, a parent of a child has in relation to a child and his property'"); *Sonderup* v. *Tondelli*, 2001 (1) SA 1171, 1177–1178 (Constitutional Ct., S. Afr. 2000) (evaluating removal where parents were both granted "joint guardianship" of the minor); CA 5271/92 *Foxman* v. *Foxman*, [1992], § 3(C) (Sup. Ct., Isr.) (K. Chagall transl.) (examining whether removal was wrongful in the context of a custody and visitation agreement that provided broadly that "each parent needs the consent of the other to every significant change in the children's residency").

same level of protection by the Convention as custody").[16] The Canadian Supreme Court later affirmed this important distinction in *D. S.* v. *V. W.*, [1996] 2 S. C. R. 108, 139, 134 D. L. R. (4th) 481, 503 (rejecting argument that "any removal of a child without the consent of the parent having access rights" should authorize return remedy because such a reading of the Convention would "indirectly afford the same protection to access rights as is afforded to custody rights").

In sum, the decisions relied upon by the Court and Mr. Abbott from other signatories do not convince me that we should refrain from a straightforward textual analysis in this case in order to make way for a "uniform international interpretation" of the Convention. 42 U. S. C. § 11601(b)(3)(B). There is no present uniformity sufficiently substantial to justify departing from our independent judgment on the Convention's text and purpose and the drafters' intent.

V

At bottom, the Convention aims to protect the best interests of the child. Pérez-Vera Report ¶ 25, at 432. Recognizing that not all removals in violation of the laws of the country of habitual residence are contrary to a child's best interests, the Convention provides a powerful but limited return remedy. The judgment of the Convention's drafters was that breaches of access rights, while significant (and thus expressly protected by Article 21), are secondary to protecting the child's interest in maintaining an existing custodial relationship.

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[16] The Canadian high court also observed that construing a permanent travel restriction on one parent as creating a right of custody in the other has "serious implications for the mobility rights of the custodian." *Thomson*, [1994] 3 S. C. R., at 590, 119 D. L. R. (4th), at 281. A French Court of Appeals made a similar observation in *Procureur de la République de Périgueux* v. *Mme S.* (TGI, Périgueux, Mar. 17, 1992), in 82 Revue Critique de Droit International Privé 650, 651–653 (Oct.–Dec. 1993).

Today, the Court has upended the considered judgment of the Convention's drafters in favor of protecting the rights of noncustodial parents. In my view, the bright-line rule the Court adopts today is particularly unwise in the context of a treaty intended to govern disputes affecting the welfare of children.

I, therefore, respectfully dissent.

Syllabus

GRAHAM *v.* FLORIDA

CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

No. 08–7412. Argued November 9, 2009—Decided May 17, 2010; modified July 6, 2010

Petitioner Graham was 16 when he committed armed burglary and another crime. Under a plea agreement, the Florida trial court sentenced Graham to probation and withheld adjudication of guilt. Subsequently, the trial court found that Graham had violated the terms of his probation by committing additional crimes. The trial court adjudicated Graham guilty of the earlier charges, revoked his probation, and sentenced him to life in prison for the burglary. Because Florida has abolished its parole system, the life sentence left Graham no possibility of release except executive clemency. He challenged his sentence under the Eighth Amendment's Cruel and Unusual Punishments Clause, but the State First District Court of Appeal affirmed.

Held: The Clause does not permit a juvenile offender to be sentenced to life in prison without parole for a nonhomicide crime. Pp. 58–82.

(a) Embodied in the cruel and unusual punishments ban is the "precept . . . that punishment for crime should be graduated and proportioned to [the] offense." *Weems* v. *United States*, 217 U. S. 349, 367. The Court's cases implementing the proportionality standard fall within two general classifications. In cases of the first type, the Court has considered all the circumstances to determine whether the length of a term-of-years sentence is unconstitutionally excessive for a particular defendant's crime. The second classification comprises cases in which the Court has applied certain categorical rules against the death penalty. In a subset of such cases considering the nature of the offense, the Court has concluded that capital punishment is impermissible for nonhomicide crimes against individuals. *E. g.*, *Kennedy* v. *Louisiana*, 554 U. S. 407, 420. In a second subset, cases turning on the offender's characteristics, the Court has prohibited death for defendants who committed their crimes before age 18, *Roper* v. *Simmons*, 543 U. S. 551, or whose intellectual functioning is in a low range, *Atkins* v. *Virginia*, 536 U. S. 304. In cases involving categorical rules, the Court first considers "objective indicia of society's standards, as expressed in legislative enactments and state practice" to determine whether there is a national consensus against the sentencing practice at issue. *Roper*, *supra*, at 563. Next, looking to "the standards elaborated by controlling prece-

dents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose," *Kennedy*, *supra*, at 421, the Court determines in the exercise of its own independent judgment whether the punishment in question violates the Constitution, *Roper*, *supra*, at 564. Because this case implicates a particular type of sentence as it applies to an entire class of offenders who have committed a range of crimes, the appropriate analysis is the categorical approach used in *Atkins*, *Roper*, and *Kennedy*. Pp. 58–62.

(b) Application of the foregoing approach convinces the Court that the sentencing practice at issue is unconstitutional. Pp. 62–82.

(1) Six jurisdictions do not allow life without parole sentences for any juvenile offenders. Seven jurisdictions permit life without parole for juvenile offenders, but only for homicide crimes. Thirty-seven States, the District of Columbia, and the Federal Government permit sentences of life without parole for a juvenile nonhomicide offender in some circumstances. The State relies on these data to argue that no national consensus against the sentencing practice in question exists. An examination of actual sentencing practices in those jurisdictions that permit life without parole for juvenile nonhomicide offenders, however, discloses a consensus against the sentence. Nationwide, there are only 123 juvenile offenders serving life without parole sentences for nonhomicide crimes. Because 77 of those offenders are serving sentences imposed in Florida and the other 46 are imprisoned in just 10 States, it appears that only 11 jurisdictions nationwide in fact impose life without parole sentences on juvenile nonhomicide offenders, while 26 States, the District of Columbia, and the Federal Government do not impose them despite apparent statutory authorization. Given that the statistics reflect nearly all juvenile nonhomicide offenders who have received a life without parole sentence stretching back many years, moreover, it is clear how rare these sentences are, even within the States that do sometimes impose them. While more common in terms of absolute numbers than the sentencing practices in, *e. g.*, *Atkins* and *Enmund* v. *Florida*, 458 U. S. 782, the type of sentence at issue is actually as rare as those other sentencing practices when viewed in proportion to the opportunities for its imposition. The fact that many jurisdictions do not expressly prohibit the sentencing practice at issue is not dispositive because it does not necessarily follow that the legislatures in those jurisdictions have deliberately concluded that such sentences would be appropriate. See *Thompson* v. *Oklahoma*, 487 U. S. 815, 826, n. 24, 850. Pp. 62–67.

(2) The inadequacy of penological theory to justify life without parole sentences for juvenile nonhomicide offenders, the limited culpability of such offenders, and the severity of these sentences all lead the Court

to conclude that the sentencing practice at issue is cruel and unusual. No recent data provide reason to reconsider *Roper*'s holding that because juveniles have lessened culpability they are less deserving of the most serious forms of punishment. 543 U. S., at 551. Moreover, defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of such punishments than are murderers. *E. g.*, *Kennedy*, *supra.* Serious nonhomicide crimes "may be devastating in their harm . . . but 'in terms of moral depravity and of the injury to the person and to the public,' . . . they cannot be compared to murder in their 'severity and irrevocability.'" *Id.*, at 438. Thus, when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability. Age and the nature of the crime each bear on the analysis. As for the punishment, life without parole is "the second most severe penalty permitted by law," *Harmelin* v. *Michigan*, 501 U. S. 957, 1001, and is especially harsh for a juvenile offender, who will on average serve more years and a greater percentage of his life in prison than an adult offender, see, *e. g.*, *Roper*, *supra*, at 572. And none of the legitimate goals of penal sanctions—retribution, deterrence, incapacitation, and rehabilitation, see *Ewing* v. *California*, 538 U. S. 11, 25—is adequate to justify life without parole for juvenile nonhomicide offenders, see, *e. g.*, *Roper*, 543 U. S., at 571, 573. Because age "18 is the point where society draws the line for many purposes between childhood and adulthood," it is the age below which a defendant may not be sentenced to life without parole for a nonhomicide crime. *Id.*, at 574. A State is not required to guarantee eventual freedom to such an offender, but must impose a sentence that provides some meaningful opportunity for release based on demonstrated maturity and rehabilitation. It is for the State, in the first instance, to explore the means and mechanisms for compliance. Pp. 67–75.

(3) A categorical rule is necessary, given the inadequacy of two alternative approaches to address the relevant constitutional concerns. First, although Florida and other States have made substantial efforts to enact comprehensive rules governing the treatment of youthful offenders, such laws allow the imposition of the type of sentence at issue based only on a discretionary, subjective judgment by a judge or jury that the juvenile offender is irredeemably depraved, and are therefore insufficient to prevent the possibility that the offender will receive such a sentence despite a lack of moral culpability. Second, a case-by-case approach requiring that the particular offender's age be weighed against the seriousness of the crime as part of a gross disproportionality inquiry would not allow courts to distinguish with sufficient accuracy the few juvenile offenders having sufficient psychological maturity and depravity to merit a life without parole sentence from the many that have the

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capacity for change. Cf. *Roper*, *supra*, at 572–573. Nor does such an approach take account of special difficulties encountered by counsel in juvenile representation, given juveniles' impulsiveness, difficulty thinking in terms of long-term benefits, and reluctance to trust adults. A categorical rule avoids the risk that, as a result of these difficulties, a court or jury will erroneously conclude that a particular juvenile is sufficiently culpable to deserve life without parole for a nonhomicide. It also gives the juvenile offender a chance to demonstrate maturity and reform. Pp. 75–79.

(4) Additional support for the Court's conclusion lies in the fact that the sentencing practice at issue has been rejected the world over: The United States is the only Nation that imposes this type of sentence. While the judgments of other nations and the international community are not dispositive as to the meaning of the Eighth Amendment, the Court has looked abroad to support its independent conclusion that a particular punishment is cruel and unusual. See, *e. g.*, *Roper*, *supra*, at 575–578. Pp. 80–82.

982 So. 2d 43, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which STEVENS, GINSBURG, BREYER, and SOTOMAYOR, JJ., joined. STEVENS, J., filed a concurring opinion, in which GINSBURG and SOTOMAYOR, JJ., joined, *post*, p. 85. ROBERTS, C. J., filed an opinion concurring in the judgment, *post*, p. 86. THOMAS, J., filed a dissenting opinion, in which SCALIA, J., joined, and in which ALITO, J., joined as to Parts I and III, *post*, p. 97. ALITO, J., filed a dissenting opinion, *post*, p. 124.

Bryan S. Gowdy, by appointment of the Court, 558 U. S. 811, argued the cause for petitioner. With him on the briefs were *John S. Mills*, *Jessie L. Harrell*, *Drew S. Days III*, *Brian R. Matsui*, *Seth M. Galanter*, and *George C. Harris*.

Scott D. Makar, Solicitor General of Florida, argued the cause for respondent. With him on the brief were *Bill McCollum*, Attorney General, *Louis F. Hubener*, Chief Deputy Solicitor General, and *Timothy D. Osterhaus*, *Craig D. Feiser*, *Courtney Brewer*, and *Ronald A. Lathan*, Deputy Solicitors General.*

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*Briefs of *amici curiae* urging reversal were filed for the American Bar Association by *H. Thomas Wells, Jr.*, and *Lawrence A. Wojcik;* for the American Psychological Association et al. by *Danielle M. Spinelli*, *Anne Harkavy*, *Shirley C. Woodward*, *Nathalie F. P. Gilfoyle*, *Richard G. Taranto*, *Carolyn I. Polowy*, and *Mark J. Heyrman;* for Amnesty Interna-

JUSTICE KENNEDY delivered the opinion of the Court.

The issue before the Court is whether the Constitution permits a juvenile offender to be sentenced to life in prison

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tional et al. by *Constance de la Vega*, *Michelle T. Leighton*, and *Neil A. F. Popovic;* for the Disability Rights Legal Center by *Neil M. Soltman* and *Donald M. Falk;* for Educators et al. by *John J. Gibbons*, *Lawrence S. Lustberg*, and *Jennifer B. Condon;* for Former Juvenile Offender Charles S. Dutton et al. by *David W. DeBruin;* for the Juvenile Law Center et al. by *Marsha L. Levick;* for the Mothers Against Murderers Association et al. by *Angela C. Vigil*, *William Lynch Schaller*, and *Michael A. Pollard;* for the Sentencing Project by *Matthew M. Shors* and *Shannon M. Pazur;* and for J. Lawrence Aber et al. by *Stephen M. Nickelsburg.*

Briefs of *amici curiae* urging affirmance were filed for the State of Louisiana et al. by *James D. "Buddy" Caldwell*, Attorney General of Louisiana, and *Kyle Duncan*, Appellate Chief, by *Richard S. Gebelein*, Chief Deputy Attorney General of Delaware, and by the Attorneys General for their respective States as follows: *Troy King* of Alabama, *Gregory F. Zoeller* of Indiana, *Jack Conway* of Kentucky, *Michael A. Cox* of Michigan, *Jim Hood* of Mississippi, *Roy Cooper* of North Carolina, *Wayne Stenehjem* of North Dakota, *W. A. Drew Edmondson* of Oklahoma, *Thomas W. Corbett, Jr.*, of Pennsylvania, *Henry D. McMaster* of South Carolina, *Marty J. Jackley* of South Dakota, *Robert E. Cooper, Jr.*, of Tennessee, *Greg Abbott* of Texas, *Mark L. Shurtleff* of Utah, *William C. Mims* of Virginia, *Robert M. McKenna* of Washington, and *Bruce A. Salzburg* of Wyoming; for the Criminal Justice Legal Foundation by *Kent S. Scheidegger;* for the National District Attorneys Association by *Gene C. Schaerr* and *Linda T. Coberly;* for the Solidarity Center for Law and Justice et al. by *James P. Kelly III;* and for Sixteen Members of the United States House of Representatives by *Michael P. Farris.*

Briefs of *amici curiae* were filed for the American Association of Jewish Lawyers and Jurists et al. by *Michael B. de Leeuw;* for the American Medical Association et al. by *E. Joshua Rosenkranz;* for the Center on the Administration of Criminal Law by *Richard K. Willard* and *Anthony S. Barkow;* for the Center for Constitutional Jurisprudence by *Anthony T. Caso*, *Edwin Meese III*, and *John C. Eastman;* for the Council of Juvenile Correctional Administrators et al. by *Corrine A. Irish;* for the NAACP Legal Defense & Educational Fund, Inc., et al. by *John A. Payton*, *Debo P. Adegbile*, *Christina Swarns*, *Jin Hee Lee*, *Vincent M. Southerland*, *Charles J. Ogletree, Jr.*, *Robert J. Smith*, and *Jeffrey L. Fisher;* and for the National Organization of Victims of Juvenile Lifers et al. by *Shannon Lee Goessling.*

without parole for a nonhomicide crime. The sentence was imposed by the State of Florida. Petitioner challenges the sentence under the Eighth Amendment's Cruel and Unusual Punishments Clause, made applicable to the States by the Due Process Clause of the Fourteenth Amendment. *Robinson* v. *California*, 370 U. S. 660 (1962).

I

Petitioner is Terrance Jamar Graham. He was born on January 6, 1987. Graham's parents were addicted to crack cocaine, and their drug use persisted in his early years. Graham was diagnosed with attention deficit hyperactivity disorder in elementary school. He began drinking alcohol and using tobacco at age 9 and smoked marijuana at age 13.

In July 2003, when Graham was age 16, he and three other school-age youths attempted to rob a barbeque restaurant in Jacksonville, Florida. One youth, who worked at the restaurant, left the back door unlocked just before closing time. Graham and another youth, wearing masks, entered through the unlocked door. Graham's masked accomplice twice struck the restaurant manager in the back of the head with a metal bar. When the manager started yelling at the assailant and Graham, the two youths ran out and escaped in a car driven by the third accomplice. The restaurant manager required stitches for his head injury. No money was taken.

Graham was arrested for the robbery attempt. Under Florida law, it is within a prosecutor's discretion whether to charge 16- and 17-year-olds as adults or juveniles for most felony crimes. Fla. Stat. § 985.227(1)(b) (2003) (subsequently renumbered at § 985.557(1)(b) (2007)). Graham's prosecutor elected to charge Graham as an adult. The charges against Graham were armed burglary with assault or battery, a first-degree felony carrying a maximum penalty of life imprisonment without the possibility of parole, §§ 810.02(1)(b), (2)(a) (2003); and attempted armed robbery, a second-degree

felony carrying a maximum penalty of 15 years' imprisonment, §§ 812.13(2)(b), 777.04(1), (4)(a), 775.082(3)(c).

On December 18, 2003, Graham pleaded guilty to both charges under a plea agreement. Graham wrote a letter to the trial court. After reciting "this is my first and last time getting in trouble," he continued, "I've decided to turn my life around." App. 379–380. Graham said, "I made a promise to God and myself that if I get a second chance, I'm going to do whatever it takes to get to the [National Football League]." *Id.*, at 380.

The trial court accepted the plea agreement. The court withheld adjudication of guilt as to both charges and sentenced Graham to concurrent 3-year terms of probation. Graham was required to spend the first 12 months of his probation in the county jail, but he received credit for the time he had served awaiting trial, and was released on June 25, 2004.

Less than six months later, on the night of December 2, 2004, Graham again was arrested. The State's case was as follows: Earlier that evening, Graham participated in a home invasion robbery. His two accomplices were Meigo Bailey and Kirkland Lawrence, both 20-year-old men. According to the State, at 7 p.m. that night, Graham, Bailey, and Lawrence knocked on the door of the home where Carlos Rodriguez lived. Graham, followed by Bailey and Lawrence, forcibly entered the home and held a pistol to Rodriguez's chest. For the next 30 minutes, the three held Rodriguez and another man, a friend of Rodriguez, at gunpoint while they ransacked the home searching for money. Before leaving, Graham and his accomplices barricaded Rodriguez and his friend inside a closet.

The State further alleged that Graham, Bailey, and Lawrence, later the same evening, attempted a second robbery, during which Bailey was shot. Graham, who had borrowed his father's car, drove Bailey and Lawrence to the hospital and left them there. As Graham drove away, a police ser-

geant signaled him to stop. Graham continued at a high speed but crashed into a telephone pole. He tried to flee on foot but was apprehended. Three handguns were found in his car.

When detectives interviewed Graham, he denied involvement in the crimes. He said he encountered Bailey and Lawrence only after Bailey had been shot. One of the detectives told Graham that the victims of the home invasion had identified him. He asked Graham, "Aside from the two robberies tonight how many more were you involved in?" Graham responded, "Two to three before tonight." *Id.*, at 160. The night that Graham allegedly committed the robbery, he was 34 days short of his 18th birthday.

On December 13, 2004, Graham's probation officer filed with the trial court an affidavit asserting that Graham had violated the conditions of his probation by possessing a firearm, committing crimes, and associating with persons engaged in criminal activity. The trial court held hearings on Graham's violations about a year later, in December 2005 and January 2006. The judge who presided was not the same judge who had accepted Graham's guilty plea to the earlier offenses.

Graham maintained that he had no involvement in the home invasion robbery; but, even after the court underscored that the admission could expose him to a life sentence on the earlier charges, he admitted violating probation conditions by fleeing. The State presented evidence related to the home invasion, including testimony from the victims. The trial court noted that Graham, in admitting his attempt to avoid arrest, had acknowledged violating his probation. The court further found that Graham had violated his probation by committing a home invasion robbery, by possessing a firearm, and by associating with persons engaged in criminal activity.

The trial court held a sentencing hearing. Under Florida law the minimum sentence Graham could receive absent a

downward departure by the judge was 5 years' imprisonment. The maximum was life imprisonment. Graham's attorney requested the minimum nondeparture sentence of 5 years. A presentence report prepared by the Florida Department of Corrections recommended that Graham receive an even lower sentence—at most 4 years' imprisonment. The State recommended that Graham receive 30 years on the armed burglary count and 15 years on the attempted armed robbery count.

After hearing Graham's testimony, the trial court explained the sentence it was about to pronounce:

> "Mr. Graham, as I look back on your case, yours is really candidly a sad situation. You had, as far as I can tell, you have quite a family structure. You had a lot of people who wanted to try and help you get your life turned around including the court system, and you had a judge who took the step to try and give you direction through his probation order to give you a chance to get back onto track. And at the time you seemed through your letters that that is exactly what you wanted to do. And I don't know why it is that you threw your life away. I don't know why.
>
> "But you did, and that is what is so sad about this today is that you have actually been given a chance to get through this, the original charge, which were very serious charges to begin with. . . . The attempted robbery with a weapon was a very serious charge.
>
> . . . . .
>
> "[I]n a very short period of time you were back before the Court on a violation of this probation, and then here you are two years later standing before me, literally the—facing a life sentence as to—up to life as to count 1 and up to 15 years as to count 2.
>
> "And I don't understand why you would be given such a great opportunity to do something with your life and

why you would throw it away. The only thing that I can rationalize is that you decided that this is how you were going to lead your life and that there is nothing that we can do for you. And as the state pointed out, that this is an escalating pattern of criminal conduct on your part and that we can't help you any further. We can't do anything to deter you. This is the way you are going to lead your life, and I don't know why you are going to. You've made that decision. I have no idea. But, evidently, that is what you decided to do.

"So then it becomes a focus, if I can't do anything to help you, if I can't do anything to get you back on the right path, then I have to start focusing on the community and trying to protect the community from your actions. And, unfortunately, that is where we are today is I don't see where I can do anything to help you any further. You've evidently decided this is the direction you're going to take in life, and it's unfortunate that you made that choice.

"I have reviewed the statute. I don't see where any further juvenile sanctions would be appropriate. I don't see where any youthful offender sanctions would be appropriate. Given your escalating pattern of criminal conduct, it is apparent to the Court that you have decided that this is the way you are going to live your life and that the only thing I can do now is to try and protect the community from your actions." *Id.*, at 392–394.

The trial court found Graham guilty of the earlier armed burglary and attempted armed robbery charges. It sentenced him to the maximum sentence authorized by law on each charge: life imprisonment for the armed burglary and 15 years for the attempted armed robbery. Because Florida has abolished its parole system, see Fla. Stat. § 921.002(1)(e) (2003), a life sentence gives a defendant no possibility of release unless he is granted executive clemency.

Graham filed a motion in the trial court challenging his sentence under the Eighth Amendment. The motion was deemed denied after the trial court failed to rule on it within 60 days. The First District Court of Appeal of Florida affirmed, concluding that Graham's sentence was not grossly disproportionate to his crimes. 982 So. 2d 43 (2008). The court took note of the seriousness of Graham's offenses and their violent nature, as well as the fact that they "were not committed by a pre-teen, but a seventeen-year-old who was ultimately sentenced at the age of nineteen." *Id.*, at 52. The court concluded further that Graham was incapable of rehabilitation. Although Graham "was given an unheard of probationary sentence for a life felony, . . . wrote a letter expressing his remorse and promising to refrain from the commission of further crime, and . . . had a strong family structure to support him," the court noted, he "rejected his second chance and chose to continue committing crimes at an escalating pace." *Ibid.* The Florida Supreme Court denied review. 990 So. 2d 1058 (2008) (table).

We granted certiorari. 556 U. S. 1220 (2009).

II

The Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." To determine whether a punishment is cruel and unusual, courts must look beyond historical conceptions to "'the evolving standards of decency that mark the progress of a maturing society.'" *Estelle* v. *Gamble*, 429 U. S. 97, 102 (1976) (quoting *Trop* v. *Dulles*, 356 U. S. 86, 101 (1958) (plurality opinion)). "This is because '[t]he standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change.'" *Kennedy* v. *Louisiana*, 554 U. S. 407, 419 (2008) (quoting *Furman* v. *Georgia*, 408 U. S. 238, 382 (1972) (Burger, C. J., dissenting)).

The Cruel and Unusual Punishments Clause prohibits the imposition of inherently barbaric punishments under all circumstances. See, *e. g.*, *Hope* v. *Pelzer*, 536 U. S. 730 (2002). "[P]unishments of torture," for example, "are forbidden." *Wilkerson* v. *Utah*, 99 U. S. 130, 136 (1879). These cases underscore the essential principle that, under the Eighth Amendment, the State must respect the human attributes even of those who have committed serious crimes.

For the most part, however, the Court's precedents consider punishments challenged not as inherently barbaric but as disproportionate to the crime. The concept of proportionality is central to the Eighth Amendment. Embodied in the Constitution's ban on cruel and unusual punishments is the "precept of justice that punishment for crime should be graduated and proportioned to [the] offense." *Weems* v. *United States*, 217 U. S. 349, 367 (1910).

The Court's cases addressing the proportionality of sentences fall within two general classifications. The first involves challenges to the length of term-of-years sentences given all the circumstances in a particular case. The second comprises cases in which the Court implements the proportionality standard by certain categorical restrictions on the death penalty.

In the first classification the Court considers all of the circumstances of the case to determine whether the sentence is unconstitutionally excessive. Under this approach, the Court has held unconstitutional a life without parole sentence for the defendant's seventh nonviolent felony, the crime of passing a worthless check. *Solem* v. *Helm*, 463 U. S. 277 (1983). In other cases, however, it has been difficult for the challenger to establish a lack of proportionality. A leading case is *Harmelin* v. *Michigan*, 501 U. S. 957 (1991), in which the offender was sentenced under state law to life without parole for possessing a large quantity of cocaine. A closely divided Court upheld the sentence. The controlling opinion concluded that the Eighth Amendment contains a "narrow

proportionality principle," that "does not require strict proportionality between crime and sentence" but rather "forbids only extreme sentences that are 'grossly disproportionate' to the crime." *Id.*, at 997, 1000–1001 (KENNEDY, J., concurring in part and concurring in judgment). Again closely divided, the Court rejected a challenge to a sentence of 25 years to life for the theft of a few golf clubs under California's so-called three-strikes recidivist sentencing scheme. *Ewing* v. *California*, 538 U. S. 11 (2003); see also *Lockyer* v. *Andrade*, 538 U. S. 63 (2003). The Court has also upheld a sentence of life with the possibility of parole for a defendant's third nonviolent felony, the crime of obtaining money by false pretenses, *Rummel* v. *Estelle*, 445 U. S. 263 (1980), and a sentence of 40 years for possession of marijuana with intent to distribute and distribution of marijuana, *Hutto* v. *Davis*, 454 U. S. 370 (1982) *(per curiam)*.

The controlling opinion in *Harmelin* explained its approach for determining whether a sentence for a term of years is grossly disproportionate for a particular defendant's crime. A court must begin by comparing the gravity of the offense and the severity of the sentence. 501 U. S., at 1005 (opinion of KENNEDY, J.). "[I]n the rare case in which [this] threshold comparison . . . leads to an inference of gross disproportionality" the court should then compare the defendant's sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions. *Ibid.* If this comparative analysis "validate[s] an initial judgment that [the] sentence is grossly disproportionate," the sentence is cruel and unusual. *Ibid.*

The second classification of cases has used categorical rules to define Eighth Amendment standards. The previous cases in this classification involved the death penalty. The classification in turn consists of two subsets, one considering the nature of the offense, the other considering the characteristics of the offender. With respect to the nature of the

offense, the Court has concluded that capital punishment is impermissible for nonhomicide crimes against individuals. *Kennedy*, 551 U. S., at 437–438; see also *Enmund* v. *Florida*, 458 U. S. 782 (1982); *Coker* v. *Georgia*, 433 U. S. 584 (1977). In cases turning on the characteristics of the offender, the Court has adopted categorical rules prohibiting the death penalty for defendants who committed their crimes before the age of 18, *Roper* v. *Simmons*, 543 U. S. 551 (2005), or whose intellectual functioning is in a low range, *Atkins* v. *Virginia*, 536 U. S. 304 (2002). See also *Thompson* v. *Oklahoma*, 487 U. S. 815 (1988).

In the cases adopting categorical rules the Court has taken the following approach. The Court first considers "objective indicia of society's standards, as expressed in legislative enactments and state practice" to determine whether there is a national consensus against the sentencing practice at issue. *Roper*, *supra*, at 563. Next, guided by "the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose," *Kennedy*, 554 U. S., at 421, the Court must determine in the exercise of its own independent judgment whether the punishment in question violates the Constitution. *Roper*, *supra*, at 564.

The present case involves an issue the Court has not considered previously: a categorical challenge to a term-of-years sentence. The approach in cases such as *Harmelin* and *Ewing* is suited for considering a gross proportionality challenge to a particular defendant's sentence, but here a sentencing practice itself is in question. This case implicates a particular type of sentence as it applies to an entire class of offenders who have committed a range of crimes. As a result, a threshold comparison between the severity of the penalty and the gravity of the crime does not advance the analysis. Here, in addressing the question presented, the appropriate analysis is the one used in cases that involved

the categorical approach, specifically *Atkins*, *Roper*, and *Kennedy*.

III

A

The analysis begins with objective indicia of national consensus. "[T]he 'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.'" *Atkins*, *supra*, at 312 (quoting *Penry* v. *Lynaugh*, 492 U. S. 302, 331 (1989)). Six jurisdictions do not allow life without parole sentences for any juvenile offenders. See Appendix, *infra*, Part III. Seven jurisdictions permit life without parole for juvenile offenders, but only for homicide crimes. *Id.*, Part II. Thirty-seven States as well as the District of Columbia permit sentences of life without parole for a juvenile nonhomicide offender in some circumstances. *Id.*, Part I. Federal law also allows for the possibility of life without parole for offenders as young as 13. See, *e. g.*, 18 U. S. C. §§2241 (2006 ed. and Supp. II), 5032 (2006 ed.). Relying on this metric, the State and its *amici* argue that there is no national consensus against the sentencing practice at issue.

This argument is incomplete and unavailing. "There are measures of consensus other than legislation." *Kennedy*, *supra*, at 433. Actual sentencing practices are an important part of the Court's inquiry into consensus. See *Enmund*, *supra*, at 794–796; *Thompson*, *supra*, at 831–832 (plurality opinion); *Atkins*, *supra*, at 316; *Roper*, *supra*, at 564–565; *Kennedy*, *supra*, at 433–434. Here, an examination of actual sentencing practices in jurisdictions where the sentence in question is permitted by statute discloses a consensus against its use. Although these statutory schemes contain no explicit prohibition on sentences of life without parole for juvenile nonhomicide offenders, those sentences are most infrequent. According to a recent study, nationwide there are only 109 juvenile offenders serving sentences of life without

parole for nonhomicide offenses. See P. Annino, D. Rasmussen, & C. Rice, Juvenile Life without Parole for Non-Homicide Offenses: Florida Compared to Nation 2 (Sept. 14, 2009) (hereinafter Annino).

The State contends that this study's tally is inaccurate because it does not count juvenile offenders who were convicted of both a homicide and a nonhomicide offense, even when the offender received a life without parole sentence for the nonhomicide. See Brief for Respondent 34; Tr. of Oral Arg. in *Sullivan* v. *Florida*, O. T. 2009, No. 08–7621, pp. 28–31. This distinction is unpersuasive. Juvenile offenders who committed both homicide and nonhomicide crimes present a different situation for a sentencing judge than juvenile offenders who committed no homicide. It is difficult to say that a defendant who receives a life sentence on a nonhomicide offense but who was at the same time convicted of homicide is not in some sense being punished in part for the homicide when the judge makes the sentencing determination. The instant case concerns only those juvenile offenders sentenced to life without parole solely for a nonhomicide offense.

Florida further criticizes this study because the authors were unable to obtain complete information on some States and because the study was not peer reviewed. See Brief for Respondent 40. The State does not, however, provide any data of its own. Although in the first instance it is for the litigants to provide data to aid the Court, we have been able to supplement the study's findings. The study's authors were not able to obtain a definitive tally for Nevada, Utah, or Virginia. See Annino 11–13. Our research shows that Nevada has five juvenile nonhomicide offenders serving life without parole sentences, Utah has none, and Virginia has eight. See Letter from Alejandra Livingston, Offender Management Division, Nevada Dept. of Corrections, to Supreme Court Library (Mar. 26, 2010) (available in Clerk of Court's case file); Letter from Steve Gehrke, Utah Dept. of

Corrections, to Supreme Court Library (Mar. 29, 2010) (same); Letter from Dr. Tama S. Celi, Virginia Dept. of Corrections, to Supreme Court Library (Mar. 30, 2010) (same). Finally, since the study was completed, a defendant in Oklahoma has apparently been sentenced to life without parole for a rape and stabbing he committed at the age of 16. See Stogsdill, Delaware County Teen Sentenced in Rape, Assault Case, Tulsa World, May 5, 2010, p. A12.

Thus, adding the individuals counted by the study to those we have been able to locate independently, there are 123 juvenile nonhomicide offenders serving life without parole sentences. A significant majority of those, 77 in total, are serving sentences imposed in Florida. Annino 2. The other 46 are imprisoned in just 10 States—California, Delaware, Iowa, Louisiana, Mississippi, Nebraska, Nevada, Oklahoma, South Carolina, and Virginia. *Id.*, at 14; *supra*, at 63 and this page; Letter from Thomas P. Hoey, Dept. of Corrections, Government of the District of Columbia, to Supreme Court Library (Mar. 31, 2010) (available in Clerk of Court's case file); Letter from Judith Simon Garrett, U. S. Dept. of Justice, Federal Bureau of Prisons (BOP), to Supreme Court Library (Apr. 9, 2010) (same). Thus, only 11 jurisdictions nationwide in fact impose life without parole sentences on juvenile nonhomicide offenders—and most of those do so quite rarely—while 26 States, the District of Columbia, and the Federal Government do not impose them despite statutory authorization.*

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*When issued, the Court's opinion relied on a report from the BOP stating that there are six juvenile nonhomicide offenders serving life without parole in the federal system. The Acting Solicitor General subsequently informed the Court that further review revealed that none of the six prisoners referred to in the earlier BOP report is serving a life without parole sentence solely for a juvenile nonhomicide crime completed before the age of 18. Letter from Neal Kumar Katyal to William K. Suter, Clerk of Court (May 24, 2010) (available in Clerk of Court's case file). The letter further stated that the Government was not aware of any other federal prisoners serving life without parole sentences solely for juvenile nonhomicide crimes. *Ibid.* The opinion was amended in light of this new information.

The numbers cited above reflect all current convicts in a jurisdiction's penal system, regardless of when they were convicted. It becomes all the more clear how rare these sentences are, even within the jurisdictions that do sometimes impose them, when one considers that a juvenile sentenced to life without parole is likely to live in prison for decades. Thus, these statistics likely reflect nearly all juvenile nonhomicide offenders who have received a life without parole sentence stretching back many years. It is not certain that this opinion has identified every juvenile nonhomicide offender nationwide serving a life without parole sentence, for the statistics are not precise. The available data, nonetheless, are sufficient to demonstrate how rarely these sentences are imposed even if there are isolated cases that have not been included in the presentations of the parties or the analysis of the Court.

It must be acknowledged that in terms of absolute numbers juvenile life without parole sentences for nonhomicides are more common than the sentencing practices at issue in some of this Court's other Eighth Amendment cases. See, *e. g.*, *Enmund*, 458 U. S., at 794 (only six executions of nontriggerman felony murderers between 1954 and 1982), *Atkins*, 536 U. S., at 316 (only five executions of mentally retarded defendants in 13-year period). This contrast can be instructive, however, if attention is first given to the base number of certain types of offenses. For example, in the year 2007 (the most recent year for which statistics are available), a total of 13,480 persons, adult and juvenile, were arrested for homicide crimes. That same year, 57,600 juveniles were arrested for aggravated assault; 3,580 for forcible rape; 34,500 for robbery; 81,900 for burglary; 195,700 for drug offenses; and 7,200 for arson. See Dept. of Justice, Office of Juvenile Justice and Delinquency Prevention, Statistical Briefing Book, online at http://ojjdp.ncjrs.org/ojstatbb/ (as visited May 14, 2010, and available in Clerk of Court's case file). Although it is not certain how many of these numerous juvenile offenders were eligible for life without parole

sentences, the comparison suggests that in proportion to the opportunities for its imposition, life without parole sentences for juveniles convicted of nonhomicide crimes is as rare as other sentencing practices found to be cruel and unusual.

The evidence of consensus is not undermined by the fact that many jurisdictions do not prohibit life without parole for juvenile nonhomicide offenders. The Court confronted a similar situation in *Thompson*, where a plurality concluded that the death penalty for offenders younger than 16 was unconstitutional. A number of States then allowed the juvenile death penalty if one considered the statutory scheme. As is the case here, those States authorized the transfer of some juvenile offenders to adult court; and at that point there was no statutory differentiation between adults and juveniles with respect to authorized penalties. The plurality concluded that the transfer laws show "that the States consider 15-year-olds to be old enough to be tried in criminal court for serious crimes (or too old to be dealt with effectively in juvenile court), *but tells us nothing about the judgment these States have made regarding the appropriate punishment for such youthful offenders.*" 487 U. S., at 826, n. 24. Justice O'Connor, concurring in the judgment, took a similar view. *Id.*, at 850 ("When a legislature provides for some 15-year-olds to be processed through the adult criminal justice system, and capital punishment is available for adults in that jurisdiction, the death penalty becomes at least theoretically applicable to such defendants. . . . [H]owever, it does not necessarily follow that the legislatures in those jurisdictions have deliberately concluded that it would be appropriate").

The same reasoning obtains here. Many States have chosen to move away from juvenile court systems and to allow juveniles to be transferred to, or charged directly in, adult court under certain circumstances. Once in adult court, a juvenile offender may receive the same sentence as would be given to an adult offender, including a life without parole

sentence. But the fact that transfer and direct charging laws make life without parole possible for some juvenile nonhomicide offenders does not justify a judgment that many States intended to subject such offenders to life without parole sentences.

For example, under Florida law a child of any age can be prosecuted as an adult for certain crimes and can be sentenced to life without parole. The State acknowledged at oral argument that even a 5-year-old, theoretically, could receive such a sentence under the letter of the law. See Tr. of Oral Arg. 36–37. All would concede this to be unrealistic, but the example underscores that the statutory eligibility of a juvenile offender for life without parole does not indicate that the penalty has been endorsed through deliberate, express, and full legislative consideration. Similarly, the many States that allow life without parole for juvenile nonhomicide offenders but do not impose the punishment should not be treated as if they have expressed the view that the sentence is appropriate. The sentencing practice now under consideration is exceedingly rare. And "it is fair to say that a national consensus has developed against it." *Atkins*, *supra*, at 316.

B

Community consensus, while "entitled to great weight," is not itself determinative of whether a punishment is cruel and unusual. *Kennedy*, 554 U. S., at 434 (internal quotation marks omitted). In accordance with the constitutional design, "the task of interpreting the Eighth Amendment remains our responsibility." *Roper*, 543 U. S., at 575. The judicial exercise of independent judgment requires consideration of the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question. *Id.*, at 568; *Kennedy*, *supra*, at 438; cf. *Solem*, 463 U. S., at 292. In this inquiry the Court also considers whether the challenged sentencing practice serves legitimate penological goals. *Kennedy*, *supra*, at

441–446; *Roper*, *supra*, at 571–572; *Atkins*, 536 U. S., at 318–320.

Roper established that because juveniles have lessened culpability they are less deserving of the most severe punishments. 543 U. S., at 569. As compared to adults, juveniles have a "'lack of maturity and an underdeveloped sense of responsibility'"; they "are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure"; and their characters are "not as well formed." *Id.*, at 569–570. These salient characteristics mean that "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Id.*, at 573. Accordingly, "juvenile offenders cannot with reliability be classified among the worst offenders." *Id.*, at 569. A juvenile is not absolved of responsibility for his actions, but his transgression "is not as morally reprehensible as that of an adult." *Thompson*, *supra*, at 835 (plurality opinion).

No recent data provide reason to reconsider the Court's observations in *Roper* about the nature of juveniles. As petitioner's *amici* point out, developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence. See Brief for American Medical Association et al. 16–24; Brief for American Psychological Association et al. 22–27. Juveniles are more capable of change than are adults, and their actions are less likely to be evidence of "irretrievably depraved character" than are the actions of adults. *Roper*, 543 U. S., at 570. It remains true that "[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed." *Ibid.* These matters relate to the status of the offenders in question; and it is relevant to consider

next the nature of the offenses to which this harsh penalty might apply.

The Court has recognized that defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers. *Kennedy*, *supra; Enmund*, 458 U. S. 782; *Tison* v. *Arizona*, 481 U. S. 137 (1987); *Coker*, 433 U. S. 584. There is a line "between homicide and other serious violent offenses against the individual." *Kennedy*, 554 U. S., at 438. Serious nonhomicide crimes "may be devastating in their harm . . . but 'in terms of moral depravity and of the injury to the person and to the public,' . . . they cannot be compared to murder in their 'severity and irrevocability.'" *Ibid.* (quoting *Coker*, 433 U. S., at 598 (plurality opinion)). This is because "[l]ife is over for the victim of the murderer," but for the victim of even a very serious nonhomicide crime, "life . . . is not over and normally is not beyond repair." *Ibid.* (plurality opinion). Although an offense like robbery or rape is "a serious crime deserving serious punishment," *Enmund*, *supra*, at 797, those crimes differ from homicide crimes in a moral sense.

It follows that, when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability. The age of the offender and the nature of the crime each bear on the analysis.

As for the punishment, life without parole is "the second most severe penalty permitted by law." *Harmelin*, 501 U. S., at 1001 (KENNEDY, J., concurring in part and concurring in judgment). It is true that a death sentence is "unique in its severity and irrevocability," *Gregg* v. *Georgia*, 428 U. S. 153, 187 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.); yet life without parole sentences share some characteristics with death sentences that are shared by no other sentences. The State does not execute the offender sentenced to life without parole, but the sentence alters the offender's life by a forfeiture that is irrevocable. It deprives

the convict of the most basic liberties without giving hope of restoration, except perhaps by executive clemency—the remote possibility of which does not mitigate the harshness of the sentence. *Solem*, 463 U. S., at 300–301. As one court observed in overturning a life without parole sentence for a juvenile defendant, this sentence "means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days." *Naovarath* v. *State*, 105 Nev. 525, 526, 779 P. 2d 944 (1989).

The Court has recognized the severity of sentences that deny convicts the possibility of parole. In *Rummel*, 445 U. S. 263, the Court rejected an Eighth Amendment challenge to a life sentence for a defendant's third nonviolent felony but stressed that the sentence gave the defendant the possibility of parole. Noting that "parole is an established variation on imprisonment of convicted criminals," it was evident that an analysis of the petitioner's sentence "could hardly ignore the possibility that he will not actually be imprisoned for the rest of his life." *Id.*, at 280–281 (internal quotation marks omitted). And in *Solem*, the only previous case striking down a sentence for a term of years as grossly disproportionate, the defendant's sentence was deemed "far more severe than the life sentence we considered in *Rummel*," because it did not give the defendant the possibility of parole. 463 U. S., at 297.

Life without parole is an especially harsh punishment for a juvenile. Under this sentence a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender. A 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only. See *Roper*, *supra*, at 572; cf. *Harmelin*, *supra*, at 996 ("In some cases . . . there will be negligible difference between life without parole and other sentences of imprisonment—for example, . . . a lengthy term

sentence without eligibility for parole, given to a 65-year-old man"). This reality cannot be ignored.

The penological justifications for the sentencing practice are also relevant to the analysis. *Kennedy*, *supra*, at 420; *Roper*, 543 U. S., at 571–572; *Atkins*, 536 U. S., at 318–320. Criminal punishment can have different goals, and choosing among them is within a legislature's discretion. See *Harmelin*, *supra*, at 999 (opinion of KENNEDY, J.) ("[T]he Eighth Amendment does not mandate adoption of any one penological theory"). It does not follow, however, that the purposes and effects of penal sanctions are irrelevant to the determination of Eighth Amendment restrictions. A sentence lacking any legitimate penological justification is by its nature disproportionate to the offense. With respect to life without parole for juvenile nonhomicide offenders, none of the goals of penal sanctions that have been recognized as legitimate—retribution, deterrence, incapacitation, and rehabilitation, see *Ewing*, 538 U. S., at 25 (plurality opinion)—provides an adequate justification.

Retribution is a legitimate reason to punish, but it cannot support the sentence at issue here. Society is entitled to impose severe sanctions on a juvenile nonhomicide offender to express its condemnation of the crime and to seek restoration of the moral imbalance caused by the offense. But "[t]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender." *Tison*, *supra*, at 149. And as *Roper* observed, "[w]hether viewed as an attempt to express the community's moral outrage or as an attempt to right the balance for the wrong to the victim, the case for retribution is not as strong with a minor as with an adult." 543 U. S., at 571. The case becomes even weaker with respect to a juvenile who did not commit homicide. *Roper* found that "[r]etribution is not proportional if the law's most severe penalty is imposed" on the juvenile murderer. *Ibid.* The considerations underlying that holding support as well the con-

clusion that retribution does not justify imposing the second most severe penalty on the less culpable juvenile nonhomicide offender.

Deterrence does not suffice to justify the sentence either. *Roper* noted that "the same characteristics that render juveniles less culpable than adults suggest . . . that juveniles will be less susceptible to deterrence." *Ibid.* Because juveniles' "lack of maturity and an underdeveloped sense of responsibility . . . often result in impetuous and ill-considered actions and decisions," *Johnson* v. *Texas*, 509 U. S. 350, 367 (1993), they are less likely to take a possible punishment into consideration when making decisions. This is particularly so when that punishment is rarely imposed. That the sentence deters in a few cases is perhaps plausible, but "[t]his argument does not overcome other objections." *Kennedy*, 554 U. S., at 441. Even if the punishment has some connection to a valid penological goal, it must be shown that the punishment is not grossly disproportionate in light of the justification offered. Here, in light of juvenile nonhomicide offenders' diminished moral responsibility, any limited deterrent effect provided by life without parole is not enough to justify the sentence.

Incapacitation, a third legitimate reason for imprisonment, does not justify the life without parole sentence in question here. Recidivism is a serious risk to public safety, and so incapacitation is an important goal. See *Ewing*, *supra*, at 26 (plurality opinion) (statistics show 67 percent of former inmates released from state prisons are charged with at least one serious new crime within three years). But while incapacitation may be a legitimate penological goal sufficient to justify life without parole in other contexts, it is inadequate to justify that punishment for juveniles who did not commit homicide. To justify life without parole on the assumption that the juvenile offender forever will be a danger to society requires the sentencer to make a judgment that the juvenile is incorrigible. The characteristics of juveniles make that

judgment questionable. "It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Roper*, *supra*, at 573. As one court concluded in a challenge to a life without parole sentence for a 14-year-old, "incorrigibility is inconsistent with youth." *Workman* v. *Commonwealth*, 429 S. W. 2d 374, 378 (Ky. App. 1968).

Here one cannot dispute that this defendant posed an immediate risk, for he had committed, we can assume, serious crimes early in his term of supervised release and despite his own assurances of reform. Graham deserved to be separated from society for some time in order to prevent what the trial court described as an "escalating pattern of criminal conduct," App. 394, but it does not follow that he would be a risk to society for the rest of his life. Even if the State's judgment that Graham was incorrigible were later corroborated by prison misbehavior or failure to mature, the sentence was still disproportionate because that judgment was made at the outset. A life without parole sentence improperly denies the juvenile offender a chance to demonstrate growth and maturity. Incapacitation cannot override all other considerations, lest the Eighth Amendment's rule against disproportionate sentences be a nullity.

Finally there is rehabilitation, a penological goal that forms the basis of parole systems. See *Solem*, 463 U. S., at 300; *Mistretta* v. *United States*, 488 U. S. 361, 363 (1989). The concept of rehabilitation is imprecise; and its utility and proper implementation are the subject of a substantial, dynamic field of inquiry and dialogue. See, *e. g.*, Cullen & Gendreau, Assessing Correctional Rehabilitation: Policy, Practice, and Prospects, 3 Criminal Justice 2000, pp. 119–133 (2000) (describing scholarly debates regarding the effectiveness of rehabilitation over the last several decades). It is

for legislatures to determine what rehabilitative techniques are appropriate and effective.

A sentence of life imprisonment without parole, however, cannot be justified by the goal of rehabilitation. The penalty forswears altogether the rehabilitative ideal. By denying the defendant the right to reenter the community, the State makes an irrevocable judgment about that person's value and place in society. This judgment is not appropriate in light of a juvenile nonhomicide offender's capacity for change and limited moral culpability. A State's rejection of rehabilitation, moreover, goes beyond a mere expressive judgment. As one *amicus* notes, defendants serving life without parole sentences are often denied access to vocational training and other rehabilitative services that are available to other inmates. See Brief for Sentencing Project 11–13. For juvenile offenders, who are most in need of and receptive to rehabilitation, see Brief for J. Lawrence Aber et al. as *Amici Curiae* 28–31 (hereinafter Aber Brief), the absence of rehabilitative opportunities or treatment makes the disproportionality of the sentence all the more evident.

In sum, penological theory is not adequate to justify life without parole for juvenile nonhomicide offenders. This determination; the limited culpability of juvenile nonhomicide offenders; and the severity of life without parole sentences all lead to the conclusion that the sentencing practice under consideration is cruel and unusual. This Court now holds that for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole. This clear line is necessary to prevent the possibility that life without parole sentences will be imposed on juvenile nonhomicide offenders who are not sufficiently culpable to merit that punishment. Because "[t]he age of 18 is the point where society draws the line for many purposes between childhood and adulthood," those who were below that age when the offense was committed may not be sentenced to

life without parole for a nonhomicide crime. *Roper*, 543 U. S., at 574.

A State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime. What the State must do, however, is give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. It is for the State, in the first instance, to explore the means and mechanisms for compliance. It bears emphasis, however, that while the Eighth Amendment prohibits a State from imposing a life without parole sentence on a juvenile nonhomicide offender, it does not require the State to release that offender during his natural life. Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives. The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life. It does prohibit States from making the judgment at the outset that those offenders never will be fit to reenter society.

C

Categorical rules tend to be imperfect, but one is necessary here. Two alternative approaches are not adequate to address the relevant constitutional concerns. First, the State argues that the laws of Florida and other States governing criminal procedure take sufficient account of the age of a juvenile offender. Here, Florida notes that under its law prosecutors are required to charge 16- and 17-year-old offenders as adults only for certain serious felonies; that prosecutors have discretion to charge those offenders as adults for other felonies; and that prosecutors may not charge nonrecidivist 16- and 17-year-old offenders as adults for misdemeanors. Brief for Respondent 54 (citing Fla. Stat. § 985.227 (2003)). The State also stresses that "in only the narrowest of circumstances" does Florida law impose no

age limit whatsoever for prosecuting juveniles in adult court. Brief for Respondent 54.

Florida is correct to say that state laws requiring consideration of a defendant's age in charging decisions are salutary. An offender's age is relevant to the Eighth Amendment, and criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed. Florida, like other States, has made substantial efforts to enact comprehensive rules governing the treatment of youthful offenders by its criminal justice system. See generally Fla. Stat. § 958 *et seq.* (2007).

The provisions the State notes are, nonetheless, by themselves insufficient to address the constitutional concerns at issue. Nothing in Florida's laws prevents its courts from sentencing a juvenile nonhomicide offender to life without parole based on a subjective judgment that the defendant's crimes demonstrate an "irretrievably depraved character." *Roper*, *supra*, at 570. This is inconsistent with the Eighth Amendment. Specific cases are illustrative. In Graham's case the sentencing judge decided to impose life without parole—a sentence greater than that requested by the prosecutor—for Graham's armed burglary conviction. The judge did so because he concluded that Graham was incorrigible: "[Y]ou decided that this is how you were going to lead your life and that there is nothing that we can do for you. . . . We can't do anything to deter you." App. 394.

Another example comes from *Sullivan* v. *Florida*, No. 08–7621. *Sullivan* was argued the same day as this case, but the Court has now dismissed the writ of certiorari in *Sullivan* as improvidently granted. *Post*, p. 181. The facts, however, demonstrate the flaws of Florida's system. The petitioner, Joe Sullivan, was prosecuted as an adult for a sexual assault committed when he was 13 years old. Noting Sullivan's past encounters with the law, the sentencing judge concluded that, although Sullivan had been "given opportunity after opportunity to upright himself and take advantage

of the second and third chances he's been given," he had demonstrated himself to be unwilling to follow the law and needed to be kept away from society for the duration of his life. Brief for Respondent in *Sullivan* v. *Florida*, O. T. 2009, No. 08–7621, p. 6. The judge sentenced Sullivan to life without parole. As these examples make clear, existing state laws, allowing the imposition of these sentences based only on a discretionary, subjective judgment by a judge or jury that the offender is irredeemably depraved, are insufficient to prevent the possibility that the offender will receive a life without parole sentence for which he or she lacks the moral culpability.

Another possible approach would be to hold that the Eighth Amendment requires courts to take the offender's age into consideration as part of a case-specific gross disproportionality inquiry, weighing it against the seriousness of the crime. This approach would allow courts to account for factual differences between cases and to impose life without parole sentences for particularly heinous crimes. Few, perhaps no, judicial responsibilities are more difficult than sentencing. The task is usually undertaken by trial judges who seek with diligence and professionalism to take account of the human existence of the offender and the just demands of a wronged society.

The case-by-case approach to sentencing must, however, be confined by some boundaries. The dilemma of juvenile sentencing demonstrates this. For even if we were to assume that some juvenile nonhomicide offenders might have "sufficient psychological maturity, and at the same time demonstrat[e] sufficient depravity," *Roper*, 543 U. S., at 572, to merit a life without parole sentence, it does not follow that courts taking a case-by-case proportionality approach could with sufficient accuracy distinguish the few incorrigible juvenile offenders from the many that have the capacity for change. *Roper* rejected the argument that the Eighth Amendment required only that juries be told they must con-

sider the defendant's age as a mitigating factor in sentencing. The Court concluded that an "unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death." *Id.*, at 573. Here, as with the death penalty, "[t]he differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive" a sentence of life without parole for a nonhomicide crime "despite insufficient culpability." *Id.*, at 572–573.

Another problem with a case-by-case approach is that it does not take account of special difficulties encountered by counsel in juvenile representation. As some *amici* note, the features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings. Juveniles mistrust adults and have limited understandings of the criminal justice system and the roles of the institutional actors within it. They are less likely than adults to work effectively with their lawyers to aid in their defense. Brief for NAACP Legal Defense & Educational Fund et al. as *Amici Curiae* 7–12; Henning, Loyalty, Paternalism, and Rights: Client Counseling Theory and the Role of Child's Counsel in Delinquency Cases, 81 Notre Dame L. Rev. 245, 272–273 (2005). Difficulty in weighing long-term consequences; a corresponding impulsiveness; and reluctance to trust defense counsel, seen as part of the adult world a rebellious youth rejects, all can lead to poor decisions by one charged with a juvenile offense. Aber Brief 35. These factors are likely to impair the quality of a juvenile defendant's representation. Cf. *Atkins*, 536 U. S., at 320 ("Mentally retarded defendants may be less able to give meaningful assistance to their counsel"). A categorical rule avoids the risk that, as a result of these difficulties, a court or jury will

erroneously conclude that a particular juvenile is sufficiently culpable to deserve life without parole for a nonhomicide.

Finally, a categorical rule gives all juvenile nonhomicide offenders a chance to demonstrate maturity and reform. The juvenile should not be deprived of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential. In *Roper*, that deprivation resulted from an execution that brought life to its end. Here, though by a different dynamic, the same concerns apply. Life in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope. Maturity can lead to that considered reflection which is the foundation for remorse, renewal, and rehabilitation. A young person who knows that he or she has no chance to leave prison before life's end has little incentive to become a responsible individual. In some prisons, moreover, the system itself becomes complicit in the lack of development. As noted above, see *supra*, at 74, it is the policy in some prisons to withhold counseling, education, and rehabilitation programs for those who are ineligible for parole consideration. A categorical rule against life without parole for juvenile nonhomicide offenders avoids the perverse consequence in which the lack of maturity that led to an offender's crime is reinforced by the prison term.

Terrance Graham's sentence guarantees he will die in prison without any meaningful opportunity to obtain release, no matter what he might do to demonstrate that the bad acts he committed as a teenager are not representative of his true character, even if he spends the next half century attempting to atone for his crimes and learn from his mistakes. The State has denied him any chance to later demonstrate that he is fit to rejoin society based solely on a nonhomicide crime that he committed while he was a child in the eyes of the law. This the Eighth Amendment does not permit.

D

There is support for our conclusion in the fact that, in continuing to impose life without parole sentences on juveniles who did not commit homicide, the United States adheres to a sentencing practice rejected the world over. This observation does not control our decision. The judgments of other nations and the international community are not dispositive as to the meaning of the Eighth Amendment. But "'[t]he climate of international opinion concerning the acceptability of a particular punishment'" is also "'not irrelevant.'" *Enmund*, 458 U. S., at 796, n. 22. The Court has looked beyond our Nation's borders for support for its independent conclusion that a particular punishment is cruel and unusual. See, *e. g.*, *Roper*, 543 U. S., at 575–578; *Atkins*, *supra*, at 316–318, n. 21; *Thompson*, 487 U. S., at 830 (plurality opinion); *Enmund*, *supra*, at 796–797, n. 22; *Coker*, 433 U. S., at 596, n. 10 (same); *Trop*, 356 U. S., at 102–103 (same).

Today we continue that longstanding practice in noting the global consensus against the sentencing practice in question. A recent study concluded that only 11 nations authorize life without parole for juvenile offenders under any circumstances; and only 2 of them, the United States and Israel, ever impose the punishment in practice. See M. Leighton & C. de la Vega, Sentencing Our Children To Die in Prison: Global Law and Practice 4 (2007). An updated version of the study concluded that Israel's "laws allow for parole review of juvenile offenders serving life terms," but expressed reservations about how that parole review is implemented. De la Vega & Leighton, Sentencing Our Children To Die in Prison: Global Law and Practice, 42 U. S. F. L. Rev. 983, 1002–1003 (2008). But even if Israel is counted as allowing life without parole for juvenile offenders, that nation does not appear to impose that sentence for nonhomicide crimes; all of the seven Israeli prisoners whom commentators have identified as serving life sentences for juvenile crimes were

convicted of homicide or attempted homicide. See Amnesty International, Human Rights Watch, The Rest of Their Lives: Life Without Parole for Child Offenders in the United States 106, n. 322 (2005); Memorandum and Attachment from Ruth Levush, Law Library of Congress, to Supreme Court Library (Feb. 16, 2010) (available in Clerk of Court's case file).

Thus, as petitioner contends and respondent does not contest, the United States is the only Nation that imposes life without parole sentences on juvenile nonhomicide offenders. We also note, as petitioner and his *amici* emphasize, that Article 37(a) of the United Nations Convention on the Rights of the Child, Nov. 20, 1989, 1577 U. N. T. S. 3 (entered into force Sept. 2, 1990), ratified by every nation except the United States and Somalia, prohibits the imposition of "life imprisonment without possibility of release . . . for offences committed by persons below eighteen years of age." Brief for Petitioner 66; Brief for Amnesty International et al. 15–17. As we concluded in *Roper* with respect to the juvenile death penalty, "the United States now stands alone in a world that has turned its face against" life without parole for juvenile nonhomicide offenders. 543 U. S., at 577.

The State's *amici* stress that no international legal agreement that is binding on the United States prohibits life without parole for juvenile offenders and thus urge us to ignore the international consensus. See Brief for Solidarity Center for Law and Justice et al. 14–16; Brief for Sixteen Members of United States House of Representatives 40–43. These arguments miss the mark. The question before us is not whether international law prohibits the United States from imposing the sentence at issue in this case. The question is whether that punishment is cruel and unusual. In that inquiry, "the overwhelming weight of international opinion against" life without parole for nonhomicide offenses committed by juveniles "provide[s] respected and significant confirmation for our own conclusions." *Roper*, *supra*, at 578.

The debate between petitioner's and respondent's *amici* over whether there is a binding *jus cogens* norm against this sentencing practice is likewise of no import. See Brief for Amnesty International 10–23; Brief for Sixteen Members of United States House of Representatives 4–40. The Court has treated the laws and practices of other nations and international agreements as relevant to the Eighth Amendment not because those norms are binding or controlling but because the judgment of the world's nations that a particular sentencing practice is inconsistent with basic principles of decency demonstrates that the Court's rationale has respected reasoning to support it.

* * *

The Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide. A State need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term. The judgment of the First District Court of Appeal of Florida is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

APPENDIX

I. JURISDICTIONS THAT PERMIT LIFE WITHOUT PAROLE FOR JUVENILE NONHOMICIDE OFFENDERS

Alabama	Ala. Code § 12–15–203 (Supp. 2009); §§ 13A–3–3, 13A–5–9(c), 13A–6–61 (2005); § 13A–7–5 (Supp. 2009)
Arizona	Ariz. Rev. Stat. Ann. §§ 13–501, 13–1423 (West 2010)
Arkansas	Ark. Code § 9–27–318(b) (2009); § 5–4–501(c) (Supp. 2009)
California	Cal. Penal Code Ann. § 667.7(a)(2) (West 1999); § 1170.17 (West 2004)
Delaware	Del. Code Ann., Tit. 10, § 1010 (Supp. 2008); *id.*, Tit. 11, § 773(c) (2003)

District of Columbia	D. C. Code § 16–2307 (2009 Supp. Pamphlet); § 22–3020 (Supp. 2007)
Florida	Fla. Stat. §§ 810.02, 921.002(1)(e), 985.557 (2007)
Georgia	Georgia Code Ann. § 15–11–30.2 (2008); § 16–6–1(b) (2007)
Idaho	Idaho Code § 18–6503 (Lexis 2005); §§ 19–2513, 20–509 (Lexis Supp. 2009)
Illinois	Ill. Comp. Stat., ch. 705, §§ 405/5–805, 405/5–130 (West 2008); *id.*, ch. 720, § 5/12–13(b)(3) (West 2008); *id.*, ch. 730, § 5/3–3–3(d) (West 2008)
Indiana	Ind. Code §§ 31–30–3–6(1), 35–50–2–8.5(a) (West 2004)
Iowa	Iowa Code §§ 232.45(6), 709.2, 902.1 (2009)
Louisiana	La. Child. Code Ann., Arts. 305, 857(A), (B) (West Supp. 2010); La. Rev. Stat. Ann. § 14:44 (West 2007)
Maryland	Md. Cts. & Jud. Proc. Code Ann. §§ 3–8A–03(d)(1), 3–8A–06(a)(2) (Lexis 2006); Md. Crim. Law Code Ann. §§ 3–303(d)(2), (3) (Lexis Supp. 2009)
Michigan	Mich. Comp. Laws Ann. § 712A.4 (West 2002); § 750.520b(2)(c) (West Supp. 2009); § 769.1 (West 2000)
Minnesota	Minn. Stat. §§ 260B.125(1), 609.3455(2) (2008)
Mississippi	Miss. Code Ann. § 43–21–157 (2009); §§ 97–3–53, 99–19–81 (2007); § 99–19–83 (2006)
Missouri	Mo. Rev. Stat. §§ 211.071, 558.018 (2000)
Nebraska	Neb. Rev. Stat. §§ 28–105, 28–416(8)(a), 29–2204(1), (3), 43–247, 43–276 (2008)
Nevada	Nev. Rev. Stat. §§ 62B.330, 200.366 (2009)
New Hampshire	N. H. Rev. Stat. Ann. §§ 169–B:24, 628:1 (2007); §§ 632–A:2, 651:6 (Supp. 2009)
New York	N. Y. Penal Law Ann. §§ 30.00, 60.06 (West 2009); § 490.55 (West 2008)
North Carolina	N. C. Gen. Stat. Ann. §§ 7B–2200, 15A–1340.16B(a) (Lexis 2009)
North Dakota	N. D. Cent. Code Ann. § 12.1–04–01 (Lexis 1997); § 12.1–20–03 (Lexis Supp. 2009); § 12.1–32–01 (Lexis 1997)
Ohio	Ohio Rev. Code Ann. § 2152.10 (Lexis 2007); § 2907.02 (Lexis 2006); § 2971.03(A)(2) (2010 Lexis Supp. Pamphlet)
Oklahoma	Okla. Stat., Tit. 10A, §§ 2–5–204, 2–5–205, 2–5–206 (2009 West Supp.); *id.*, Tit. 21, § 1115 (2007 West Supp.)
Oregon	Ore. Rev. Stat. §§ 137.707, 137.719(1) (2009)
Pennsylvania	42 Pa. Cons. Stat. § 6355(a) (2000); 18 *id.*, § 3121(e)(2) (2008); 61 *id.*, § 6137(a) (2009)

Rhode Island	R. I. Gen. Laws §§ 14–1–7, 14–1–7.1, 11–47–3.2 (Lexis 2002)
South Carolina	S. C. Code Ann. § 63–19–1210 (2008 Supp. Pamphlet); § 16–11–311(B) (Westlaw 2009)
South Dakota	S. D. Codified Laws § 26–11–3.1 (Supp. 2009); § 26–11–4 (2004); §§ 22–3–1, 22–6–1(2), (3) (2006); § 24–15–4 (2004); §§ 22–19–1, 22–22–1 (2006)
Tennessee	Tenn. Code Ann. §§ 37–1–134, 40–35–120(g) (Westlaw 2010)
Utah	Utah Code Ann. §§ 78A–6–602, 78A–6–703, 76–5–302 (Lexis 2008)
Virginia	Va. Code Ann. §§ 16.1–269.1, 18.2–61, 53.1–151(B1) (2009)
Washington	Wash. Rev. Code § 13.40.110 (2009 Supp.); §§ 9A.04.050, 9.94A.030(34), 9.94A.570 (2008)
West Virginia	W. Va. Code Ann. § 49–5–10 (Lexis 2009); § 61–2–14a(a) (Lexis 2005)
Wisconsin	Wis. Stat. §§ 938.18, 938.183 (2007–2008); § 939.62(2m)(c) (Westlaw 2005)
Wyoming	Wyo. Stat. Ann. §§ 6–2–306(d), (e), 14–6–203 (2009)
Federal	18 U. S. C. § 2241 (2006 ed. and Supp. II); § 5032 (2006 ed.)

II. JURISDICTIONS THAT PERMIT LIFE WITHOUT PAROLE FOR JUVENILE OFFENDERS CONVICTED OF HOMICIDE CRIMES ONLY

Connecticut	Conn. Gen. Stat. § 53a–35a (2009)
Hawaii	Haw. Rev. Stat. § 571–22(d) (2006); § 706–656(1) (2008 Supp. Pamphlet)
Maine	Me. Rev. Stat. Ann., Tit. 15, § 3101(4) (Supp. 2009); *id.*, Tit. 17–a, § 1251 (2006)
Massachusetts	Mass Gen. Laws ch. 119, § 74, *id.*, ch. 265, § 2 (West 2008)
New Jersey	N. J. Stat. Ann. § 2A:4A–26 (West Supp. 2009); § 2C:11–3(b)(2) (West Supp. 2009)
New Mexico	N. M. Stat. Ann. § 31–18–14 (Supp. 2009); § 31–18–15.2(A) (Westlaw 2010)
Vermont	Vt. Stat. Ann., Tit. 33, § 5204 (2009 Cum. Supp.); *id.*, Tit. 13, § 2303 (2009)

III. JURISDICTIONS THAT FORBID LIFE WITHOUT PAROLE FOR JUVENILE OFFENDERS

Alaska	Alaska Stat. § 12.55.015(g) (2008)
Colorado	Colo. Rev. Stat. Ann. § 18–1.3–401(4)(b) (2009)
Kansas	Kan. Stat. Ann. § 21–4622 (West 2007)
Kentucky	Ky. Rev. Stat. Ann. § 640.040 (West 2008); *Shepherd* v. *Commonwealth*, 251 S. W. 3d 309, 320–321 (Ky. 2008)
Montana	Mont. Code Ann. § 46–18–222(1) (2009)
Texas	Tex. Penal Code Ann. § 12.31 (West Supp. 2009)

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

In his dissenting opinion, JUSTICE THOMAS argues that today's holding is not entirely consistent with the controlling opinions in *Lockyer* v. *Andrade*, 538 U. S. 63 (2003), *Ewing* v. *California*, 538 U. S. 11 (2003), *Harmelin* v. *Michigan*, 501 U. S. 957 (1991), and *Rummel* v. *Estelle*, 445 U. S. 263 (1980). *Post*, at 102–105. Given that "evolving standards of decency" have played a central role in our Eighth Amendment jurisprudence for at least a century, see *Weems* v. *United States*, 217 U. S. 349, 373–378 (1910), this argument suggests the dissenting opinions in those cases more accurately describe the law today than does JUSTICE THOMAS' rigid interpretation of the Amendment. Society changes. Knowledge accumulates. We learn, sometimes, from our mistakes. Punishments that did not seem cruel and unusual at one time may, in the light of reason and experience, be found cruel and unusual at a later time; unless we are to abandon the moral commitment embodied in the Eighth Amendment, proportionality review must never become effectively obsolete, *post*, at 103–104, and n. 2.

While JUSTICE THOMAS would apparently not rule out a death sentence for a $50 theft by a 7-year-old, see *post*, at 100, 106, n. 3, the Court wisely rejects his static approach to the law. Standards of decency have evolved since 1980. They will never stop doing so.

CHIEF JUSTICE ROBERTS, concurring in the judgment.

I agree with the Court that Terrance Graham's sentence of life without parole violates the Eighth Amendment's prohibition on "cruel and unusual punishments." Unlike the majority, however, I see no need to invent a new constitutional rule of dubious provenance in reaching that conclusion. Instead, my analysis is based on an application of this Court's precedents, in particular (1) our cases requiring "narrow proportionality" review of noncapital sentences and (2) our conclusion in *Roper* v. *Simmons*, 543 U. S. 551 (2005), that juvenile offenders are generally less culpable than adults who commit the same crimes.

These cases expressly allow courts addressing allegations that a noncapital sentence violates the Eighth Amendment to consider the particular defendant and particular crime at issue. The standards for relief under these precedents are rigorous, and should be. But here Graham's juvenile status—together with the nature of his criminal conduct and the extraordinarily severe punishment imposed—lead me to conclude that his sentence of life without parole is unconstitutional.

I

Our Court has struggled with whether and how to apply the Cruel and Unusual Punishments Clause to sentences for noncapital crimes. Some of my colleagues have raised serious and thoughtful questions about whether, as an original matter, the Constitution was understood to require any degree of proportionality between noncapital offenses and their corresponding punishments. See, *e. g.*, *Harmelin* v. *Michigan*, 501 U. S. 957, 962–994 (1991) (principal opinion of SCALIA, J.); *post*, at 99–100, and n. 1 (THOMAS, J., dissenting). Neither party here asks us to reexamine our precedents requiring such proportionality, however, and so I approach this case by trying to apply our past decisions to the facts at hand.

A

Graham's case arises at the intersection of two lines of Eighth Amendment precedent. The first consists of decisions holding that the Cruel and Unusual Punishments Clause embraces a "narrow proportionality principle" that we apply, on a case-by-case basis, when asked to review noncapital sentences. *Lockyer* v. *Andrade*, 538 U. S. 63, 72 (2003) (internal quotation marks omitted); *Solem* v. *Helm*, 463 U. S. 277, 290 (1983); *Ewing* v. *California*, 538 U. S. 11, 20 (2003) (plurality opinion); *Harmelin*, *supra*, at 996–997 (KENNEDY, J., concurring in part and concurring in judgment). This "narrow proportionality principle" does not grant judges blanket authority to second-guess decisions made by legislatures or sentencing courts. On the contrary, a reviewing court will only "rarely" need "to engage in extended analysis to determine that a sentence is *not* constitutionally disproportionate," *Solem*, *supra*, at 290, n. 16 (emphasis added), and "successful challenges" to noncapital sentences will be all the more "exceedingly rare," *Rummel* v. *Estelle*, 445 U. S. 263, 272 (1980).

We have "not established a clear or consistent path for courts to follow" in applying the highly deferential "narrow proportionality" analysis. *Lockyer*, *supra*, at 72. We have, however, emphasized the primacy of the legislature in setting sentences, the variety of legitimate penological schemes, the state-by-state diversity protected by our federal system, and the requirement that review be guided by objective, rather than subjective, factors. *Ewing*, *supra*, at 23 (plurality opinion); *Harmelin*, *supra*, at 998–1001 (opinion of KENNEDY, J.). Most importantly, however, we have explained that the Eighth Amendment "'does not require strict proportionality between crime and sentence'"; rather, "'it forbids only extreme sentences that are "grossly disproportionate" to the crime.'" *Ewing*, *supra*, at 23 (plurality opinion) (quoting *Harmelin*, *supra*, at 1001 (opinion of KENNEDY, J.)).

Our cases indicate that courts conducting "narrow proportionality" review should begin with a threshold inquiry that compares "the gravity of the offense and the harshness of the penalty." *Solem*, 463 U. S., at 290–291. This analysis can consider a particular offender's mental state and motive in committing the crime, the actual harm caused to his victim or to society by his conduct, and any prior criminal history. *Id.*, at 292–294, 296–297, and n. 22 (considering motive, past criminal conduct, alcoholism, and propensity for violence of the particular defendant); see also *Ewing*, *supra*, at 28–30 (plurality opinion) (examining defendant's criminal history); *Harmelin*, 501 U. S., at 1001–1004 (opinion of KENNEDY, J.) (noting specific details of the particular crime of conviction).

Only in "the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality," *id.*, at 1005, should courts proceed to an "intrajurisdictional" comparison of the sentence at issue with those imposed on other criminals in the same jurisdiction, and an "interjurisdictional" comparison with sentences imposed for the same crime in other jurisdictions, *Solem*, *supra*, at 291–292. If these subsequent comparisons confirm the inference of gross disproportionality, courts should invalidate the sentence as a violation of the Eighth Amendment.

B

The second line of precedent relevant to assessing Graham's sentence consists of our cases acknowledging that juvenile offenders are *generally*—though not necessarily in every case—less morally culpable than adults who commit the same crimes. This insight animated our decision in *Thompson* v. *Oklahoma*, 487 U. S. 815 (1988), in which we invalidated a capital sentence imposed on a juvenile who had committed his crime under the age of 16. More recently, in *Roper*, 543 U. S. 551, we extended the prohibition on executions to those who committed their crimes before the age of 18.

Both *Thompson* and *Roper* arose in the unique context of the death penalty, a punishment that our Court has recognized "must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" 543 U. S., at 568 (quoting *Atkins* v. *Virginia,* 536 U. S. 304, 319 (2002)). *Roper*'s prohibition on the juvenile death penalty followed from our conclusion that "[t]hree general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders." 543 U. S., at 569. These differences are a lack of maturity and an underdeveloped sense of responsibility, a heightened susceptibility to negative influences and outside pressures, and the fact that the character of a juvenile is "more transitory" and "less fixed" than that of an adult. *Id.*, at 569–570. Together, these factors establish the "diminished culpability of juveniles," *id.*, at 571, and "render suspect any conclusion" that juveniles are among "the worst offenders" for whom the death penalty is reserved, *id.*, at 570.

Today, the Court views *Roper* as providing the basis for a new categorical rule that juveniles may never receive a sentence of life without parole for nonhomicide crimes. I disagree. In *Roper,* the Court tailored its analysis of juvenile characteristics to the specific question whether juvenile offenders could constitutionally be subject to capital punishment. Our answer that they could not be sentenced to death was based on the explicit conclusion that they "cannot with reliability be classified among the *worst* offenders." *Id.*, at 569 (emphasis added).

This conclusion does not establish that juveniles can never be eligible for life without parole. A life sentence is of course far less severe than a death sentence, and we have never required that it be imposed only on the very worst offenders, as we have with capital punishment. Treating juvenile life sentences as analogous to capital punishment is at

odds with our longstanding view that "the death penalty is different from other punishments in kind rather than degree." *Solem*, *supra*, at 294. It is also at odds with *Roper* itself, which drew the line at capital punishment by blessing juvenile sentences that are "less severe than death" despite involving "forfeiture of some of the most basic liberties." 543 U. S., at 573–574. Indeed, *Roper* explicitly relied on the possible imposition of life without parole on some juvenile offenders. *Id.*, at 572.

But the fact that *Roper* does not support a categorical rule barring life sentences for all juveniles does not mean that a criminal defendant's age is irrelevant to those sentences. On the contrary, our cases establish that the "narrow proportionality" review applicable to noncapital cases itself takes the personal "culpability of the offender" into account in examining whether a given punishment is proportionate to the crime. *Solem*, *supra*, at 292. There is no reason why an offender's juvenile status should be excluded from the analysis. Indeed, given *Roper*'s conclusion that juveniles are typically less blameworthy than adults, 543 U. S., at 571, an offender's juvenile status can play a central role in the inquiry.

JUSTICE THOMAS disagrees with even our limited reliance on *Roper* on the ground that the present case does not involve capital punishment. *Post*, at 121 (dissenting opinion). That distinction is important—indeed, it underlies our rejection of the categorical rule declared by the Court. But *Roper*'s conclusion that juveniles are typically less culpable than adults has pertinence beyond capital cases, and rightly informs the case-specific inquiry I believe to be appropriate here.

In short, our existing precedent already provides a sufficient framework for assessing the concerns outlined by the majority. Not every juvenile receiving a life sentence will prevail under this approach. Not every juvenile should. But all will receive the protection that the Eighth Amendment requires.

II

Applying the "narrow proportionality" framework to the particular facts of this case, I conclude that Graham's sentence of life without parole violates the Eighth Amendment.*

A

I begin with the threshold inquiry comparing the gravity of Graham's conduct to the harshness of his penalty. There is no question that the crime for which Graham received his life sentence—armed burglary of a nondomicile with an assault or battery—is "a serious crime deserving serious punishment." *Enmund* v. *Florida*, 458 U. S. 782, 797 (1982). So too is the home invasion robbery that was the basis of Graham's probation violation. But these crimes are certainly less serious than other crimes, such as murder or rape.

As for Graham's degree of personal culpability, he committed the relevant offenses when he was a juvenile—a stage at which, *Roper* emphasized, one's "culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity." 543 U. S., at 571. Graham's age places him in a significantly different category from the defendants in *Rummel*, *Harmelin*, and *Ewing*, all of whom committed their crimes as adults. Graham's youth made

*JUSTICE ALITO suggests that Graham has failed to preserve any challenge to his sentence based on the "narrow, as-applied proportionality principle." *Post*, at 124 (dissenting opinion). I disagree. It is true that Graham asks us to declare, categorically, that no juvenile convicted of a nonhomicide offense may ever be subject to a sentence of life without parole. But he claims that this rule is warranted under the narrow proportionality principle we set forth in *Solem* v. *Helm*, 463 U. S. 277 (1983), *Harmelin* v. *Michigan*, 501 U. S. 957 (1991), and *Ewing* v. *California*, 538 U. S. 11 (2003). Brief for Petitioner 30, 31, 54–64. Insofar as he relies on that framework, I believe we may do so as well, even if our analysis results in a narrower holding than the categorical rule Graham seeks. See also Reply Brief for Petitioner 15, n. 8 ("[T]he Court could rule narrowly in this case and hold only that petitioner's sentence of life without parole was unconstitutionally disproportionate").

him relatively more likely to engage in reckless and dangerous criminal activity than an adult; it also likely enhanced his susceptibility to peer pressure. See, *e. g.*, *Roper*, *supra*, at 569; *Johnson* v. *Texas*, 509 U. S. 350, 367 (1993); *Eddings* v. *Oklahoma*, 455 U. S. 104, 115–117 (1982). There is no reason to believe that Graham should be denied the general presumption of diminished culpability that *Roper* indicates should apply to juvenile offenders. If anything, Graham's in-court statements—including his request for a second chance so that he could "do whatever it takes to get to the NFL"—underscore his immaturity. App. 380.

The fact that Graham committed the crimes that he did proves that he was dangerous and deserved to be punished. But it does not establish that he was *particularly* dangerous—at least relative to the murderers and rapists for whom the sentence of life without parole is typically reserved. On the contrary, his lack of prior criminal convictions, his youth and immaturity, and the difficult circumstances of his upbringing noted by the majority, *ante*, at 53, all suggest that he was markedly less culpable than a typical adult who commits the same offenses.

Despite these considerations, the trial court sentenced Graham to life in prison without the possibility of parole. This is the second-harshest sentence available under our precedents for *any* crime, and the most severe sanction available for a nonhomicide offense. See *Kennedy* v. *Louisiana*, 554 U. S. 407 (2008). Indeed, as the majority notes, Graham's sentence far exceeded the punishment proposed by the Florida Department of Corrections (which suggested a sentence of four years, Brief for Petitioner 20), and the state prosecutors (who asked that he be sentenced to 30 years in prison for the armed burglary, App. 388). No one in Graham's case other than the sentencing judge appears to have believed that Graham deserved to go to prison for life.

Based on the foregoing circumstances, I conclude that there is a strong inference that Graham's sentence of life

imprisonment without parole was grossly disproportionate in violation of the Eighth Amendment. I therefore proceed to the next steps of the proportionality analysis.

B

Both intrajurisdictional and interjurisdictional comparisons of Graham's sentence confirm the threshold inference of disproportionality.

Graham's sentence was far more severe than that imposed for similar violations of Florida law, even without taking juvenile status into account. For example, individuals who commit burglary or robbery offenses in Florida receive average sentences of less than 5 years and less than 10 years, respectively. Florida Dept. of Corrections, Annual Report FY 2007–2008: The Guidebook to Corrections in Florida 35. Unsurprisingly, Florida's juvenile criminals receive similarly low sentences—typically less than five years for burglary and less than seven years for robbery. *Id.*, at 36. Graham's life without parole sentence was far more severe than the average sentence imposed on those convicted of murder or manslaughter, who typically receive under 25 years in prison. *Id.*, at 35. As the Court explained in *Solem*, 463 U. S., at 291, "[i]f more serious crimes are subject to the same penalty, or to less serious penalties, that is some indication that the punishment at issue may be excessive."

Finally, the inference that Graham's sentence is disproportionate is further validated by comparison to the sentences imposed in other domestic jurisdictions. As the majority opinion explains, Florida is an outlier in its willingness to impose sentences of life without parole on juveniles convicted of nonhomicide crimes. See *ante*, at 62–64.

III

So much for Graham. But what about Milagro Cunningham, a 17-year-old who beat and raped an 8-year-old girl before leaving her to die under 197 pounds of rock in a recy-

cling bin in a remote landfill? See Musgrave, Cruel or Necessary? Life Terms for Youths Spur National Debate, Palm Beach Post, Oct. 15, 2009, p. 1A. Or Nathan Walker and Jakaris Taylor, the Florida juveniles who together with their friends gang-raped a woman and forced her to perform oral sex on her 12-year-old son? See 3 Sentenced to Life for Gang Rape of Mother, Associated Press, Oct. 14, 2009. The fact that Graham cannot be sentenced to life without parole for his conduct says nothing whatever about these offenders, or others like them who commit nonhomicide crimes far more reprehensible than the conduct at issue here. The Court uses Graham's case as a vehicle to proclaim a new constitutional rule—applicable well beyond the particular facts of Graham's case—that a sentence of life without parole imposed on *any* juvenile for *any* nonhomicide offense is unconstitutional. This categorical conclusion is as unnecessary as it is unwise.

A holding this broad is unnecessary because the particular conduct and circumstances at issue in the case before us are not serious enough to justify Graham's sentence. In reaching this conclusion, there is no need for the Court to decide whether that same sentence would be constitutional if imposed for other more heinous nonhomicide crimes.

A more restrained approach is especially appropriate in light of the Court's apparent recognition that it is perfectly legitimate for a juvenile to receive a sentence of life without parole for committing murder. This means that there is nothing *inherently* unconstitutional about imposing sentences of life without parole on juvenile offenders; rather, the constitutionality of such sentences depends on the particular crimes for which they are imposed. But if the constitutionality of the sentence turns on the particular crime being punished, then the Court should limit its holding to the particular offenses that Graham committed here, and should decline to consider other hypothetical crimes not presented by this case.

In any event, the Court's categorical conclusion is also unwise. Most importantly, it ignores the fact that some nonhomicide crimes—like the ones committed by Milagro Cunningham, Nathan Walker, and Jakaris Taylor—are especially heinous or grotesque, and thus may be deserving of more severe punishment.

Those under 18 years old may as a general matter have "diminished" culpability relative to adults who commit the same crimes, *Roper*, 543 U. S., at 571, but that does not mean that their culpability is always insufficient to justify a life sentence. See generally *Thompson*, 487 U. S., at 853 (O'Connor, J., concurring in judgment). It does not take a moral sense that is fully developed in every respect to know that beating and raping an 8-year-old girl and leaving her to die under 197 pounds of rocks is horribly wrong. The single fact of being 17 years old would not afford Cunningham protection against life without parole if the young girl had died—as Cunningham surely expected she would—so why should it do so when she miraculously survived his barbaric brutality?

The Court defends its categorical approach on the grounds that a "clear line is necessary to prevent the possibility that life without parole sentences will be imposed on juvenile nonhomicide offenders who are not sufficiently culpable to merit that punishment." *Ante*, at 74. It argues that a case-by-case approach to proportionality review is constitutionally insufficient because courts might not be able "with sufficient accuracy [to] distinguish the few incorrigible juvenile offenders from the many that have the capacity for change." *Ante*, at 77.

The Court is of course correct that judges will never have perfect foresight—or perfect wisdom—in making sentencing decisions. But this is true when they sentence adults no less than when they sentence juveniles. It is also true when they sentence juveniles who commit murder no less than when they sentence juveniles who commit other crimes.

Our system depends upon sentencing judges applying their reasoned judgment to each case that comes before them. As we explained in *Solem*, the whole enterprise of proportionality review is premised on the "justified" assumption that "courts are competent to judge the gravity of an offense, at least on a relative scale." 463 U. S., at 292. Indeed, "courts traditionally have made these judgments" by applying "generally accepted criteria" to analyze "the harm caused or threatened to the victim or society, and the culpability of the offender." *Id.*, at 292, 294.

* * *

Terrance Graham committed serious offenses, for which he deserves serious punishment. But he was only 16 years old, and under our Court's precedents, his youth is one factor, among others, that should be considered in deciding whether his punishment was unconstitutionally excessive. In my view, Graham's age—together with the nature of his criminal activity and the unusual severity of his sentence—tips the constitutional balance. I thus concur in the Court's judgment that Graham's sentence of life without parole violated the Eighth Amendment.

I would not, however, reach the same conclusion in every case involving a juvenile offender. Some crimes are so heinous, and some juvenile offenders so highly culpable, that a sentence of life without parole may be entirely justified under the Constitution. As we have said, "successful challenges" to noncapital sentences under the Eighth Amendment have been—and, in my view, should continue to be—"exceedingly rare." *Rummel*, 445 U. S., at 272. But Graham's sentence presents the exceptional case that our precedents have recognized will come along. We should grant Graham the relief to which he is entitled under the Eighth Amendment. The Court errs, however, in using this case as a vehicle for unsettling our established jurisprudence and fashioning a categorical rule applicable to far different cases.

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, and with whom JUSTICE ALITO joins as to Parts I and III, dissenting.

The Court holds today that it is "grossly disproportionate" and hence unconstitutional for any judge or jury to impose a sentence of life without parole on an offender less than 18 years old, unless he has committed a homicide. Although the text of the Constitution is silent regarding the permissibility of this sentencing practice, and although it would not have offended the standards that prevailed at the founding, the Court insists that the standards of American society have evolved such that the Constitution now requires its prohibition.

The news of this evolution will, I think, come as a surprise to the American people. Congress, the District of Columbia, and 37 States allow judges and juries to consider this sentencing practice in juvenile nonhomicide cases, and those judges and juries have decided to use it in the very worst cases they have encountered.

The Court does not conclude that life without parole itself is a cruel and unusual punishment. It instead rejects the judgments of those legislatures, judges, and juries regarding what the Court describes as the "moral" question whether this sentence can ever be "proportiona[te]" when applied to the category of offenders at issue here. *Ante*, at 58, 59 (internal quotation marks omitted); *ante*, at 85 (STEVENS, J., concurring).

I am unwilling to assume that we, as Members of this Court, are any more capable of making such moral judgments than our fellow citizens. Nothing in our training as judges qualifies us for that task, and nothing in Article III gives us that authority.

I respectfully dissent.

I

The Court recounts the facts of Terrance Jamar Graham's case in detail, so only a summary is necessary here. At age

16 years and 6 months, Graham and two masked accomplices committed a burglary at a small Florida restaurant, during which one of Graham's accomplices twice struck the restaurant manager on the head with a steel pipe when he refused to turn over money to the intruders. Graham was arrested and charged as an adult. He later pleaded guilty to two offenses, including armed burglary with assault or battery, an offense punishable by life imprisonment under Florida law. Fla. Stat. §§ 810.02(2)(a), (b) (2007). The trial court withheld adjudication on both counts, however, and sentenced Graham to probation, the first 12 months of which he spent in a county detention facility.

Graham reoffended just six months after his release. At a probation revocation hearing, a judge found by a preponderance of the evidence that, at age 17 years and 11 months, Graham invaded a home with two accomplices and held the homeowner at gunpoint for approximately 30 minutes while his accomplices ransacked the residence. As a result, the judge concluded that Graham had violated his probation and, after additional hearings, adjudicated Graham guilty on both counts arising from the restaurant robbery. The judge imposed the maximum sentence allowed by Florida law on the armed burglary count, life imprisonment without the possibility of parole.

Graham argues, and the Court holds, that this sentence violates the Eighth Amendment's Cruel and Unusual Punishments Clause because a life-without-parole sentence is always "grossly disproportionate" when imposed on a person under 18 who commits any crime short of a homicide. Brief for Petitioner 24; *ante*, at 72.

II

A

The Eighth Amendment, which applies to the States through the Fourteenth, provides that "[e]xcessive bail shall

not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." It is by now well established that the Cruel and Unusual Punishments Clause was originally understood as prohibiting torturous "'*methods* of punishment,'" *Harmelin* v. *Michigan*, 501 U. S. 957, 979 (1991) (opinion of SCALIA, J.) (quoting Granucci, "Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning, 57 Cal. L. Rev. 839, 842 (1969))—specifically methods akin to those that had been considered cruel and unusual at the time the Bill of Rights was adopted, *Baze* v. *Rees*, 553 U. S. 35, 99 (2008) (THOMAS, J., concurring in judgment). With one arguable exception, see *Weems* v. *United States*, 217 U. S. 349 (1910); *Harmelin*, *supra*, at 990–994 (opinion of SCALIA, J.) (discussing the scope and relevance of *Weems*' holding), this Court applied the Clause with that understanding for nearly 170 years after the Eighth Amendment's ratification.

More recently, however, the Court has held that the Clause authorizes it to proscribe not only methods of punishment that qualify as "cruel and unusual," but also any punishment that the Court deems "grossly disproportionate" to the crime committed. *Ante*, at 58 (internal quotation marks omitted). This latter interpretation is entirely the Court's creation. As has been described elsewhere at length, there is virtually no indication that the Cruel and Unusual Punishments Clause originally was understood to require proportionality in sentencing. See *Harmelin*, 501 U. S., at 975–985 (opinion of SCALIA, J.). Here, it suffices to recall just two points. First, the Clause does not expressly refer to proportionality or invoke any synonym for that term, even though the Framers were familiar with the concept, as evidenced by several founding-era state constitutions that required (albeit without defining) proportional punishments. See *id.*, at 977–978. In addition, the penal statute adopted by the First Congress demonstrates that proportionality in sentencing was not con-

sidered a constitutional command.[1] See *id.*, at 980–981 (noting that the statute prescribed capital punishment for offenses ranging from "'run[ning] away with . . . goods or merchandise to the value of fifty dollars,'" to "murder on the high seas" (quoting 1 Stat. 114)); see also Preyer, Penal Measures in the American Colonies: An Overview, 26 Am. J. Legal Hist. 326, 348–349, 353 (1982) (explaining that crimes in the late 18th-century Colonies generally were punished either by fines, whipping, or public "shaming," or by death, as intermediate sentencing options such as incarceration were not common).

The Court has nonetheless invoked proportionality to declare that capital punishment—though not unconstitutional *per se*—is categorically too harsh a penalty to apply to certain types of crimes and certain classes of offenders. See *Coker* v. *Georgia*, 433 U. S. 584 (1977) (plurality opinion) (rape of an adult woman); *Kennedy* v. *Louisiana*, 554 U. S. 407 (2008) (rape of a child); *Enmund* v. *Florida*, 458 U. S. 782 (1982) (felony murder in which the defendant participated in the felony but did not kill or intend to kill); *Thompson* v. *Oklahoma*, 487 U. S. 815 (1988) (plurality opinion) (juveniles

[1] THE CHIEF JUSTICE's concurrence suggests that it is unnecessary to remark on the underlying question whether the Eighth Amendment requires proportionality in sentencing because "[n]either party here asks us to reexamine our precedents" requiring "proportionality between noncapital offenses and their corresponding punishments." *Ante*, at 86 (opinion concurring in judgment). I disagree. Both the Court and the concurrence do more than apply existing noncapital proportionality precedents to the particulars of Graham's claim. The Court radically departs from the framework those precedents establish by applying to a noncapital sentence the categorical proportionality review its prior decisions have reserved for death penalty cases alone. See Part III, *infra*. The concurrence, meanwhile, breathes new life into the case-by-case proportionality approach that previously governed noncapital cases, from which the Court has steadily, and wisely, retreated since *Solem* v. *Helm*, 463 U. S. 277 (1983). See Part IV, *infra*. In dissenting from both choices to expand proportionality review, I find it essential to reexamine the foundations on which that doctrine is built.

under 16); *Roper* v. *Simmons*, 543 U. S. 551 (2005) (juveniles under 18); *Atkins* v. *Virginia*, 536 U. S. 304 (2002) (mentally retarded offenders). In adopting these categorical proportionality rules, the Court intrudes upon areas that the Constitution reserves to other (state and federal) organs of government. The Eighth Amendment prohibits the government from inflicting a cruel and unusual method of punishment upon a defendant. Other constitutional provisions ensure the defendant's right to fair process before any punishment is imposed. But, as members of today's majority note, "[s]ociety changes," *ante*, at 85 (STEVENS, J., concurring), and the Eighth Amendment leaves the unavoidably moral question of who "deserves" a particular nonprohibited method of punishment to the judgment of the legislatures that authorize the penalty, the prosecutors who seek it, and the judges and juries that impose it under circumstances they deem appropriate.

The Court has nonetheless adopted categorical rules that shield entire classes of offenses and offenders from the death penalty on the theory that "evolving standards of decency" require this result. *Ante*, at 58 (internal quotation marks omitted). The Court has offered assurances that these standards can be reliably measured by "'objective indicia'" of "national consensus," such as state and federal legislation, jury behavior, and (surprisingly, given that we are talking about "national" consensus) international opinion. *Ante*, at 61 (quoting *Roper*, *supra*, at 563); see also *ante*, at 62–67, 80–82. Yet even assuming that is true, the Framers did not provide for the constitutionality of a particular type of punishment to turn on a "snapshot of American public opinion" taken at the moment a case is decided. *Roper*, *supra*, at 629 (SCALIA, J., dissenting). By holding otherwise, the Court pretermits in all but one direction the evolution of the standards it describes, thus "calling a constitutional halt to what may well be a pendulum swing in social attitudes," *Thompson*, *supra*, at 869 (SCALIA, J., dissenting), and "stunt[ing]

legislative consideration" of new questions of penal policy as they emerge, *Kennedy*, *supra*, at 448 (ALITO, J., dissenting).

But the Court is not content to rely on snapshots of community consensus in any event. *Ante*, at 67 ("Community consensus, while 'entitled to great weight,' is not itself determinative" (quoting *Kennedy*, *supra*, at 434)). Instead, it reserves the right to reject the evidence of consensus it finds whenever its own "independent judgment" points in a different direction. *Ante*, at 67. The Court thus openly claims the power not only to approve or disapprove of democratic choices in penal policy based on evidence of how society's standards *have* evolved, but also on the basis of the Court's "independent" perception of how those standards *should* evolve, which depends on what the Court concedes is "'"necessarily . . . a moral judgment"'" regarding the propriety of a given punishment in today's society. *Ante*, at 58 (quoting *Kennedy*, *supra*, at 419).

The categorical proportionality review the Court employs in capital cases thus lacks a principled foundation. The Court's decision today is significant because it does not merely apply this standard—it remarkably expands its reach. For the first time in its history, the Court declares an entire class of offenders immune from a noncapital sentence using the categorical approach it previously reserved for death penalty cases alone.

B

Until today, the Court has based its categorical proportionality rulings on the notion that the Constitution gives special protection to capital defendants because the death penalty is a uniquely severe punishment that must be reserved for only those who are "most deserving of execution." *Atkins*, *supra*, at 319; see *Roper*, *supra*, at 568; *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982); *Lockett* v. *Ohio*, 438 U. S. 586 (1978). Of course, the Eighth Amendment itself makes no

distinction between capital and noncapital sentencing, but the "'bright line'" the Court drew between the two penalties has for many years served as the principal justification for the Court's willingness to reject democratic choices regarding the death penalty. See *Rummel* v. *Estelle*, 445 U. S. 263, 275 (1980).

Today's decision eviscerates that distinction. "Death is different" no longer. The Court now claims not only the power categorically to reserve the "most severe punishment" for those the Court thinks are "'the most deserving of execution,'" *Roper*, *supra*, at 568 (quoting *Atkins*, *supra*, at 319), *but also* to declare that "less culpable" persons are categorically exempt from the "*second* most severe penalty." *Ante*, at 72 (emphasis added). No reliable limiting principle remains to prevent the Court from immunizing any class of offenders from the law's third, fourth, fifth, or fiftieth most severe penalties as well.

The Court's departure from the "death is different" distinction is especially mystifying when one considers how long it has resisted crossing that divide. Indeed, for a time the Court declined to apply proportionality principles to noncapital sentences at all, emphasizing that "a sentence of death differs in kind from any sentence of imprisonment, *no matter how long*." *Rummel*, 445 U. S., at 272 (emphasis added). Based on that rationale, the Court found that the excessiveness of one prison term as compared to another was "properly within the province of legislatures, not courts," *id.*, at 275–276, precisely because it involved an "*invariably . . . subjective determination*, there being no clear way to make 'any constitutional distinction between one term of years and a shorter or longer term of years,'" *Hutto* v. *Davis*, 454 U. S. 370, 373 (1982) *(per curiam)* (quoting *Rummel*, *supra*, at 275; emphasis added).

Even when the Court broke from that understanding in its 5-to-4 decision in *Solem* v. *Helm*, 463 U. S. 277 (1983) (strik-

ing down as "grossly disproportionate" a life-without-parole sentence imposed on a defendant for passing a worthless check), the Court did so only as applied to the facts of that case; it announced no categorical rule. *Id.*, at 288, 303. Moreover, the Court soon cabined *Solem*'s rationale. The controlling opinion in the Court's very next noncapital proportionality case emphasized that principles of federalism require substantial deference to legislative choices regarding the proper length of prison sentences. *Harmelin*, 501 U. S., at 999 (KENNEDY, J., concurring in part and concurring in judgment) ("[M]arked divergences both in underlying theories of sentencing and in the length of prescribed prison terms are the inevitable, often beneficial, result of the federal structure"); *id.*, at 1000 ("[D]iffering attitudes and perceptions of local conditions may yield different, yet rational, conclusions regarding the appropriate length of prison terms for particular crimes"). That opinion thus concluded that "*successful* challenges to the proportionality of [prison] sentences [would be] exceedingly rare." *Id.*, at 1001 (internal quotation marks omitted).

They have been rare indeed. In the 28 years since *Solem*, the Court has considered just three such challenges and has rejected them all, see *Ewing* v. *California*, 538 U. S. 11 (2003); *Lockyer* v. *Andrade*, 538 U. S. 63 (2003); *Harmelin*, *supra*, largely on the theory that criticisms of the "wisdom, cost-efficiency, and effectiveness" of term-of-years prison sentences are "appropriately directed at the legislature[s]," not the courts, *Ewing*, *supra*, at 27, 28 (plurality opinion). The Court correctly notes that those decisions were "closely divided," *ante*, at 59, but so was *Solem* itself, and it is now fair to describe *Solem* as an outlier.[2]

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[2] Courts and commentators interpreting this Court's decisions have reached this conclusion. See, *e. g.*, *United States* v. *Polk*, 546 F. 3d 74, 76 (CA1 2008) ("[I]nstances of gross disproportionality [in noncapital cases] will be hen's-teeth rare"); Barkow, The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity, 107 Mich. L. Rev. 1145, 1160 (2009) ("*Solem* now stands as an outlier"); Note,

Remarkably, the Court today does more than return to *Solem*'s case-by-case proportionality standard for noncapital sentences; it hurtles past it to impose a *categorical* proportionality rule banning life-without-parole sentences not just in this case, but in *every* case involving a juvenile nonhomicide offender, no matter what the circumstances. Neither the Eighth Amendment nor the Court's precedents justify this decision.

III

The Court asserts that categorical proportionality review is necessary here merely because Graham asks for a categorical rule, see *ante*, at 61, and because the Court thinks clear lines are a good idea, see *ante*, at 75. I find those factors wholly insufficient to justify the Court's break from past practice. First, the Court fails to acknowledge that a petitioner seeking to exempt an entire category of offenders from a sentencing practice carries a much heavier burden than one seeking case-specific relief under *Solem*. Unlike the petitioner in *Solem*, Graham must establish not only that his own life-without-parole sentence is "grossly disproportionate," but also that such a sentence is always grossly disproportionate whenever it is applied to a juvenile nonhomicide offender, no matter how heinous his crime. Cf. *United States* v. *Salerno*, 481 U. S. 739 (1987). Second, even applying the Court's categorical "evolving standards" test, neither objective evidence of national consensus nor the notions of culpability on which the Court's "independent judgment" relies can justify the categorical rule it declares here.

The Capital Punishment Exception: A Case for Constitutionalizing the Substantive Criminal Law, 104 Colum. L. Rev. 426, 445 (2004) (observing that outside of the capital context, "proportionality review has been virtually dormant"); Steiker & Steiker, Opening a Window or Building a Wall? The Effect of Eighth Amendment Death Penalty Law and Advocacy on Criminal Justice More Broadly, 11 U. Pa. J. Const. L. 155, 184 (2009) ("Eighth Amendment challenges to excessive incarceration [are] essentially non-starters").

A

According to the Court, proper Eighth Amendment analysis "begins with objective indicia of national consensus,"[3] and "[t]he clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures," *ante*, at 62 (internal quotation marks omitted). As such, the analysis should end quickly, because a national "consensus" in favor of the Court's result simply does not exist. The laws of all 50 States, the Federal Government, and the District of Columbia provide that juveniles over a certain age may be tried in adult court if charged with certain crimes.[4] See *ante*, at 82–85 (appendix to opinion of the Court). Forty-five States, the Federal Government, and the District of Columbia expose juvenile offenders charged

[3] The Court ignores entirely the threshold inquiry of whether subjecting juvenile offenders to adult penalties was one of the "modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted." *Ford* v. *Wainwright*, 477 U. S. 399, 405 (1986). As the Court has noted in the past, however, the evidence is clear that, at the time of the founding, "the common law set the rebuttable presumption of incapacity to commit any felony at the age of 14, and theoretically permitted [even] capital punishment to be imposed on anyone over the age of 7." *Stanford* v. *Kentucky*, 492 U. S. 361, 368 (1989) (citing 4 W. Blackstone, Commentaries *23–*24; 1 M. Hale, Pleas of the Crown 24–29 (1800)). It thus seems exceedingly unlikely that the imposition of a life-without-parole sentence on a person of Graham's age would run afoul of those standards.

[4] Although the details of state laws vary extensively, they generally permit the transfer of a juvenile offender to adult court through one or more of the following mechanisms: (1) judicial waiver, in which the juvenile court has the authority to waive jurisdiction over the offender and transfer the case to adult court; (2) concurrent jurisdiction, in which adult and juvenile courts share jurisdiction over certain cases and the prosecutor has discretion to file in either court; or (3) statutory provisions that exclude juveniles who commit certain crimes from juvenile-court jurisdiction. See Dept. of Justice, Juvenile Offenders and Victims: 1999 National Report 89, 104 (1999) (hereinafter 1999 DOJ National Report); Feld, Unmitigated Punishment: Adolescent Criminal Responsibility and LWOP Sentences, 10 J. Law & Family Studies 11, 38–39 (2007).

in adult court to the very same range of punishments faced by adults charged with the same crimes. See *ante*, at 82–84 (Part I). Eight of those States do not make life-without-parole sentences available for any nonhomicide offender, regardless of age.[5] All remaining jurisdictions—the Federal Government, the other 37 States, and the District—authorize life-without-parole sentences for certain nonhomicide offenses, and authorize the imposition of such sentences on persons under 18. See *ibid.* Only *five* States prohibit juvenile offenders from receiving a life-without-parole sentence that could be imposed on an adult convicted of the same crime.[6]

No plausible claim of a consensus against this sentencing practice can be made in light of this overwhelming legislative evidence. The sole fact that federal law authorizes this practice singlehandedly refutes the claim that our Nation finds it morally repugnant. The additional reality that 37 out of 50 States (a supermajority of 74%) permit the practice makes the claim utterly implausible. Not only is there no consensus against this penalty, there is a clear legislative consensus *in favor* of its availability.

Undaunted, however, the Court brushes this evidence aside as "incomplete and unavailing," declaring that " '[t]here

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[5] Alaska entitles all offenders to parole, regardless of their crime. Alaska Stat. § 12.55.015(g) (2008). The other seven States provide parole eligibility to all offenders, except those who commit certain homicide crimes. Conn. Gen. Stat. § 53a–35a (2009); Haw. Rev. Stat. §§ 706–656(1) to 656(2) (1993 and 2008 Supp. Pamphlet); Me. Rev. Stat. Ann., Tit. 17–A, § 1251 (2006); Mass. Gen. Laws Ann., ch. 265, § 2 (West 2008); N. J. Stat. Ann. §§ 2C:11–3(b)(2) to 3(b)(3) (West Supp. 2009); N. M. Stat. Ann. § 31–18–14 (Supp. 2009); Vt. Stat. Ann., Tit. 13, § 2303 (2009).

[6] Colo. Rev. Stat. Ann. § 18–1.3–401(4)(b) (2009) (authorizing mandatory life sentence with possibility for parole after 40 years for juveniles convicted of class 1 felonies); Kan. Stat. Ann. §§ 21–4622, 4643 (2007); Ky. Rev. Stat. Ann. § 640.040 (West 2008); *Shepherd* v. *Commonwealth*, 251 S. W. 3d 309, 320–321 (Ky. 2008); Mont. Code Ann. § 46–18–222(1) (2009); Tex. Penal Code Ann. § 12.31 (West Supp. 2009).

are measures of consensus other than legislation.'" *Ante*, at 62 (quoting *Kennedy*, 554 U. S., at 433). This is nothing short of stunning. Most importantly, federal civilian law approves this sentencing practice.[7] And although the Court has never decided how many state laws are necessary to show consensus, the Court has never banished into constitutional exile a sentencing practice that the laws of a majority, let alone a supermajority, of States expressly permit.[8]

Moreover, the consistency and direction of recent legislation—a factor the Court previously has relied upon when crafting categorical proportionality rules, see *Atkins*, 536 U. S., at 315–316; *Roper*, 543 U. S., at 565–566—underscores

[7] Although the Court previously has dismissed the relevance of the Uniform Code of Military Justice to its discernment of consensus, see *Kennedy* v. *Louisiana*, 554 U. S. 945, 946 (2008) (statement of KENNEDY, J., respecting denial of rehearing), juveniles who enlist in the military are nonetheless eligible for life-without-parole sentences if they commit certain nonhomicide crimes. See 10 U. S. C. §§505(a) (permitting enlistment at age 17), 856a; §920 (2006 ed., Supp. II).

[8] *Kennedy* v. *Louisiana*, 554 U. S. 407, 423, 434 (2008) (prohibiting capital punishment for the rape of a child where only six States had enacted statutes authorizing the punishment since *Furman* v. *Georgia*, 408 U. S. 238 (1972) *(per curiam)*); *Roper* v. *Simmons*, 543 U. S. 551, 564, 568 (2005) (prohibiting capital punishment for offenders younger than 18 where 18 of 38 death penalty States precluded imposition of the penalty on persons under 18 and the remaining 12 States did not permit capital punishment at all); *Atkins* v. *Virginia*, 536 U. S. 304, 314–315 (2002) (prohibiting capital punishment of mentally retarded persons where 18 of 38 death penalty States precluded imposition of the penalty on such persons and the remaining States did not authorize capital punishment at all); *Thompson* v. *Oklahoma*, 487 U. S. 815, 826, 829 (1988) (plurality opinion) (prohibiting capital punishment of offenders under 16 where 18 of 36 death penalty States precluded imposition of the penalty on such persons and the remaining States did not permit capital punishment at all); *Enmund* v. *Florida*, 458 U. S. 782, 789 (1982) (prohibiting capital punishment for felony murder without proof of intent to kill where eight States allowed the punishment without proof of that element); *Coker* v. *Georgia*, 433 U. S. 584, 593 (1977) (plurality opinion) (holding capital punishment for the rape of a woman unconstitutional where "[a]t no time in the last 50 years have a majority of the States authorized death as a punishment for rape").

the consensus *against* the rule the Court announces here. In my view, the Court cannot point to a national consensus in favor of its rule without assuming a consensus in favor of the two penological points it later discusses: (1) Juveniles are always less culpable than similarly-situated adults, and (2) juveniles who commit nonhomicide crimes should always receive an opportunity to demonstrate rehabilitation through parole. *Ante,* at 68–69, 74–75. But legislative trends make that assumption untenable.

First, States over the past 20 years have consistently *increased* the severity of punishments for juvenile offenders. See 1999 DOJ National Report 89 (referring to the 1990's as "a time of unprecedented change as State legislatures crack[ed] down on juvenile crime"); *ibid.* (noting that, during that period, "legislatures in 47 States and the District of Columbia enacted laws that made their juvenile justice systems more punitive," principally by "ma[king] it easier to transfer juvenile offenders from the juvenile justice system to the [adult] criminal justice system"); *id.*, at 104. This, in my view, reveals the States' widespread agreement that juveniles can sometimes act with the same culpability as adults and that the law should permit judges and juries to consider adult sentences—including life without parole—in those rare and unfortunate cases. See Feld, Unmitigated Punishment: Adolescent Criminal Responsibility and LWOP Sentences, 10 J. Law & Family Studies 11, 69–70 (2007) (noting that life-without-parole sentences for juveniles have increased since the 1980's); Amnesty International & Human Rights Watch, The Rest of Their Lives: Life Without Parole for Child Offenders in the United States 2, 31 (2005) (same).

Second, legislatures have moved away from parole over the same period. Congress abolished parole for federal offenders in 1984 amid criticism that it was subject to "gamesmanship and cynicism," Breyer, Federal Sentencing Guidelines Revisited, 11 Fed. Sentencing Rep. 180 (1999) (discussing the Sentencing Reform Act of 1984, 98 Stat.

1987), and several States have followed suit, see T. Hughes, D. Wilson, & A. Beck, Dept. of Justice, Bureau of Justice Statistics, Trends in State Parole, 1990–2000, p. 1 (2001) (noting that, by the end of 2000, 16 States had abolished parole for all offenses, while another 4 States had abolished it for certain ones). In light of these developments, the argument that there is nationwide consensus that parole must be available to offenders less than 18 years old in *every* nonhomicide case simply fails.

B

The Court nonetheless dismisses existing legislation, pointing out that life-without-parole sentences are rarely imposed on juvenile nonhomicide offenders—123 times in recent memory[9] by the Court's calculation, spread out across 11 States.[10] *Ante*, at 62–64. Based on this rarity of use,

[9] I say "recent memory" because the research relied upon by the Court provides a headcount of juvenile nonhomicide offenders presently incarcerated in this country, but does not provide more specific information about all of the offenders, such as the dates on which they were convicted.

[10] When issued, the Court's opinion relied on a letter the Court had requested from the Bureau of Prisons (BOP), which stated that there were six juvenile nonhomicide offenders then serving life-without-parole sentences in the federal system. After the Court released its opinion, the Acting Solicitor General disputed the BOP's calculations and stated that none of those six offenders was serving a life-without-parole sentence solely for a juvenile nonhomicide crime completed before the age of 18. See Letter from Neal Kumar Katyal, Acting Solicitor General, U. S. Dept. of Justice, to Clerk of the Supreme Court (May 24, 2010) (available in Clerk of Court's case file) (noting that five of the six inmates were convicted for participation in unlawful conspiracies that began when they were juveniles but continued after they reached the age of 18, and noting that the sixth inmate was convicted of murder as a predicate offense under the Racketeer Influenced and Corrupt Organizations Act). The Court has amended its opinion in light of the Acting Solicitor General's letter. In my view, the inconsistency between the BOP's classification of these six offenders and the Solicitor General's is irrelevant. The fact remains that federal law, and the laws of a supermajority of States, permit this sentencing practice. And, as will be explained, see *infra* this page and 111–115,

the Court proclaims a consensus against the practice, implying that laws allowing it either reflect the consensus of a prior, less civilized time or are the work of legislatures tone-deaf to the moral values of their constituents that this Court claims to have easily discerned from afar. See *ante*, at 62.

This logic strains credulity. It has been rejected before. *Gregg* v. *Georgia*, 428 U. S. 153, 182 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.) ("[T]he relative infrequency of jury verdicts imposing the death sentence does not indicate rejection of capital punishment *per se*. Rather, [it] . . . may well reflect the humane feeling that this most irrevocable of sanctions should be reserved for a small number of extreme cases"). It should also be rejected here. That a punishment is rarely imposed demonstrates nothing more than a general consensus that it should be just that—rarely imposed. It is not proof that the punishment is one the Nation abhors.

The Court nonetheless insists that the 26 States that authorize this penalty, but are not presently incarcerating a juvenile nonhomicide offender on a life-without-parole sentence, cannot be counted as approving its use. The mere fact that the laws of a jurisdiction permit this penalty, the Court explains, "does not indicate that the penalty has been endorsed through deliberate, express, and full legislative consideration." *Ante*, at 67.

But this misapplies the Court's own evolving standards test. Under that test, "[i]t is not the burden of [a State] to establish a national consensus *approving* what their citizens have voted to do; rather, it is the 'heavy burden' of petitioners to establish a national consensus *against* it." *Stanford* v. *Kentucky*, 492 U. S. 361, 373 (1989) (quoting *Gregg*, *supra*, at 175 (joint opinion of Stewart, Powell, and STEVENS, JJ.); some emphasis added; citation omitted). In light of this fact, the Court is wrong to equate a jurisdiction's disuse of a

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judges and jurors have chosen to impose this sentence in the very worst cases they have encountered.

legislatively authorized penalty with its moral opposition to it. The fact that the laws of a jurisdiction permit this sentencing practice demonstrates, at a minimum, that the citizens of that jurisdiction find tolerable the possibility that a jury of their peers could impose a life-without-parole sentence on a juvenile whose nonhomicide crime is sufficiently depraved.

The recent case of 16-year-old Keighton Budder illustrates this point. Just weeks before the release of this opinion, an Oklahoma jury sentenced Budder to life without parole after hearing evidence that he viciously attacked a 17-year-old girl who gave him a ride home from a party. See Stogsdill, Teen Gets Life Terms in Stabbing, Rape Case, Tulsa World, Apr. 2, 2010, p. A10; Stogsdill, Delaware County Teen Sentenced in Rape, Assault Case, Tulsa World, May 4, 2010, p. A12. Budder allegedly put the girl's head "'into a headlock and sliced her throat,'" raped her, stabbed her about 20 times, beat her, and pounded her face into the rocks alongside a dirt road. Teen Gets Life Terms in Stabbing, Rape Case, at A10. Miraculously, the victim survived. *Ibid.*

Budder's crime was rare in its brutality. The sentence the jury imposed was also rare. According to the study relied upon by this Court, Oklahoma had no such offender in its prison system before Budder's offense. P. Annino, D. Rasmussen, & C. Rice, Juvenile Life Without Parole for Non-Homicide Offenses: Florida Compared to Nation 2, 14 (Sept. 14, 2009) (Table A). Without his conviction, therefore, the Court would have counted Oklahoma's citizens as morally opposed to life-without-parole sentences for juvenile nonhomicide offenders.

Yet Oklahoma's experience proves the inescapable flaw in that reasoning: Oklahoma citizens have enacted laws that allow Oklahoma juries to consider life-without-parole sentences in juvenile nonhomicide cases. Oklahoma juries invoke those laws rarely—in the unusual cases that they find exceptionally depraved. I cannot agree with the Court that

Oklahoma citizens should be constitutionally disabled from using this sentencing practice merely because they have not done so more frequently. If anything, the rarity of this penalty's use underscores just how judicious sentencing judges and juries across the country have been in invoking it.

This fact is entirely consistent with the Court's intuition that juveniles *generally* are less culpable and more capable of growth than adults. See *infra*, at 116–118. Graham's own case provides another example. Graham was statutorily eligible for a life-without-parole sentence after his first crime. But the record indicates that the trial court did not give such a sentence serious consideration at Graham's initial plea hearing. It was only after Graham subsequently violated his parole by invading a home at gunpoint that the maximum sentence was imposed.

In sum, the Court's calculation that 123 juvenile nonhomicide life-without-parole sentences have been imposed nationwide in recent memory, even if accepted, hardly amounts to strong evidence that the sentencing practice offends our common sense of decency.[11]

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[11] Because existing legislation plainly suffices to refute any consensus against this sentencing practice, I assume the accuracy of the Court's evidence regarding the frequency with which this sentence has been imposed. But I would be remiss if I did not mention two points about the Court's figures. First, it seems odd that the Court counts only those juveniles sentenced to life without parole and excludes from its analysis all juveniles sentenced to lengthy term-of-years sentences (*e. g.*, 70 or 80 years' imprisonment). It is difficult to argue that a judge or jury imposing such a long sentence—which effectively denies the offender any material opportunity for parole—would express moral outrage at a life-without-parole sentence.

Second, if objective indicia of consensus were truly important to the Court's analysis, the statistical information presently available would be woefully inadequate to form the basis of an Eighth Amendment rule that can be revoked only by constitutional amendment. The only evidence submitted to this Court regarding the frequency of this sentence's imposition was a single study completed after this Court granted certiorari in this case. See P. Annino, D. Rasmussen, & C. Rice, Juvenile Life Without Parole for Non-Homicide Offenses: Florida Compared to Nation 2

Finally, I cannot help but note that the statistics the Court finds inadequate to justify the penalty in this case are stronger than those supporting at least one other penalty this Court has upheld. Not long ago, this Court, joined by the author of today's opinion, upheld the application of the death penalty against a 16-year-old, despite the fact that no such punishment had been carried out on a person of that age in this country in nearly 30 years. See *Stanford*, 492 U. S., at 374. Whatever the statistical frequency with which life-without-parole sentences have been imposed on juvenile nonhomicide offenders in the last 30 years, it is surely greater than zero.

In the end, however, objective factors such as legislation and the frequency of a penalty's use are merely ornaments in the Court's analysis, window dressing that accompanies its judicial fiat.[12] By the Court's own decree, "[c]ommunity

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(Sept. 14, 2009). Although I have no reason to question the professionalism with which this study was conducted, the study itself acknowledges that it was incomplete and the first of its kind. See *id.*, at 1. The Court's questionable decision to "complete" the study on its own does not materially increase its reliability. For one thing, by finishing the study itself, the Court prohibits the parties from ever disputing its findings. Complicating matters further, the original study sometimes relied on third-party data rather than data from the States themselves, see *ibid.;* the study has never been peer reviewed; and specific data on all 123 offenders (age, date of conviction, crime of conviction, etc.) have not been collected, making verification of the Court's headcount impossible. The Court inexplicably blames Florida for all of this. See *ante*, at 63. But as already noted, it is not Florida's burden to collect data to prove a national consensus in favor of this sentencing practice, but Graham's "heavy burden" to prove a consensus *against* it. See *supra*, at 111.

[12] I confine to a footnote the Court's discussion of foreign laws and sentencing practices because past opinions explain at length why such factors are irrelevant to the meaning of our Constitution or the Court's discernment of any longstanding tradition in *this* Nation. See *Atkins*, 536 U. S., at 324–325 (Rehnquist, C. J., dissenting). Here, two points suffice. First, despite the Court's attempt to count the actual number of juvenile nonhomicide offenders serving life-without-parole sentences in other nations (a task even more challenging than counting them within our borders), the

consensus . . . is not itself determinative." *Ante*, at 67. Only the independent moral judgment of this Court is sufficient to decide the question. See *ibid.*

C

Lacking any plausible claim to consensus, the Court shifts to the heart of its argument: its "independent judgment" that this sentencing practice does not "serv[e] legitimate penological goals." *Ibid.* The Court begins that analysis with the obligatory preamble that "'[t]he Eighth Amendment does not mandate adoption of any one penological theory,'" *ante*, at 71 (quoting *Harmelin*, 501 U. S., at 999 (KENNEDY, J., concurring in part and concurring in judgment)), then promptly mandates the adoption of the theories the Court deems best.

First, the Court acknowledges that, at a minimum, the imposition of life-without-parole sentences on juvenile nonhomicide offenders serves two "legitimate" penological goals: incapacitation and deterrence. *Ante*, at 72–74. By definition, such sentences serve the goal of incapacitation by ensuring that juvenile offenders who commit armed burglaries, or those who commit the types of grievous sex crimes described by THE CHIEF JUSTICE, no longer threaten their communities. See *ante*, at 93–94 (opinion concurring in judgment). That should settle the matter, since the Court acknowledges

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laws of other countries permit juvenile life-without-parole sentences, see Child Rights Information Network, C. de la Vega, M. Montesano, & A. Solter, Human Rights Advocates, Statement on Juvenile Sentencing to Human Rights Council, 10th Sess., ¶ 9 (Nov. 3, 2009), online at http://www.crin.org/resources/infoDetail.asp?ID=19806) ("Eleven countries have laws with the potential to permit the sentencing of child offenders to life without [the] possibility of release" (as visited May 14, 2010, and available in Clerk of Court's case file)). Second, present legislation notwithstanding, democracies around the world remain free to adopt life-without-parole sentences for juvenile offenders tomorrow if they see fit. Starting today, ours can count itself among the few in which judicial decree prevents voters from making that choice.

that incapacitation is an "important" penological goal. *Ante*, at 72. Yet, the Court finds this goal "*inadequate*" to justify the life-without-parole sentences here. *Ibid.* (emphasis added). A similar fate befalls deterrence. The Court acknowledges that such sentences will deter future juvenile offenders, at least to some degree, but rejects that penological goal, not as illegitimate, but as insufficient. *Ibid.* ("[A]ny limited deterrent effect provided by life without parole is *not enough* to justify the sentence" (emphasis added)).

The Court looks more favorably on rehabilitation, but laments that life-without-parole sentences do little to promote this goal because they result in the offender's permanent incarceration. *Ante*, at 74. Of course, the Court recognizes that rehabilitation's "utility and proper implementation" are subject to debate. *Ante*, at 73. But that does not stop it from declaring that a legislature may not "forswea[r] . . . the rehabilitative ideal." *Ante*, at 74. In other words, the Eighth Amendment does not mandate "any one penological theory," *ante*, at 71 (internal quotation marks omitted), just one the Court approves.

Ultimately, however, the Court's "independent judgment" and the proportionality rule itself center on retribution—the notion that a criminal sentence should be proportioned to "'the personal culpability of the criminal offender.'" *Ante*, at 67, 71 (quoting *Tison* v. *Arizona*, 481 U. S. 137, 149 (1987)). The Court finds that retributive purposes are not served here for two reasons.

1

First, quoting *Roper*, 543 U. S., at 569–570, the Court concludes that juveniles are less culpable than adults because, as compared to adults, they "have a '"lack of maturity and an underdeveloped sense of responsibility,"'" and "their characters are 'not as well formed.'" *Ante*, at 68. As a general matter, this statement is entirely consistent with the

evidence recounted above that judges and juries impose the sentence at issue quite infrequently, despite legislative authorization to do so in many more cases. See Part III–B, *supra*. Our society tends to treat the average juvenile as less culpable than the average adult. But the question here does not involve the average juvenile. The question, instead, is whether the Constitution prohibits judges and juries from *ever* concluding that an offender under the age of 18 has demonstrated sufficient depravity and incorrigibility to warrant his permanent incarceration.

In holding that the Constitution imposes such a ban, the Court cites "developments in psychology and brain science" indicating that juvenile minds "continue to mature through late adolescence," *ante*, at 68 (citing Brief for American Medical Association et al. as *Amici Curiae* 16–24; Brief for American Psychological Association et al. as *Amici Curiae* 22–27 (hereinafter APA Brief)), and that juveniles are "more likely [than adults] to engage in risky behaviors," *id.*, at 7. But even if such generalizations from social science were relevant to constitutional rulemaking, the Court misstates the data on which it relies.

The Court equates the propensity of a fairly substantial number of youths to engage in "risky" or antisocial behaviors with the propensity of a much smaller group to commit violent crimes. *Ante*, at 76–79. But research relied upon by the *amici* cited in the Court's opinion differentiates between adolescents for whom antisocial behavior is a fleeting symptom and those for whom it is a lifelong pattern. See Moffitt, Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy, 100 Psychological Rev. 674, 678 (1993) (cited in APA Brief 8, 17, 20) (distinguishing between adolescents who are "antisocial only during adolescence" and a smaller group who engage in antisocial behavior "at every life stage" despite "drift[ing] through successive systems aimed at curbing their deviance"). That research further suggests that the pattern of behavior in the

latter group often sets in before 18. See Moffitt, *supra*, at 684 ("The well-documented resistance of antisocial personality disorder to treatments of all kinds seems to suggest that the life-course-persistent style is fixed sometime before age 18"). And, notably, it suggests that violence itself is evidence that an adolescent offender's antisocial behavior is *not* transient. See Moffitt, A Review of Research on the Taxonomy of Life-Course Persistent Versus Adolescence-Limited Antisocial Behavior, in Taking Stock: the Status of Criminological Theory 277, 292–293 (F. Cullen, J. Wright, & K. Blevins eds. 2006) (observing that "life-course persistent" males "tended to specialize in serious offenses (carrying a hidden weapon, assault, robbery, violating court orders), whereas adolescence-limited" ones "specialized in non-serious offenses (theft less than $5, public drunkenness, giving false information on application forms, pirating computer software, etc.)").

In sum, even if it were relevant, none of this psychological or sociological data is sufficient to support the Court's "'moral'" conclusion that youth defeats culpability in *every* case. *Ante*, at 68 (quoting *Roper*, 543 U. S., at 570); see *id.*, at 618 (SCALIA, J., dissenting); R. Epstein, The Case Against Adolescence 171 (2007) (reporting on a study of juvenile reasoning skills and concluding that "most teens are capable of conventional, adult-like moral reasoning").

The Court responds that a categorical rule is nonetheless necessary to prevent the "'unacceptable likelihood'" that a judge or jury, unduly swayed by "'the brutality or cold-blooded nature'" of a juvenile's nonhomicide crime, will sentence him to a life-without-parole sentence for which he possesses "'insufficient culpability,'" *ante*, at 78 (quoting *Roper*, *supra*, at 572–573). I find that justification entirely insufficient. The integrity of our criminal justice system depends on the ability of citizens to stand between the defendant and an outraged public and dispassionately determine his guilt and the proper amount of punishment based on the evidence

presented. That process necessarily admits of human error. But so does the process of judging in which we engage. As between the two, I find far more "unacceptable" that this Court, swayed by studies reflecting the general tendencies of youth, decree that the people of this country are not fit to decide for themselves when the rare case requires different treatment.

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That is especially so because, in the end, the Court does not even believe its pronouncements about the juvenile mind. If it did, the categorical rule it announces today would be most peculiar because it leaves intact state and federal laws that permit life-without-parole sentences for juveniles who commit homicides. See *ante*, at 68–69. The Court thus acknowledges that there is nothing inherent in the psyche of a person less than 18 that prevents him from acquiring the moral agency necessary to warrant a life-without-parole sentence. Instead, the Court rejects overwhelming legislative consensus only on the question of which *acts* are sufficient to demonstrate that moral agency.

The Court is quite willing to accept that a 17-year-old who pulls the trigger on a firearm can demonstrate sufficient depravity and irredeemability to be denied reentry into society, but insists that a 17-year-old who rapes an 8-year-old and leaves her for dead does not. See *ibid.;* cf. *ante*, at 93–94 (ROBERTS, C. J., concurring in judgment) (describing the crime of life-without-parole offender Milagro Cunningham). Thus, the Court's conclusion that life-without-parole sentences are "grossly disproportionate" for juvenile nonhomicide offenders in fact has very little to do with its view of juveniles, and much more to do with its perception that "defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers." *Ante*, at 69.

That the Court is willing to impose such an exacting constraint on democratic sentencing choices based on such an untestable philosophical conclusion is remarkable. The question of what acts are "deserving" of what punishments is bound so tightly with questions of morality and social conditions as to make it, almost by definition, a question for legislative resolution. It is true that the Court previously has relied on the notion of proportionality in holding certain classes of offenses categorically exempt from capital punishment. See *supra*, at 100–101. But never before today has the Court relied on its own view of just deserts to impose a categorical limit on the imposition of a lesser punishment. Its willingness to cross that well-established boundary raises the question whether any democratic choice regarding appropriate punishment is safe from the Court's ever-expanding constitutional veto.

IV

Although THE CHIEF JUSTICE's concurrence avoids the problems associated with expanding categorical proportionality review to noncapital cases, it employs noncapital proportionality analysis in a way that raises the same fundamental concern. Although I do not believe *Solem* merits *stare decisis* treatment, Graham's claim cannot prevail even under that test (as it has been limited by the Court's subsequent precedents). *Solem* instructs a court first to compare the "gravity" of an offender's conduct to the "harshness of the penalty" to determine whether an "inference" of gross disproportionality exists. 463 U. S., at 290–291. Only in "the rare case" in which such an inference is present should the court proceed to the "objective" part of the inquiry—an intrajurisdictional and interjurisdictional comparison of the defendant's sentence with others similarly situated. *Harmelin*, 501 U. S., at 1000, 1005 (KENNEDY, J., concurring in part).

Under the Court's precedents, I fail to see how an "inference" of gross disproportionality arises here. The concurrence notes several arguably mitigating facts—Graham's "lack of prior criminal convictions, his youth and immaturity, and the difficult circumstances of his upbringing." *Ante*, at 92 (opinion of ROBERTS, C. J.). But the Court previously has upheld a life-without-parole sentence imposed on a first-time offender who committed a *nonviolent* drug crime. See *Harmelin*, *supra*, at 1002–1004. Graham's conviction for an actual violent felony is surely more severe than that offense. As for Graham's age, it is true that *Roper* held juveniles categorically ineligible for capital punishment, but as the concurrence explains, *Roper* was based on the "explicit conclusion that [juveniles] 'cannot with reliability be classified among the *worst* offenders'"; it did "not establish that juveniles can never be eligible for life without parole." *Ante*, at 89 (opinion of ROBERTS, C. J.) (quoting *Roper*, 543 U. S., at 569; emphasis added in opinion of ROBERTS, C. J.). In my view, *Roper*'s principles are thus not generally applicable outside the capital sentencing context.

By holding otherwise, the concurrence relies on the same type of subjective judgment as the Court, only it restrains itself to a case-by-case rather than a categorical ruling. The concurrence is quite ready to hand Graham "the general presumption of diminished culpability" for juveniles, *ante*, at 92, apparently because it believes that Graham's armed burglary and home invasion crimes were "certainly less serious" than murder or rape, *ante*, at 91. It recoils only from the prospect that the Court would extend the same presumption to a juvenile who commits a sex crime. See *ante*, at 94–95. I simply cannot accept that these subjective judgments of proportionality are ones the Eighth Amendment authorizes us to make.

The "objective" elements of the *Solem* test provide no additional support for the concurrence's conclusion. The concurrence compares Graham's sentence to "similar" sentences

in Florida and concludes that Graham's sentence was "far more severe." *Ante*, at 93 (ROBERTS, C. J., concurring in judgment). But strangely, the concurrence uses average sentences for burglary or robbery offenses as examples of "similar" offenses, even though it seems that a run-of-the-mill burglary or robbery is not at all similar to Graham's criminal history, which includes a charge for armed burglary *with assault*, *and* a probation violation for invading a home at gunpoint.

And even if Graham's sentence is higher than ones he might have received for an armed burglary with assault in other jurisdictions, see *ibid.*, this hardly seems relevant if one takes seriously the principle that "'[a]bsent a constitutionally imposed uniformity inimical to traditional notions of federalism, some State will *always* bear the distinction of treating particular offenders more severely than any other State,'" *Harmelin*, *supra*, at 1000 (opinion of KENNEDY, J.) (quoting *Rummel*, 445 U. S., at 282; emphasis added). Applying *Solem*, the Court has upheld a 25-years-to-life sentence for theft under California's recidivist statute, despite the fact that the State and its *amici* could cite only "a single instance of a similar sentence imposed outside the context of California's three strikes law, out of a prison population [then] approaching two million individuals." *Ewing*, 538 U. S., at 47 (BREYER, J., dissenting). It has also upheld a life-without-parole sentence for a first-time drug offender in Michigan charged with possessing 672 grams of cocaine despite the fact that only one other State would have authorized such a stiff penalty for a first-time drug offense, and even that State required a far greater quantity of cocaine (10 kilograms) to trigger the penalty. See *Harmelin*, *supra*, at 1026 (White, J., dissenting). Graham's sentence is certainly less rare than the sentences upheld in these cases, so his claim fails even under *Solem*.

* * *

Both the Court and the concurrence claim their decisions to be narrow ones, but both invite a host of line-drawing problems to which courts must seek answers beyond the strictures of the Constitution. The Court holds that "[a] State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime," but must provide the offender with "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Ante*, at 75. But what, exactly, does such a "meaningful" opportunity entail? When must it occur? And what Eighth Amendment principles will govern review by the parole boards the Court now demands that States empanel? The Court provides no answers to these questions, which will no doubt embroil the courts for years.[13]

V

The ultimate question in this case is not whether a life-without-parole sentence "fits" the crime at issue here or the crimes of juvenile nonhomicide offenders more generally, but to whom the Constitution assigns that decision. The Florida Legislature has concluded that such sentences should be available for persons under 18 who commit certain crimes, and the trial judge in this case decided to impose that legislatively authorized sentence here. Because a life-without-parole prison sentence is not a "cruel and unusual" method

[13] It bears noting that Colorado, one of the five States that prohibit life-without-parole sentences for juvenile nonhomicide offenders, permits such offenders to be sentenced to mandatory terms of imprisonment for up to 40 years. Colo. Rev. Stat. § 18–1.3–401(4)(b) (2009). In light of the volume of state and federal legislation that presently *permits* life-without-parole sentences for juvenile nonhomicide offenders, it would be impossible to argue that there is any objective evidence of agreement that a juvenile is constitutionally entitled to a parole hearing any sooner than 40 years after conviction. See Tr. of Oral Arg. 6–7 (counsel for Graham, stating that "[o]ur position is that it should be left up to the States to decide. We think that the . . . Colorado provision would probably be constitutional").

of punishment under any standard, the Eighth Amendment gives this Court no authority to reject those judgments.

It would be unjustifiable for the Court to declare otherwise even if it could claim that a bare majority of state laws supported its independent moral view. The fact that the Court categorically prohibits life-without-parole sentences for juvenile nonhomicide offenders in the face of an overwhelming legislative majority *in favor* of leaving that sentencing option available under certain cases simply illustrates how far beyond any cognizable constitutional principle the Court has reached to ensure that its own sense of morality and retributive justice pre-empts that of the people and their representatives.

I agree with JUSTICE STEVENS that "[w]e learn, sometimes, from our mistakes." *Ante*, at 85 (concurring opinion). Perhaps one day the Court will learn from this one.

I respectfully dissent.

JUSTICE ALITO, dissenting.

I join Parts I and III of JUSTICE THOMAS' dissenting opinion. I write separately to make two points.

First, the Court holds only that "for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of *life without parole*." *Ante*, at 74 (emphasis added). Nothing in the Court's opinion affects the imposition of a sentence to a term of years without the possibility of parole. Indeed, petitioner conceded at oral argument that a sentence of as much as 40 years without the possibility of parole "probably" would be constitutional. Tr. of Oral Arg. 6–7; see also *ante*, at 123, n. 13 (THOMAS, J., dissenting).

Second, the question whether petitioner's sentence violates the narrow, as-applied proportionality principle that applies to noncapital sentences is not properly before us in this case. Although petitioner asserted an as-applied proportionality challenge to his sentence before the Florida courts, see 982 So. 2d 43, 51–53 (Fla. App. 2008), he did not include

an as-applied claim in his petition for certiorari or in his merits briefs before this Court. Instead, petitioner argued for only a categorical rule banning the imposition of life without parole on *any* juvenile convicted of a nonhomicide offense. Because petitioner abandoned his as-applied claim, I would not reach that issue. See this Court's Rule 14.1(a); *Yee* v. *Escondido*, 503 U. S. 519, 534–538 (1992).

Syllabus

UNITED STATES *v.* COMSTOCK ET AL.

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

No. 08–1224. Argued January 12, 2010—Decided May 17, 2010

Federal law allows a district court to order the civil commitment of a mentally ill, sexually dangerous federal prisoner beyond the date he would otherwise be released. 18 U. S. C. § 4248. The Government instituted civil-commitment proceedings under § 4248 against respondents, each of whom moved to dismiss on the ground, *inter alia*, that, in enacting the statute, Congress exceeded its powers under the Necessary and Proper Clause, U. S. Const., Art. I, § 8, cl. 18. Agreeing, the District Court granted dismissal, and the Fourth Circuit affirmed on the legislative-power ground.

Held: The Necessary and Proper Clause grants Congress authority sufficient to enact § 4248. Taken together, five considerations compel this conclusion. Pp. 133–150.

(1) The Clause grants Congress broad authority to pass laws in furtherance of its constitutionally enumerated powers. It makes clear that grants of specific federal legislative authority are accompanied by broad power to enact laws that are "convenient, or useful" or "conducive" to the enumerated power's "beneficial exercise," *e. g.*, *McCulloch* v. *Maryland*, 4 Wheat. 316, 413, 418, and that Congress can "legislate on that vast mass of incidental powers which must be involved in the constitution," *id.*, at 421. In determining whether the Clause authorizes a particular federal statute, there must be "means-ends rationality" between the enacted statute and the source of federal power. *Sabri* v. *United States*, 541 U. S. 600, 605. The Constitution "addresse[s]" the "choice of means" "primarily . . . to the judgment of Congress. If it can be seen that the means adopted are really calculated to attain the end, the degree of their necessity, the extent to which they conduce to the end, the closeness of the relationship between the means adopted and the end to be attained, are matters for congressional determination alone." *Burroughs* v. *United States*, 290 U. S. 534, 547–548. Thus, although the Constitution nowhere grants Congress express power to create federal crimes beyond those specifically enumerated, to punish their violation, to imprison violators, to provide appropriately for those imprisoned, or to maintain the security of those who are not imprisoned but who

may be affected by the federal imprisonment of others, Congress possesses broad authority to do each of those things under the Clause. Pp. 133–137.

(2) Congress has long been involved in the delivery of mental-health care to federal prisoners, and has long provided for their civil commitment. See, *e. g.*, Act of Mar. 3, 1855, 10 Stat. 682; Insanity Defense Reform Act of 1984, 18 U. S. C. §§ 4241–4247. A longstanding history of related federal action does not demonstrate a statute's constitutionality, see, *e. g.*, *Walz* v. *Tax Comm'n of City of New York*, 397 U. S. 664, 678, but can be "helpful in reviewing the substance of a congressional statutory scheme," *Gonzales* v. *Raich*, 545 U. S. 1, 21, and, in particular, the reasonableness of the relation between the new statute and preexisting federal interests. Section 4248 differs from earlier statutes in that it focuses directly upon persons who, due to a mental illness, are sexually dangerous. Many of these individuals, however, were likely already subject to civil commitment under § 4246, which, since 1949, has authorized the postsentence detention of federal prisoners who suffer from a mental illness and who are thereby dangerous (whether sexually or otherwise). The similarities between § 4246 and § 4248 demonstrate that the latter is a modest addition to a longstanding federal statutory framework. Pp. 137–142.

(3) There are sound reasons for § 4248's enactment. The Federal Government, as custodian of its prisoners, has the constitutional power to act in order to protect nearby (and other) communities from the danger such prisoners may pose. Moreover, § 4248 is "reasonably adapted" to Congress' power to act as a responsible federal custodian. *United States* v. *Darby*, 312 U. S. 100, 121. Congress could have reasonably concluded that federal inmates who suffer from a mental illness that causes them to "have serious difficulty in refraining from sexually violent conduct," § 4247(a)(6), would pose an especially high danger to the public if released. And Congress could also have reasonably concluded that a reasonable number of such individuals would likely not be detained by the States if released from federal custody. Congress' desire to address these specific challenges, taken together with its responsibilities as a federal custodian, supports the conclusion that § 4248 satisfies "review for means-end rationality," *Sabri*, *supra*, at 605. Pp. 142–143.

(4) Respondents' contention that § 4248 violates the Tenth Amendment because it invades the province of state sovereignty in an area typically left to state control is rejected. That Amendment does not "reserve to the States" those powers that are "delegated to the United States by the Constitution," including the powers delegated by the Necessary and Proper Clause. See, *e. g.*, *New York* v. *United States*, 505

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U. S. 144, 159. And § 4248 does not "invade" state sovereignty, but rather requires *accommodation* of state interests: Among other things, it directs the Attorney General to inform the States where the federal prisoner "is domiciled or was tried" of his detention, § 4248(d), and gives either State the right, at any time, to assert its authority over the individual, which will prompt the individual's immediate transfer to state custody, § 4248(d)(1). In *Greenwood* v. *United States*, 350 U. S. 366, 375–376, the Court rejected a similar challenge to § 4248's predecessor, the 1949 statute described above. Because the version of the statute at issue in *Greenwood* was *less* protective of state interests than § 4248, *a fortiori*, the current statute does not invade state interests. Pp. 143–146.

(5) Section 4248 is narrow in scope. The Court rejects respondents' argument that, when legislating pursuant to the Necessary and Proper Clause, Congress' authority can be no more than one step removed from a specifically enumerated power. See, *e. g.*, *McCulloch*, *supra*, at 417. Nor will the Court's holding today confer on Congress a general "police power, which the Founders denied the National Government and reposed in the States." *United States* v. *Morrison*, 529 U. S. 598, 618. Section 4248 has been applied to only a small fraction of federal prisoners, and its reach is limited to individuals already "in the custody of the" Federal Government, § 4248(a). Thus, far from a "general police power," § 4248 is a reasonably adapted and narrowly tailored means of pursuing the Government's legitimate interest as a federal custodian in the responsible administration of its prison system. See *New York*, *supra*, at 157. Pp. 146–149.

The Court does not reach or decide any claim that the statute or its application denies equal protection, procedural or substantive due process, or any other constitutional rights. Respondents are free to pursue those claims on remand, and any others they have preserved. Pp. 149–150.

551 F. 3d 274, reversed and remanded.

BREYER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and STEVENS, GINSBURG, and SOTOMAYOR, JJ., joined. KENNEDY, J., *post*, p. 150, and ALITO, J., *post*, p. 155, filed opinions concurring in the judgment. THOMAS, J., filed a dissenting opinion, in which SCALIA, J., joined in all but Part III–A–1–b, *post*, p. 158.

Solicitor General Kagan argued the cause for the United States. With her on the brief were *Assistant Attorney General West*, *Deputy Solicitor General Kneedler*, *Curtis E. Gannon*, and *Mark B. Stern*.

G. Alan DuBois argued the cause for respondents. With him on the brief were *Thomas P. McNamara*, *Jane E. Pearce*, *Eric J. Brignac*, and *Robert A. Long, Jr.**

JUSTICE BREYER delivered the opinion of the Court.

A federal civil-commitment statute authorizes the Department of Justice to detain a mentally ill, sexually dangerous federal prisoner beyond the date the prisoner would otherwise be released. 18 U. S. C. § 4248. We have previously examined similar statutes enacted under state law to determine whether they violate the Due Process Clause. See *Kansas* v. *Hendricks*, 521 U. S. 346, 356–358 (1997); *Kansas* v. *Crane*, 534 U. S. 407 (2002). But this case presents a different question. Here we ask whether the Federal Government has the authority under Article I of the Constitution to enact this federal civil-commitment program or whether its doing so falls beyond the reach of a government "of

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*A brief of *amici curiae* urging reversal was filed for the State of Kansas et al. by *Steve Six*, Attorney General of Kansas, *Stephen R. McAllister*, Solicitor General, and *Kristafer R. Ailslieger*, Assistant Solicitor General, by *Richard S. Gebelein*, Chief Deputy Attorney General of Delaware, and by the Attorneys General for their respective States as follows: *Troy King* of Alabama, *Terry Goddard* of Arizona, *Dustin McDaniel* of Arkansas, *Edmund G. Brown, Jr.*, of California, *Bill McCollum* of Florida, *Mark J. Bennett* of Hawaii, *Lisa Madigan* of Illinois, *Jack Conway* of Kentucky, *James D. "Buddy" Caldwell* of Louisiana, *Douglas F. Gansler* of Maryland, *Martha Coakley* of Massachusetts, *Michael A. Cox* of Michigan, *Lori Swanson* of Minnesota, *Jim Hood* of Mississippi, *Chris Koster* of Missouri, *Steve Bullock* of Montana, *Anne Milgram* of New Jersey, *Gary K. King* of New Mexico, *Roy Cooper* of North Carolina, *Wayne Stenehjem* of North Dakota, *W. A. Drew Edmondson* of Oklahoma, *Thomas W. Corbett, Jr.*, of Pennsylvania, *Henry D. McMaster* of South Carolina, *Robert E. Cooper, Jr.*, of Tennessee, *Mark L. Shurtleff* of Utah, *William C. Mims* of Virginia, *Robert M. McKenna* of Washington, and *J. B. Van Hollen* of Wisconsin.

Briefs of *amici curiae* urging affirmance were filed for the Cato Institute et al. by *C. Allen Foster, Robert P. Charrow, Eric C. Rowe, David S. Panzer*, and *Ilya Shapiro;* and for the National Association of Criminal Defense Lawyers et al. by *Jeffrey T. Green*, *Judith H. Mizner*, *Jonathan Hacker*, and *Sarah O'Rourke Schrup.*

enumerated powers." *McCulloch* v. *Maryland*, 4 Wheat. 316, 405 (1819). We conclude that the Constitution grants Congress the authority to enact § 4248 as "necessary and proper for carrying into Execution" the powers "vested by" the "Constitution in the Government of the United States." Art. I, § 8, cl. 18.

I

The federal statute before us allows a district court to order the civil commitment of an individual who is currently "in the custody of the [Federal] Bureau of Prisons," § 4248, if that individual (1) has previously "engaged or attempted to engage in sexually violent conduct or child molestation," (2) currently "suffers from a serious mental illness, abnormality, or disorder," and (3) "as a result of" that mental illness, abnormality, or disorder is "sexually dangerous to others," in that "he would have serious difficulty in refraining from sexually violent conduct or child molestation if released," §§ 4247(a)(5)–(6).

In order to detain such a person, the Government (acting through the Department of Justice) must certify to a federal district judge that the prisoner meets the conditions just described, *i. e.*, that he has engaged in sexually violent activity or child molestation in the past and that he suffers from a mental illness that makes him correspondingly dangerous to others. § 4248(a). When such a certification is filed, the statute automatically stays the individual's release from prison, *ibid.*, thereby giving the Government an opportunity to prove its claims at a hearing through psychiatric (or other) evidence, §§ 4247(b)–(c), 4248(b). The statute provides that the prisoner "shall be represented by counsel" and shall have "an opportunity" at the hearing "to testify, to present evidence, to subpoena witnesses on his behalf, and to confront and cross-examine" the Government's witnesses. §§ 4247(d), 4248(c).

If the Government proves its claims by "clear and convincing evidence," the court will order the prisoner's continued

commitment in "the custody of the Attorney General," who must "make all reasonable efforts to cause" the State where that person was tried, or the State where he is domiciled, to "assume responsibility for his custody, care, and treatment." § 4248(d); cf. *Sullivan* v. *Freeman*, 944 F. 2d 334, 337 (CA7 1991). If either State is willing to assume that responsibility, the Attorney General "shall release" the individual "to the appropriate official" of that State. § 4248(d). But if, "notwithstanding such efforts, neither such State will assume such responsibility," then "the Attorney General shall place the person for treatment in a suitable [federal] facility." *Ibid.;* cf. § 4247(i)(A).

Confinement in the federal facility will last until either (1) the person's mental condition improves to the point where he is no longer dangerous (with or without appropriate ongoing treatment), in which case he will be released; or (2) a State assumes responsibility for his custody, care, and treatment, in which case he will be transferred to the custody of that State. §§ 4248(d)(1)–(2). The statute establishes a system for ongoing psychiatric and judicial review of the individual's case, including judicial hearings at the request of the confined person at 6-month intervals. §§ 4247(e)(1)(B), (h).

In November and December 2006, the Government instituted proceedings in the Federal District Court for the Eastern District of North Carolina against the five respondents in this case. Three of the five had previously pleaded guilty in federal court to possession of child pornography, see 507 F. Supp. 2d 522, 526, and n. 2 (2007); § 2252A(a), and a fourth had pleaded guilty to sexual abuse of a minor, see *United States* v. *Vigil,* No. 1:99CR00509–001 (D NM, Jan. 26, 2000); §§ 1153, 2243(a). With respect to each of them, the Government claimed that the respondent was about to be released from federal prison, that he had engaged in sexually violent conduct or child molestation in the past, and that he suffered from a mental illness that made him sexually dangerous to

others. App. 38–40, 44–52. During that same time period, the Government instituted similar proceedings against the fifth respondent, who had been charged in federal court with aggravated sexual abuse of a minor, but was found mentally incompetent to stand trial. See *id.*, at 41–43; *United States* v. *Catron*, No. 04–778 (D Ariz., Mar. 27, 2006); § 4241(d).

Each of the five respondents moved to dismiss the civil-commitment proceeding on constitutional grounds. They claimed that the commitment proceeding is, in fact, criminal, not civil, in nature and consequently that it violates the Double Jeopardy Clause, the *Ex Post Facto* Clause, and the Sixth and Eighth Amendments. 507 F. Supp. 2d, at 528. They claimed that the statute denies them substantive due process and equal protection of the laws. *Ibid.* They claimed that it violates their procedural due process rights by allowing a showing of sexual dangerousness to be made by clear and convincing evidence, instead of by proof beyond a reasonable doubt. *Ibid.* And, finally, they claimed that, in enacting the statute, Congress exceeded the powers granted to it by Article I, § 8, of the Constitution, including those granted by the Commerce Clause and the Necessary and Proper Clause. 507 F. Supp. 2d, at 528–529.

The District Court, accepting two of the respondents' claims, granted their motion to dismiss. It agreed with respondents that the Constitution requires proof beyond a reasonable doubt, *id.*, at 551–559 (citing *In re Winship*, 397 U. S. 358 (1970)), and it agreed that, in enacting the statute, Congress exceeded its Article I legislative powers, 507 F. Supp. 2d, at 530–551. On appeal, the Court of Appeals for the Fourth Circuit upheld the dismissal on this latter, legislative-power ground. 551 F. 3d 274, 278–284 (2009). It did not decide the standard-of-proof question, nor did it address any of respondents' other constitutional challenges. *Id.*, at 276, n. 1.

The Government sought certiorari, and we granted its request, limited to the question of Congress' authority under

Article I, § 8, of the Constitution. Pet. for Cert. i. Since then, two other Courts of Appeals have considered that same question, each deciding it in the Government's favor, thereby creating a split of authority among the Circuits. See *United States* v. *Volungus*, 595 F. 3d 1 (CA1 2010); *United States* v. *Tom*, 565 F. 3d 497 (CA8 2009).

II

The question presented is whether the Necessary and Proper Clause, Art. I, § 8, cl. 18, grants Congress authority sufficient to enact the statute before us. In resolving that question, we assume, but we do not decide, that other provisions of the Constitution—such as the Due Process Clause—do not prohibit civil commitment in these circumstances. Cf. *Hendricks*, 521 U. S. 346; *Addington* v. *Texas*, 441 U. S. 418 (1979). In other words, we assume for argument's sake that the Federal Constitution would permit a State to enact this statute, and we ask solely whether the Federal Government, exercising its enumerated powers, may enact such a statute as well. On that assumption, we conclude that the Constitution grants Congress legislative power sufficient to enact § 4248. We base this conclusion on five considerations, taken together.

First, the Necessary and Proper Clause grants Congress broad authority to enact federal legislation. Nearly 200 years ago, this Court stated that the Federal "[G]overnment is acknowledged by all to be one of enumerated powers," *McCulloch*, 4 Wheat., at 405, which means that "[e]very law enacted by Congress must be based on one or more of" those powers, *United States* v. *Morrison*, 529 U. S. 598, 607 (2000). But, at the same time, "a government, entrusted with such" powers "must also be entrusted with ample means for their execution." *McCulloch*, 4 Wheat., at 408. Accordingly, the Necessary and Proper Clause makes clear that the Constitution's grants of specific federal legislative authority are accompanied by broad power to enact laws that are "conven-

ient, or useful" or "conducive" to the authority's "beneficial exercise." *Id.*, at 413, 418; see also *id.*, at 421 ("[Congress can] legislate on that vast mass of incidental powers which must be involved in the constitution . . . "). Chief Justice Marshall emphasized that the word "necessary" does not mean "absolutely necessary." *Id.*, at 413–415 (emphasis deleted); *Jinks* v. *Richland County*, 538 U. S. 456, 462 (2003) ("[W]e long ago rejected the view that the Necessary and Proper Clause demands that an Act of Congress be '"*absolutely* necessary"' to the exercise of an enumerated power"). In language that has come to define the scope of the Necessary and Proper Clause, he 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*, *supra*, at 421.

We have since made clear that, in determining whether the Necessary and Proper Clause grants Congress the legislative authority to enact a particular federal statute, we look to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power. *Sabri* v. *United States*, 541 U. S. 600, 605 (2004) (using term "means-ends rationality" to describe the necessary relationship); *ibid.* (upholding Congress' "authority under the Necessary and Proper Clause" to enact a criminal statute in furtherance of the federal power granted by the Spending Clause); see *Gonzales* v. *Raich*, 545 U. S. 1, 22 (2005) (holding that because "Congress had a rational basis" for concluding that a statute implements Commerce Clause power, the statute falls within the scope of congressional "authority to 'make all Laws which shall be necessary and proper' to 'regulate Commerce . . . among the several States'" (ellipsis in original)); see also *United States* v.

Lopez, 514 U. S. 549, 557 (1995); *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U. S. 264, 276 (1981).

Of course, as Chief Justice Marshall stated, a federal statute, in addition to being authorized by Art. I, § 8, must also "not [be] prohibited" by the Constitution. *McCulloch*, *supra*, at 421. But as we have already stated, the present statute's validity under provisions of the Constitution other than the Necessary and Proper Clause is an issue that is not before us. Under the question presented, the relevant inquiry is simply "whether the means chosen are 'reasonably adapted' to the attainment of a legitimate end under the commerce power" or under other powers that the Constitution grants Congress the authority to implement. *Gonzales*, *supra*, at 37 (SCALIA, J., concurring in judgment) (quoting *United States* v. *Darby*, 312 U. S. 100, 121 (1941)).

We have also recognized that the Constitution "addresse[s]" the "choice of means"

> "primarily . . . to the judgment of Congress. If it can be seen that the means adopted are really calculated to attain the end, the degree of their necessity, the extent to which they conduce to the end, the closeness of the relationship between the means adopted and the end to be attained, are matters for congressional determination alone." *Burroughs* v. *United States*, 290 U. S. 534, 547–548 (1934).

See also *Lottery Case*, 188 U. S. 321, 355 (1903) ("[T]he Constitution . . . leaves to Congress a large discretion as to the means that may be employed in executing a given power"); *Morrison*, *supra*, at 607 (applying a "presumption of constitutionality" when examining the scope of congressional power); *McCulloch*, *supra*, at 410, 421.

Thus, the Constitution, which nowhere speaks explicitly about the creation of federal crimes beyond those related to "counterfeiting," "[t]reason," or "Piracies and Felonies committed on the high Seas" or "against the Law of Nations,"

Art. I, § 8, cls. 6, 10; Art. III, § 3, nonetheless grants Congress broad authority to create such crimes. See *McCulloch*, 4 Wheat., at 416 ("All admit that the government may, legitimately, punish any violation of its laws; and yet, this is not among the enumerated powers of Congress"); see also *United States* v. *Fox*, 95 U. S. 670, 672 (1878). And Congress routinely exercises its authority to enact criminal laws in furtherance of, for example, its enumerated powers to regulate interstate and foreign commerce, to enforce civil rights, to spend funds for the general welfare, to establish federal courts, to establish post offices, to regulate bankruptcy, to regulate naturalization, and so forth. Art. I, § 8, cls. 1, 3, 4, 7, 9; Amdts. 13–15. See, *e. g.*, *Lottery Case*, *supra* (upholding criminal statute enacted in furtherance of the Commerce Clause); *Ex parte Yarbrough*, 110 U. S. 651 (1884) (upholding Congress' authority to enact Rev. Stat. § 5508, currently 18 U. S. C. § 241 (criminalizing civil-rights violations) and Rev. Stat. § 5520, currently 42 U. S. C. § 1973j (criminalizing voting-rights violations) in furtherance of the Fourteenth and Fifteenth Amendments); *Sabri*, *supra* (upholding criminal statute enacted in furtherance of the Spending Clause); *Jinks*, *supra*, at 462, n. 2 (describing perjury and witness tampering as federal crimes enacted in furtherance of the power to constitute federal tribunals (citing *McCulloch*, *supra*, at 417)); see also 18 U. S. C. § 1691 *et seq.* (postal crimes); § 151 *et seq.* (bankruptcy crimes); 8 U. S. C. §§ 1324–1328 (immigration crimes).

Similarly, Congress, in order to help ensure the enforcement of federal criminal laws enacted in furtherance of its enumerated powers, "can cause a prison to be erected at any place within the jurisdiction of the United States, and direct that all persons sentenced to imprisonment under the laws of the United States shall be confined there." *Ex parte Karstendick*, 93 U. S. 396, 400 (1876). Moreover, Congress, having established a prison system, can enact laws that seek to ensure that system's safe and responsible administration

by, for example, requiring prisoners to receive medical care and educational training, see, *e. g.*, 18 U. S. C. §§ 4005–4006; § 4042(a)(3), and can also ensure the safety of the prisoners, prison workers and visitors, and those in surrounding communities by, for example, creating further criminal laws governing entry, exit, and smuggling, and by employing prison guards to ensure discipline and security, see, *e. g.*, § 1791 (prohibiting smuggling contraband); § 751 *et seq.* (prohibiting escape and abetting thereof); 28 CFR § 541.10 *et seq.* (2009) (inmate discipline).

Neither Congress' power to criminalize conduct, nor its power to imprison individuals who engage in that conduct, nor its power to enact laws governing prisons and prisoners, is explicitly mentioned in the Constitution. But Congress nonetheless possesses broad authority to do each of those things in the course of "carrying into Execution" the enumerated powers "vested by" the "Constitution in the Government of the United States," Art. I, § 8, cl. 18—authority granted by the Necessary and Proper Clause.

Second, the civil-commitment statute before us constitutes a modest addition to a set of federal prison-related mental-health statutes that have existed for many decades. We recognize that even a longstanding history of related federal action does not demonstrate a statute's constitutionality. See, *e. g.*, *Walz* v. *Tax Comm'n of City of New York*, 397 U. S. 664, 678 (1970) ("[N]o one acquires a vested or protected right in violation of the Constitution by long use . . . "); cf. *Morrison*, 529 U. S., at 612–614 (legislative history is neither necessary nor sufficient with respect to Art. I analysis). A history of involvement, however, can nonetheless be "helpful in reviewing the substance of a congressional statutory scheme," *Gonzales*, 545 U. S., at 21; *Walz*, *supra*, at 678, and, in particular, the reasonableness of the relation between the new statute and pre-existing federal interests.

Here, Congress has long been involved in the delivery of mental-health care to federal prisoners, and has long pro-

vided for their civil commitment. In 1855, it established Saint Elizabeth's Hospital in the District of Columbia to provide treatment to "the insane of the army and navy . . . and of the District of Columbia." Act of Mar. 3, 1855, 10 Stat. 682; 39 Stat. 309. In 1857, it provided for confinement at Saint Elizabeth's of any person within the District of Columbia who had been "charged with [a] crime" and who was "insane" or later became "insane during the continuance of his or her sentence in the United States penitentiary." Act of Feb. 7, 1857, §§ 5–6, 11 Stat. 158; see 17 Op. Atty. Gen. 211, 212–213 (1881). In 1874, expanding the geographic scope of its statutes, Congress provided for civil commitment in federal facilities (or in state facilities if a State so agreed) of "*all* persons who have been or shall be convicted of any offense in *any* court of the United States" and who are or "shall become" insane "during the term of their imprisonment." Act of June 23, 1874, ch. 465, 18 Stat. 251 (emphasis added). And in 1882, Congress provided for similar commitment of those "*charged*" with federal offenses who become "insane" while in the "custody" of the United States. Act of Aug. 7, 1882, 22 Stat. 330 (emphasis added). Thus, over the span of three decades, Congress created a national, federal civil-commitment program under which any person who was either charged with or convicted of any federal offense in any federal court could be confined in a federal mental institution.

These statutes did not raise the question presented here, for they all provided that commitment in a federal hospital would end upon the completion of the relevant "terms" of federal "imprisonment" as set forth in the underlying criminal sentence or statute. §§ 2–3, 18 Stat. 252; see 35 Op. Atty. Gen. 366, 368 (1927); cf. 30 Op. Atty. Gen. 569, 571 (1916). But in the mid-1940's that proviso was eliminated.

In 1945, the Judicial Conference of the United States proposed legislative reforms of the federal civil-commitment system. The Judicial Conference based its proposals upon

what this Court has described as a "long study by a conspicuously able committee" (chaired by Judge Calvert Magruder and whose members included Judge Learned Hand), involving consultation "with federal district and circuit judges" across the country as well as with the Department of Justice. *Greenwood* v. *United States*, 350 U. S. 366, 373 (1956); *Greenwood* v. *United States*, 219 F. 2d 376, 380–384 (CA8 1955) (describing the committee's work). The committee studied, among other things, the "serious problem faced by the Bureau of Prisons, namely, what to do with insane criminals upon the expiration of their terms of confinement, where it would be dangerous to turn them loose upon society and where no state will assume responsibility for their custody." Judicial Conference, Report of Committee To Study Treatment Accorded by Federal Courts to Insane Persons Charged With Crime 11 (1945) (hereinafter Committee Report), App. 73. The committee provided examples of instances in which the Bureau of Prisons had struggled with the problem of "'paranoid'" and "'threatening'" individuals whom no State would accept. *Id.*, at 9, App. 71. And it noted that, in the Bureau's "[e]xperience," States would not accept an "appreciable number" of "mental[ly] incompetent" individuals "nearing expiration" of their prison terms, because of their "lack of legal residence in any State," even though those individuals "ought not . . . be at large because they constitute a menace to public safety." H. R. Rep. No. 1319, 81st Cong., 1st Sess., 2 (1949) (statement of James V. Bennett, Director); see also Letter from Bennett to Judge Magruder, attachment to Committee Report, App. 83–88. The committee, hence the Judicial Conference, therefore recommended that Congress enact "some provision of law authorizing the continued confinement of such persons after their sentences expired." Committee Report 11, App. 73; see also Report of the Judicial Conference of Senior Circuit Judges 13 (1945).

Between 1948 and 1949, following its receipt of the Judicial Conference report, Congress modified the law. See Act of June 25, 1948, 62 Stat. 855, 18 U. S. C. §§ 4241–4243 (1952 ed.); Act of Sept. 7, 1949, 63 Stat. 686, 18 U. S. C. §§ 4244–4248. It provided for the civil commitment of individuals who are, or who become, mentally incompetent at any time after their arrest and before the expiration of their federal sentence, §§ 4241, 4244, 4247–4248; and it set forth various procedural safeguards, §§ 4242, 4246, 4247. With respect to an individual whose prison term is about to expire, it specified the following:

> "Whenever the Director of the Bureau of Prisons shall certify that a prisoner whose sentence is about to expire has been examined [and] . . . in the judgment of the Director and the board of examiners the prisoner is insane or mentally incompetent, and . . . if released he will probably endanger the safety of the officers, the property, or other interests of the United States, and that suitable arrangements for the custody and care of the prisoner are not otherwise available, the Attorney General shall transmit the certificate to . . . the court for the district in which the prisoner is confined. Whereupon the court shall cause the prisoner to be examined . . . and shall . . . hold a hearing . . . . If upon such hearing the court shall determine that the conditions specified above exist, the court may commit the prisoner to the custody of the Attorney General or his authorized representative." § 4247.

The precondition that the mentally ill individual's release would "probably endanger the safety of the officers, the property, or other interests of the United States" was uniformly interpreted by the Judiciary to mean that his "release would endanger the safety of persons, property or the public interest in general—not merely the interests peculiar to the United States as such." *United States* v. *Curry,* 410 F. 2d

1372, 1374 (CA4 1969); see also *Royal* v. *United States*, 274 F. 2d 846, 851–852 (CA10 1960).

In 1984, Congress modified these basic statutes. See Insanity Defense Reform Act of 1984, 98 Stat. 2057, 18 U. S. C. §§ 4241–4247 (2006 ed.). As relevant here, it altered the provision just discussed, regarding the prisoner's danger to the "interests of the United States," to conform more closely to the then-existing judicial interpretation of that language, *i. e.*, it altered the language so as to authorize (explicitly) civil commitment if, in addition to the other conditions, the prisoner's "release would create a substantial risk of bodily injury to another person or serious damage to the property of another." § 4246(d).

Congress also elaborated upon the required condition "that suitable arrangements . . . are not otherwise available" by directing the Attorney General to seek alternative placement in state facilities, as we have set forth above. See *ibid.; supra*, at 130–131. With these modifications, the statutes continue to authorize the civil commitment of individuals who are both mentally ill and dangerous, once they have been charged with, or convicted of, a federal crime. §§ 4241(d), 4246; see also § 4243(d). They continue to provide for the *continued* civil commitment of those individuals when they are "due for release" from federal custody because their "sentence is about to expire." § 4246. And, as we have previously set forth, they establish various procedural and other requirements. *E. g.*, § 4247.

In 2006, Congress enacted the particular statute before us. § 302, 120 Stat. 619, 18 U. S. C. § 4248. It differs from earlier statutes in that it focuses directly upon persons who, due to a mental illness, are sexually dangerous. Notably, many of these individuals were likely already subject to civil commitment under § 4246, which, since 1949, has authorized the postsentence detention of federal prisoners who suffer from a mental illness and who are thereby dangerous (whether sexually or otherwise). But cf. H. R. Rep. No. 109–218,

pt. 1, p. 29 (2005). Aside from its specific focus on sexually dangerous persons, § 4248 is similar to the provisions first enacted in 1949. Cf. § 4246. In that respect, it is a modest addition to a longstanding federal statutory framework, which has been in place since 1855.

Third, Congress reasonably extended its longstanding civil-commitment system to cover mentally ill and sexually dangerous persons who are already in federal custody, even if doing so detains them beyond the termination of their criminal sentence. For one thing, the Federal Government is the custodian of its prisoners. As federal custodian, it has the constitutional power to act in order to protect nearby (and other) communities from the danger federal prisoners may pose. Cf. *Youngberg* v. *Romeo*, 457 U. S. 307, 320 (1982) ("In operating an institution such as [a prison system], there are occasions in which it is necessary for the State to restrain the movement of residents—for example, to protect them *as well as others* from violence" (emphasis added)). Indeed, at common law, one "who takes charge of a third person" is "under a duty to exercise reasonable care to control" that person to prevent him from causing reasonably foreseeable "bodily harm to others." 2 Restatement (Second) of Torts § 319, p. 129 (1963–1964); see *Volungus*, 595 F. 3d, at 7–8 (citing cases); see also *United States* v. *S. A.*, 129 F. 3d 995, 999 (CA8 1997) ("[Congress enacted § 4246] to avert the public danger likely to ensue from the release of mentally ill and dangerous detainees"). If a federal prisoner is infected with a communicable disease that threatens others, surely it would be "necessary and proper" for the Federal Government to take action, pursuant to its role as federal custodian, to refuse (at least until the threat diminishes) to release that individual among the general public, where he might infect others (even if not threatening an interstate epidemic, cf. Art. I, § 8, cl. 3). And if confinement of such an individual is a "necessary and proper" thing to do, then how could it not

be similarly "necessary and proper" to confine an individual whose mental illness threatens others to the same degree?

Moreover, § 4248 is "reasonably adapted," *Darby*, 312 U. S., at 121, to Congress' power to act as a responsible federal custodian (a power that rests, in turn, upon federal criminal statutes that legitimately seek to implement constitutionally enumerated authority, see *supra*, at 135–136). Congress could have reasonably concluded that federal inmates who suffer from a mental illness that causes them to "have serious difficulty in refraining from sexually violent conduct," § 4247(a)(6), would pose an especially high danger to the public if released. Cf. H. R. Rep. No. 109–218, at 22–23. And Congress could also have reasonably concluded (as detailed in the Judicial Conference's report) that a reasonable number of such individuals would likely *not* be detained by the States if released from federal custody, in part because the Federal Government itself severed their claim to "legal residence in any State" by incarcerating them in remote federal prisons. H. R. Rep. No. 1319, at 2; Committee Report 7–11, App. 69–75; cf. *post*, at 154 (KENNEDY, J., concurring in judgment). Here Congress' desire to address the specific challenges identified in the Reports cited above, taken together with its responsibilities as a federal custodian, supports the conclusion that § 4248 satisfies "review for means-end rationality," *i. e.*, that it satisfies the Constitution's insistence that a federal statute represent a rational means for implementing a constitutional grant of legislative authority. *Sabri*, 541 U. S., at 605 (citing *McCulloch*, 4 Wheat. 316). See *Jinks*, 538 U. S., at 462–463 (opinion for the Court by SCALIA, J.) (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").

Fourth, the statute properly accounts for state interests. Respondents and the dissent contend that § 4248 violates the Tenth Amendment because it "invades the province of state sovereignty" in an area typically left to state control. *New*

York v. *United States,* 505 U. S. 144, 155 (1992); see Brief for Respondents 35–47; *post,* at 164–165, 176–180 (THOMAS, J., dissenting). See also *Jackson* v. *Indiana*, 406 U. S. 715, 736 (1972) ("The States have traditionally exercised broad power to commit persons found to be mentally ill"). But the Tenth Amendment's text is clear: "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." (Emphasis added.) The powers "delegated to the United States by the Constitution" include those specifically enumerated powers listed in Article I along with the implementation authority granted by the Necessary and Proper Clause. Virtually by definition, these powers are not powers that the Constitution "reserved to the States." See *New York*, *supra*, at 156, 159 ("If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States . . . ." "In the end . . . it makes no difference whether one views the question at issue in these cases as one of ascertaining the limits of the power delegated to the Federal Government under the affirmative provisions of the Constitution or one of discerning the core of sovereignty retained by the States under the Tenth Amendment"); *Darby*, *supra*, at 123–124; see also *Hodel*, 452 U. S., at 276–277, 281; *Maryland* v. *Wirtz*, 392 U. S. 183, 195–196 (1968); *Lambert* v. *Yellowley,* 272 U. S. 581, 596 (1926).

Nor does this statute invade state sovereignty or otherwise improperly limit the scope of "powers that remain with the States." *Post*, at 164 (THOMAS, J., dissenting). To the contrary, it requires *accommodation* of state interests: The Attorney General must inform the State in which the federal prisoner "is domiciled or was tried" that he is detaining someone with respect to whom those States may wish to assert their authority, and he must encourage those States to assume custody of the individual. § 4248(d). He must also immediately "release" that person "to the appropriate official

of" either State "if such State will assume [such] responsibility." *Ibid.* And either State has the right, at any time, to assert its authority over the individual, which will prompt the individual's immediate transfer to state custody. § 4248(d)(1). Respondents contend that the States are nonetheless "powerless to *prevent* the detention of their citizens under § 4248, even if detention is contrary to the States' policy choices." Brief for Respondents 11 (emphasis added). But that is not the most natural reading of the statute, see §§ 4248(d)(1)–(e), and the Solicitor General acknowledges that "the Federal Government would have no appropriate role" with respect to an individual covered by the statute once "the transfer to State responsibility and State control has occurred." Tr. of Oral Arg. 9.

In *Greenwood*, 350 U. S. 366, the Court rejected a challenge to the current statute's predecessor—*i. e.*, to the 1949 statute we described above, *supra*, at 140–141. The petitioners in that case claimed, like the respondents here, that the statute improperly interfered with state sovereignty. See Brief for Petitioner in *Greenwood* v. *United States*, O. T. 1955, No. 460, pp. 2, 18–29. But the Court rejected that argument. See *Greenwood*, *supra*, at 375–376. And the version of the statute at issue in *Greenwood* was *less* protective of state interests than the current statute. That statute authorized federal custody so long as "*suitable* arrangements" were "not otherwise available" in a State or otherwise. 63 Stat. 687 (emphasis added). Cf. Brief for Petitioner in *Greenwood*, *supra*, at 25 ("What has really happened is that the Federal government has been dissatisfied with the care given by the states to those mentally incompetent who have been released by the Federal authorities"). Here, by contrast, as we have explained, § 4248 requires the Attorney General to encourage the relevant States to take custody of the individual without inquiring into the "suitability" of their intended care or treatment, and to relinquish federal authority whenever a State asserts its own. § 4248(d). Thus, if

the statute at issue in *Greenwood* did not invade state interests, then, *a fortiori*, neither does § 4248.

Fifth, the links between § 4248 and an enumerated Article I power are not too attenuated. Neither is the statutory provision too sweeping in its scope. Invoking the cautionary instruction that we may not "pile inference upon inference" in order to sustain congressional action under Article I, *Lopez*, 514 U. S., at 567, respondents argue that, when legislating pursuant to the Necessary and Proper Clause, Congress' authority can be no more than one step removed from a specifically enumerated power. See Brief for Respondents 21–22; Tr. of Oral Arg. 27–28. But this argument is irreconcilable with our precedents. Again, take *Greenwood* as an example. In that case we upheld the (likely indefinite) civil commitment of a mentally incompetent federal defendant who was accused of robbing a United States Post Office. 350 U. S., at 369, 375. The underlying enumerated Article I power was the power to "Establish Post Offices and post Roads." Art. I, § 8, cl. 7. But, as Chief Justice Marshall recognized in *McCulloch*,

> "the power 'to establish post offices and post roads' . . . is executed by the single act of *making* the establishment. . . . [F]rom this has been inferred the power and duty of *carrying* the mail along the post road, from one post office to another. And, from this *implied* power, has *again* been inferred the right to *punish* those who steal letters from the post office, or rob the mail." 4 Wheat., at 417 (emphasis added).

And, as we have explained, from the implied power to punish we have *further* inferred both the power to imprison, see *supra*, at 136–137, and, in *Greenwood*, the federal civil-commitment power.

Our necessary and proper jurisprudence contains multiple examples of similar reasoning. For example, in *Sabri* we observed that "Congress has authority under the Spending

Clause to appropriate federal moneys" and that it therefore "has corresponding authority under the Necessary and Proper Clause to see to it that taxpayer dollars" are not "siphoned off" by "corrupt public officers." 541 U. S., at 605 (citation omitted). We then further held that, in aid of that implied power to criminalize graft of "taxpayer dollars," Congress has the *additional* prophylactic power to criminalize bribes or kickbacks even when the stolen funds have not been "traceably skimmed from specific federal payments." *Id.*, at 605–606. Similarly, in *United States* v. *Hall*, 98 U. S. 343 (1879), we held that the Necessary and Proper Clause grants Congress the power, in furtherance of Art. I, § 8, cls. 11–13, to award "pensions to the wounded and disabled" soldiers of the armed forces and their dependents, 98 U. S., at 351; and from that implied power we further inferred the "[i]mplied power" "to pass laws to . . . punish" anyone who fraudulently appropriated such pensions, *id.*, at 346. See also *Stewart* v. *Kahn*, 11 Wall. 493, 506–507 (1871).

Indeed, even the dissent acknowledges that Congress has the implied power to criminalize any conduct that might interfere with the exercise of an enumerated power, and also the additional power to imprison people who violate those (inferentially authorized) laws, and the additional power to provide for the safe and reasonable management of those prisons, and the additional power to regulate the prisoners' behavior even after their release. See *post*, at 169–170, 173–174, n. 12. Of course, each of those powers, like the powers addressed in *Sabri*, *Hall*, and *McCulloch*, is ultimately "derived from" an enumerated power, *Hall*, *supra*, at 346. And, as the dissent agrees, that enumerated power is "the enumerated power that justifies the defendant's statute of conviction," *post*, at 174, n. 12. Neither we nor the dissent can point to a single specific enumerated power "that justif[ies] a criminal defendant's arrest or conviction," *post*, at 169, in *all* cases because Congress relies on different enumerated powers (often, but not exclusively, its Commerce Clause

power) to enact its various federal criminal statutes, see *supra*, at 136. But every such statute must itself be legitimately predicated on an enumerated power. And the same enumerated power that justifies the creation of a federal criminal statute, and that justifies the additional implied federal powers that the dissent considers legitimate, justifies civil commitment under § 4248 as well. See *supra*, at 142–143. Thus, we must reject respondents' argument that the Necessary and Proper Clause permits no more than a single step between an enumerated power and an Act of Congress.

Nor need we fear that our holding today confers on Congress a general "police power, which the Founders denied the National Government and reposed in the States." *Morrison*, 529 U. S., at 618. As the Solicitor General repeatedly confirmed at oral argument, § 4248 is narrow in scope. It has been applied to only a small fraction of federal prisoners. See Tr. of Oral Arg. 24–25 (105 individuals have been subject to § 4248 out of over 188,000 federal inmates); see also Dept. of Justice, Bureau of Justice Statistics, W. Sabol, H. West, & M. Cooper, Prisoners in 2008, p. 8 (NCJ 228417, Dec. 2009) (Table 8). And its reach is limited to individuals already "in the custody of the" Federal Government. § 4248(a); Tr. of Oral Arg. 7 ("[Federal authority for § 4248] has always depended on the fact of Federal custody, on the fact that this person has entered the criminal justice system . . . "). Indeed, the Solicitor General argues 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." *Id.*, at 9. Thus, far from a "general police power," § 4248 is a reasonably adapted and narrowly tailored means of pursuing the Government's legitimate interest as a federal custodian in the responsible administration of its prison system.

To be sure, as we have previously acknowledged:

> "The Federal Government undertakes activities today that would have been unimaginable to the Framers in

> two senses; first, because the Framers would not have conceived that *any* government would conduct such activities; and second, because the Framers would not have believed that the *Federal* Government, rather than the States, would assume such responsibilities. Yet the powers conferred upon the Federal Government by the Constitution were phrased in language broad enough to allow for the expansion of the Federal Government's role." *New York*, 505 U. S., at 157.

The Framers demonstrated considerable foresight in drafting a Constitution capable of such resilience through time. As Chief Justice Marshall observed nearly 200 years ago, the Necessary and Proper Clause is part of "a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs." *McCulloch*, 4 Wheat., at 415 (emphasis deleted).

* * *

We take these five considerations together. They include: (1) the breadth of the Necessary and Proper Clause, (2) the long history of federal involvement in this arena, (3) the sound reasons for the statute's enactment in light of the Government's custodial interest in safeguarding the public from dangers posed by those in federal custody, (4) the statute's accommodation of state interests, and (5) the statute's narrow scope. Taken together, these considerations lead us to conclude that the statute is a "necessary and proper" means of exercising the federal authority that permits Congress to create federal criminal laws, to punish their violation, to imprison violators, to provide appropriately for those imprisoned, and to maintain the security of those who are not imprisoned but who may be affected by the federal imprisonment of others. The Constitution consequently authorizes Congress to enact the statute.

We do not reach or decide any claim that the statute or its application denies equal protection of the laws, procedural or

substantive due process, or any other rights guaranteed by the Constitution. Respondents are free to pursue those claims on remand, and any others they have preserved.

The judgment of the Court of Appeals for the Fourth Circuit with respect to Congress' power to enact this statute is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE KENNEDY, concurring in the judgment.

The Court is correct, in my view, to hold that the challenged portions of 18 U. S. C. § 4248 are necessary and proper exercises of congressional authority.

Respondents argue that congressional authority under the Necessary and Proper Clause can be no more than one step removed from an enumerated power. This is incorrect. When the inquiry is whether a federal law has sufficient links to an enumerated power to be within the scope of federal authority, the analysis depends not on the number of links in the congressional-power chain but on the strength of the chain.

Concluding that a relation can be put into a verbal formulation that fits somewhere along a causal chain of federal powers is merely the beginning, not the end, of the constitutional inquiry. See *United States* v. *Lopez*, 514 U. S. 549, 566–567 (1995). The inferences must be controlled by some limitations lest, as Thomas Jefferson warned, congressional powers become completely unbounded by linking one power to another *ad infinitum* in a veritable game of "'this is the house that Jack built.'" Letter from Thomas Jefferson to Edward Livingston (Apr. 30, 1800), 31 The Papers of Thomas Jefferson 547 (B. Oberg ed. 2004); see also *United States* v. *Patton*, 451 F. 3d 615, 628 (CA10 2006).

This separate writing serves two purposes. The first is to withhold assent from certain statements and propositions of the Court's opinion. The second is to caution that the

Constitution does require the invalidation of congressional attempts to extend federal powers in some instances.

I

The Court concludes that, when determining whether Congress has the authority to enact a specific law under the Necessary and Proper Clause, we look "to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power." *Ante*, at 134 (suggesting that *Sabri* v. *United States*, 541 U. S. 600, 605 (2004), adopts a "means-ends rationality" test).

The terms "rationally related" and "rational basis" must be employed with care, particularly if either is to be used as a stand-alone test. The phrase "rational basis" most often is employed to describe the standard for determining whether legislation that does not proscribe fundamental liberties nonetheless violates the Due Process Clause. Referring to this due process inquiry, and in what must be one of the most deferential formulations of the standard for reviewing legislation in all the Court's precedents, the Court has said: "But the law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it." *Williamson* v. *Lee Optical of Okla., Inc.*, 348 U. S. 483, 487–488 (1955). This formulation was in a case presenting a due process challenge and a challenge to a State's exercise of its own powers, powers not confined by the principles that control the limited nature of our National Government. The phrase, then, should not be extended uncritically to the issue before us.

The operative constitutional provision in this case is the Necessary and Proper Clause. This Court has not held that the *Lee Optical* test, asking if "it might be thought that the particular legislative measure was a rational way to correct" an evil, is the proper test in this context. Rather, under the

Necessary and Proper Clause, application of a "rational basis" test should be at least as exacting as it has been in the Commerce Clause cases, if not more so. Indeed, the cases the Court cites in the portion of its opinion referring to "rational basis" are predominantly Commerce Clause cases, and none are due process cases. See *ante*, at 134–135 (citing *Gonzales* v. *Raich*, 545 U. S. 1 (2005); *Lopez*, *supra;* *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U. S. 264, 276 (1981)).

There is an important difference between the two questions, but the Court does not make this distinction clear. *Raich*, *Lopez*, and *Hodel* were all Commerce Clause cases. Those precedents require a tangible link to commerce, not a mere conceivable rational relation, as in *Lee Optical.* "'[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.'" *Lopez*, *supra*, at 557, n. 2 (quoting *Hodel*, *supra*, at 311 (Rehnquist, J., concurring in judgment)). The rational basis referred to in the Commerce Clause context is a demonstrated link in fact, based on empirical demonstration. While undoubtedly deferential, this may well be different from the rational-basis test as *Lee Optical* described it.

The Court relies on *Sabri*, *supra*, for its conclusion that a "means-ends rationality" is all that is required for a power to come within the Necessary and Proper Clause's reach. See *ante*, at 134. *Sabri* only refers to "means-ends rationality" in a parenthetical describing the holding in *McCulloch* v. *Maryland*, 4 Wheat. 316 (1819); it certainly did not import the *Lee Optical* rational-basis test into this arena through such a parenthetical. See *Sabri*, *supra*, at 612 (THOMAS, J., concurring in judgment) ("A statute can have a 'rational' connection to an enumerated power without being obviously or clearly tied to that enumerated power"). It should be remembered, moreover, that the spending power is not designated as such in the Constitution but rather is implied from

the power to lay and collect taxes and other specified exactions in order, among other purposes, "to pay the Debts and provide for the common Defence and general Welfare of the United States." Art. I, § 8, cl. 1; see *South Dakota* v. *Dole*, 483 U. S. 203, 206 (1987). The limits upon the spending power have not been much discussed, but if the relevant standard is parallel to the Commerce Clause cases, then the limits and the analytic approach in those precedents should be respected.

A separate concern stems from the Court's explanation of the Tenth Amendment. *Ante*, at 143–144. I had thought it a basic principle that the powers reserved to the States consist of the whole, undefined residuum of power remaining after taking account of powers granted to the National Government. The Constitution delegates limited powers to the National Government and then reserves the remainder for the States (or the people), not the other way around, as the Court's analysis suggests. And the powers reserved to the States are so broad that they remain undefined. Residual power, sometimes referred to (perhaps imperfectly) as the police power, belongs to the States and the States alone.

It is correct in one sense to say that if the National Government has the power to act under the Necessary and Proper Clause then that power is not one reserved to the States. But the precepts of federalism embodied in the Constitution inform which powers are properly exercised by the National Government in the first place. See *Lopez*, 514 U. S., at 580–581 (KENNEDY, J., concurring); see also *McCulloch*, *supra*, at 421 (powers "consist[ent] with the letter and spirit of the constitution, are constitutional"). 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; if so, that is a factor suggesting that the power is not one properly within the reach of federal power.

The opinion of the Court should not be interpreted to hold that the only, or even the principal, constraints on the exercise of congressional power are the Constitution's express prohibitions. The Court's discussion of the Tenth Amendment invites the inference that restrictions flowing from the federal system are of no import when defining the limits of the National Government's power, as it proceeds by first asking whether the power is within the National Government's reach, and if so it discards federalism concerns entirely.

These remarks explain why the Court ignores important limitations stemming from federalism principles. Those principles are essential to an understanding of the function and province of the States in our constitutional structure.

II

As stated at the outset, in this case Congress has acted within its powers to ensure that an abrupt end to the federal detention of prisoners does not endanger third parties. Federal prisoners often lack a single home State to take charge of them due to their lengthy prison stays, so it is incumbent on the National Government to act. This obligation, parallel in some respects to duties defined in tort law, is not to put in motion a particular force (here an unstable and dangerous person) that endangers others. Having acted within its constitutional authority to detain the person, the National Government can acknowledge a duty to ensure that an abrupt end to the detention does not prejudice the States and their citizens.

I would note, as the Court's opinion does, that § 4248 does not supersede the right and responsibility of the States to identify persons who ought to be subject to civil confinement. The federal program in question applies only to those in federal custody and thus involves little intrusion upon the ordinary processes and powers of the States.

This is not a case in which the National Government demands that a State use its own governmental system to im-

plement federal commands. See *Printz* v. *United States*, 521 U. S. 898 (1997). It is not a case in which the National Government relieves the States of their own primary responsibility to enact laws and policies for the safety and well-being of their citizens. See *United States* v. *Morrison*, 529 U. S. 598 (2000). Nor is it a case in which the exercise of national power intrudes upon functions and duties traditionally committed to the State. See *Lopez*, *supra*, at 580–581 (KENNEDY, J., concurring).

Rather, this is a discrete and narrow exercise of authority over a small class of persons already subject to the federal power. Importantly, § 4248(d) requires the Attorney General to release any civil detainee "to the appropriate official of the State in which the person is domiciled or was tried if such State will assume responsibility for his custody, care, and treatment," providing a strong assurance that the proffered reason for the legislation's necessity is not a mere artifice.

With these observations, I concur in the judgment of the Court.

JUSTICE ALITO, concurring in the judgment.

I am concerned about the breadth of the Court's language, see *ante*, at 151–153 (KENNEDY, J., concurring in judgment), and the ambiguity of the standard that the Court applies, see *post*, at 166 (THOMAS, J., dissenting), but I am persuaded, on narrow grounds, that it was "necessary and proper" for Congress to enact the statute at issue in this case, 18 U. S. C. § 4248, in order to "carr[y] into Execution" powers specifically conferred on Congress by the Constitution, see Art. I, § 8, cl. 18.

Section 4248 was enacted to protect the public from federal prisoners who suffer from "a serious mental illness, abnormality, or disorder" and who, if released, would have "serious difficulty in refraining from sexually violent conduct or child molestation." See §§ 4247(a)(5), (6), 4248(d). Under

this law, if neither the State of a prisoner's domicile nor the State in which the prisoner was tried will assume the responsibility for the prisoner's "custody, care, and treatment," the Federal Government is authorized to undertake that responsibility. § 4248(d). The statute recognizes that, in many cases, no State will assume the heavy financial burden of civilly committing a dangerous federal prisoner who, as a result of lengthy federal incarceration, no longer has any substantial ties to any State.

I entirely agree with the dissent that "[t]he Necessary and Proper Clause empowers Congress to enact only those laws that 'carr[y] into Execution' one or more of the federal powers enumerated in the Constitution," *post*, at 159, but § 4248 satisfies that requirement because it is a necessary and proper means of carrying into execution the enumerated powers that support the federal criminal statutes under which the affected prisoners were convicted. The Necessary and Proper Clause provides the constitutional authority for most federal criminal statutes. In other words, most federal criminal statutes rest upon a congressional judgment that, in order to execute one or more of the powers conferred on Congress, it is necessary and proper to criminalize certain conduct, and in order to do that it is obviously necessary and proper to provide for the operation of a federal criminal justice system and a federal prison system.

All of this has been recognized since the beginning of our country. The First Congress enacted federal criminal laws,[1] created federal law enforcement and prosecutorial positions,[2]

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[1] See, *e. g.*, ch. 9, 1 Stat. 112 ("An Act for the Punishment of certain Crimes against the United States").

[2] § 35, *id.*, at 92 ("[T]here shall be appointed in each district a meet person learned in the law to act as attorney for the United States in such district, . . . whose duty it shall be to prosecute in such district all delinquents for crimes and offences, cognizable under the authority of the United States").

established a federal court system,[3] provided for the imprisonment of persons convicted of federal crimes,[4] and gave United States marshals the responsibility of securing federal prisoners.[5]

The only additional question presented here is whether, in order to carry into execution the enumerated powers on which the federal criminal laws rest, it is also necessary and proper for Congress to protect the public from dangers created by the federal criminal justice and prison systems. In my view, the answer to that question is "yes." Just as it is necessary and proper for Congress to provide for the apprehension of escaped federal prisoners, it is necessary and proper for Congress to provide for the civil commitment of dangerous federal prisoners who would otherwise escape civil commitment as a result of federal imprisonment.

Some years ago, a distinguished study group created by the Judicial Conference of the United States found that, in a

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[3] § 1, *id.*, at 73 ("An Act to establish the Judicial Courts of the United States").

[4] See, *e. g.*, § 9, *id.*, at 76–77 (providing that the federal district courts shall have exclusive jurisdiction over "all crimes and offences that shall be cognizable under the authority of the United States, . . . where no other punishment than whipping, not exceeding thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months, is to be inflicted"); see also J. Roberts, The Federal Bureau of Prisons: Its Mission, Its History, and Its Partnership With Probation and Pretrial Services, 61 Fed. Probation 53 (1997) (explaining that federal prisoners were originally housed in state and county facilities on a contract basis).

[5] See § 27, 1 Stat. 87 ("[A] marshal shall be appointed in and for each district for the term of four years, . . . whose duty it shall be to attend the district and circuit courts when sitting therein, . . . [a]nd to execute throughout the district, all lawful precepts directed to him, and issued under the authority of the United States"); § 28, *id.*, at 88 ("[T]he marshal shall be held answerable for the delivery to his successor of all prisoners which may be in his custody at the time of his removal, or when the term for which he is appointed shall expire, and for that purpose may retain such prisoners in his custody until his successor shall be appointed and qualified as the law directs").

disturbing number of cases, no State was willing to assume the financial burden of providing for the civil commitment of federal prisoners who, if left at large after the completion of their sentences, would present a danger to any communities in which they chose to live or visit. See *ante*, at 138–139; *Greenwood* v. *United States*, 350 U. S. 366, 373–374 (1956). These federal prisoners, having been held for years in a federal prison, often had few ties to any State; it was a matter of speculation where they would choose to go upon release; and accordingly no State was enthusiastic about volunteering to shoulder the burden of civil commitment.

The Necessary and Proper Clause does not give Congress *carte blanche*. Although the term "necessary" does not mean "absolutely necessary" or indispensable, the term requires an "appropriate" link between a power conferred by the Constitution and the law enacted by Congress. See *McCulloch* v. *Maryland*, 4 Wheat. 316, 415 (1819). And it is an obligation of this Court to enforce compliance with that limitation. *Id.*, at 423.

The law in question here satisfies that requirement. This is not a case in which it is merely possible for a court to think of a rational basis on which Congress might have perceived an attenuated link between the powers underlying the federal criminal statutes and the challenged civil commitment provision. Here, there is a substantial link to Congress' constitutional powers.

For this reason, I concur in the judgment that Congress had the constitutional authority to enact 18 U. S. C. § 4248.

JUSTICE THOMAS, with whom JUSTICE SCALIA joins in all but Part III–A–1–b, dissenting.

The Court holds today that Congress has power under the Necessary and Proper Clause to enact a law authorizing the Federal Government to civilly commit "sexually dangerous person[s]" beyond the date it lawfully could hold them on a charge or conviction for a federal crime. 18 U. S. C.

§ 4248(a). I disagree. The Necessary and Proper Clause empowers Congress to enact only those laws that "carr[y] into Execution" one or more of the federal powers enumerated in the Constitution. Art. I, § 8, cl. 18. Because § 4248 "Execut[es]" no enumerated power, I must respectfully dissent.

I

"As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory* v. *Ashcroft*, 501 U. S. 452, 457 (1991). In our system, the Federal Government's powers are enumerated, and hence limited. See, *e. g.*, *McCulloch* v. *Maryland*, 4 Wheat. 316, 405 (1819) ("This government is acknowledged by all to be one of enumerated powers"). Thus, Congress has no power to act unless the Constitution authorizes it to do so. *United States* v. *Morrison*, 529 U. S. 598, 607 (2000) ("Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution"). The States, in turn, are free to exercise all powers that the Constitution does not withhold from them. 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").[1] This constitutional structure establishes different default rules for Congress and the States: Congress' powers are "few and defined," while those that belong to the States "remain . . . numerous and indefinite." The Federalist No. 45, p. 328 (B. Wright ed. 1961) (J. Madison).

The Constitution plainly sets forth the "few and defined" powers that Congress may exercise. Article I "vest[s]" in

[1] "With this careful last phrase, the [Tenth] Amendment avoids taking any position on the division of power between the state governments and the people of the States: It is up to the people of each State to determine which 'reserved' powers their state government may exercise." *U. S. Term Limits, Inc.* v. *Thornton*, 514 U. S. 779, 848 (1995) (THOMAS, J., dissenting).

Congress "[a]ll legislative Powers herein granted," §1, and carefully enumerates those powers in §8. The final clause of §8, the Necessary and Proper Clause, authorizes Congress "[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." As the Clause's placement at the end of §8 indicates, the "foregoing Powers" are those granted to Congress in the preceding clauses of that section. The "other Powers" to which the Clause refers are those "vested" in Congress and the other branches by other specific provisions of the Constitution.

Chief Justice Marshall famously summarized Congress' authority under the Necessary and Proper Clause in *McCulloch*, which has stood for nearly 200 years as this Court's definitive interpretation of that text:

> "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." 4 Wheat., at 421.

McCulloch's summation is descriptive of the Clause itself, providing that federal legislation is a valid exercise of Congress' authority 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"—that is, the powers expressly delegated to the Federal Government by some provision in the Constitution. 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. *Ibid.* *McCulloch* accords Congress a certain amount of discretion in assessing means-end fit under this second inquiry. 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." *Ibid.*

Critically, however, *McCulloch* underscores the linear relationship the Clause establishes between the two inquiries: Unless the end itself is "legitimate," the fit between means and end is irrelevant. In other words, no 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. Art. I, § 8, cl. 18.

This limitation was of utmost importance to the Framers. During the state ratification debates, Anti-Federalists expressed concern that the Necessary and Proper Clause would give Congress virtually unlimited power. See, *e. g.*, Essays of Brutus, in 2 The Complete Anti-Federalist 421 (H. Storing ed. 1981). Federalist supporters of the Constitution swiftly refuted that charge, explaining that the Clause did not grant Congress any freestanding authority, but instead made explicit what was already implicit in the grant of each enumerated power. Referring to the "powers declared in the Constitution," Alexander Hamilton noted that "it is *expressly* to execute these powers that the sweeping clause . . . authorizes the national legislature to pass all *necessary* and *proper* laws." The Federalist No. 33, at 245. James Madison echoed this view, stating that "the sweeping clause . . . only extend[s] to the enumerated powers." 3 J. Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 455 (1836) (hereinafter Elliot). Statements by delegates to the state ratification conventions indicate that this understanding was widely held by the founding generation. *E. g.*, *id.*, at 245–246 (statement of George Nicholas) ("Suppose [the Necessary and Proper Clause] had been inserted, at the end of every power, that

they should have power to make laws to carry that power into execution; would that have increased their powers? If, therefore, it could not have increased their powers, if placed at the end of each power, it cannot increase them at the end of all").[2]

Roughly 30 years after the Constitution's ratification, *McCulloch* firmly established this understanding in our constitutional jurisprudence. 4 Wheat., at 421, 423. Since then, our precedents uniformly have maintained that the Necessary and Proper Clause is not an independent fount of congressional authority, but rather "a *caveat* that Congress possesses all the means necessary to carry out the specifically granted 'foregoing' powers of §8 'and all other Powers vested by this Constitution.'" *Kinsella* v. *United States ex rel. Singleton*, 361 U. S. 234, 247 (1960); *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 291 (1936); see *Alden* v. *Maine*, 527 U. S. 706, 739 (1999); *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 326 (1816); see also *Gonzales* v. *Raich*, 545 U. S. 1, 39 (2005) (SCALIA, J., concurring in judgment) (stating that, although the Clause "empowers Congress to enact laws . . . that are not within its authority to enact in isolation," those laws must be "in effectuation of [Congress'] enumerated powers" (citing *McCulloch*, *supra*, at 421–422)).

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[2] See also 4 Elliot 141 (statement of William Maclaine) ("This clause specifies that [Congress] shall make laws to carry into execution *all the powers vested* by this Constitution, consequently they can make no laws to execute any other power"); 2 *id.*, at 468 (statement of James Wilson) ("[W]hen it is said that Congress shall have power to make all laws which shall be necessary and proper, those words are limited and defined by the following, 'for carrying into execution the foregoing powers.' [The Clause] is saying no more than that the powers we have already particularly given, shall be effectually carried into execution"); Barnett, The Original Meaning of the Necessary and Proper Clause, 6 U. Pa. J. Const. L. 183, 185–186 (2003); Lawson & Granger, The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause, 43 Duke L. J. 267, 274–275, and n. 24 (1993).

II

Section 4248 establishes a federal civil-commitment regime for certain persons in the custody of the Federal Bureau of Prisons (BOP).[3] If the Attorney General demonstrates to a federal court by clear and convincing evidence that a person subject to the statute is "sexually dangerous,"[4] a court may order the person committed until he is no longer a risk "to others," even if that does not occur until after his federal criminal sentence has expired or the statute of limitations on the federal charge against him has run. §§ 4248(a), (d)–(e).

No enumerated power in Article I, § 8, expressly delegates to Congress the power to enact a civil-commitment regime for sexually dangerous persons, nor does any other provision in the Constitution vest Congress or the other branches of the Federal Government with such a power. Accordingly, § 4248 can be a valid exercise of congressional authority only if it is "necessary and proper for carrying into Execution" one or more of those federal powers actually enumerated in the Constitution.

Section 4248 does not fall within any of those powers. The Government identifies no specific enumerated power or powers as a constitutional predicate for § 4248, and none are readily discernable. Indeed, not even the Commerce

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[3] The statute authorizes the Attorney General to petition a federal court to order the commitment of a person in BOP custody (1) who has been convicted of a federal crime and is serving a federal prison sentence therefor, (2) who has been found mentally incompetent to stand trial, or (3) "against whom all federal criminal charges have been dismissed solely for reasons relating to [his] mental condition." 18 U. S. C. § 4248(a).

[4] The Act defines a "sexually dangerous person" as one "who has engaged or attempted to engage in sexually violent conduct or child molestation," and "who is sexually dangerous to others." § 4247(a)(5). It further defines "sexually dangerous to others" to mean a person who "suffers from a serious mental illness" such that he would "have serious difficulty in refraining from sexually violent conduct or child molestation if released." § 4247(a)(6).

Clause—the enumerated power this Court has interpreted most expansively, see, *e. g.*, *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 37 (1937)—can justify federal civil detention of sex offenders. Under the Court's precedents, Congress may not regulate noneconomic activity (such as sexual violence) based solely on the effect such activity may have, in individual cases or in the aggregate, on interstate commerce. *Morrison*, 529 U. S., at 617–618; *United States* v. *Lopez*, 514 U. S. 549, 563–567 (1995). That limitation forecloses any claim that § 4248 carries into execution Congress' Commerce Clause power, and the Government has never argued otherwise, see Tr. of Oral Arg. 21–22.[5]

This Court, moreover, consistently has recognized that the power to care for the mentally ill and, where necessary, the power "to protect the community from the dangerous tendencies of some" mentally ill persons, are among the numerous powers that remain with the States. *Addington* v. *Texas*, 441 U. S. 418, 426 (1979). As a consequence, we have held that States may "take measures to restrict the freedom of the dangerously mentally ill"—including those who are sexually dangerous—provided that such commitments satisfy due process and other constitutional requirements. *Kansas* v. *Hendricks*, 521 U. S. 346, 363 (1997).

Section 4248 closely resembles the involuntary civil-commitment laws that States have enacted under their *parens patriae* and general police powers. Indeed, it is clear, on the face of the Act and in the Government's arguments urging its constitutionality, that § 4248 is aimed at protecting society from acts of sexual violence, not toward "carrying into Execution" any enumerated power or powers of the Federal Government. See Adam Walsh Child Protection and Safety Act of 2006, 120 Stat. 587 (entitled "[a]n Act [t]o protect children from sexual exploitation and violent crime"),

[5] For the reasons explained in Part III–A–2, *infra*, the enumerated power that justifies a particular defendant's criminal arrest or conviction cannot justify his subsequent civil detention under § 4248.

§ 102, *id.*, at 590 (statement of purpose declaring that the Act was promulgated "to protect the public from sex offenders"); Brief for United States 38–39 (asserting the Federal Government's power to "*protect the public from harm* that might result upon these prisoners' release, even when that harm might arise from conduct that is *otherwise beyond the general regulatory powers of the federal government*" (emphasis added)).

To be sure, protecting society from violent sexual offenders is certainly an important end. Sexual abuse is a despicable act with untold consequences for the victim personally and society generally. See, *e. g.*, *Kennedy* v. *Louisiana*, 554 U. S. 407, 455, n. 2, 468–469 (2008) (ALITO, J., dissenting). But the Constitution does not vest in Congress the authority to protect society from every bad act that might befall it.[6] *New York* v. *United States*, 505 U. S. 144, 157 (1992) ("'The question is not what power the Federal Government ought to have but what powers in fact have been given by the people'" (quoting *United States* v. *Butler*, 297 U. S. 1, 63 (1936))).

In my view, this should decide the question. Section 4248 runs afoul of our settled understanding of Congress' power under the Necessary and Proper Clause. Congress may act under that Clause only when its legislation "carr[ies] into Execution" one of the Federal Government's enumerated powers. Art. I, § 8, cl. 18. Section 4248 does not execute *any* enumerated power. Section 4248 is therefore unconstitutional.

III

The Court perfunctorily genuflects to *McCulloch*'s framework for assessing Congress' Necessary and Proper Clause authority, and to the principle of dual sovereignty it helps to

[6] The absence of a constitutional delegation of general police power to Congress does not leave citizens vulnerable to the harms Congress seeks to regulate in § 4248 because, as recent legislation indicates, the States have the capacity to address the threat that sexual offenders pose. See n. 15, *infra*.

maintain, then promptly abandons both in favor of a novel five-factor test supporting its conclusion that § 4248 is a "'necessary and proper'" adjunct to a jumble of *unenumerated* "authorit[ies]." *Ante,* at 149. The Court's newly minted test cannot be reconciled with the Clause's plain text or with two centuries of our precedents interpreting it. It also raises more questions than it answers. Must each of the five considerations exist before the Court sustains future federal legislation as proper exercises of Congress' Necessary and Proper Clause authority? What if the facts of a given case support a finding of only four considerations? Or three? And if three or four will suffice, *which* three or four are imperative? At a minimum, this shift from the two-step *McCulloch* framework to this five-consideration approach warrants an explanation as to why *McCulloch* is no longer good enough and which of the five considerations will bear the most weight in future cases, assuming some number less than five suffices. (Or, if not, why all five are required.) The Court provides no answers to these questions.

A

I begin with the first and last "considerations" in the Court's inquiry. *Ante,* at 133. The Court concludes that § 4248 is a valid exercise of Congress' Necessary and Proper Clause authority because that authority is "broad," *ibid.*, and because "the links between § 4248 and an enumerated Article I power are not too attenuated," *ante,* at 146. In so doing, the Court first inverts, then misapplies, *McCulloch*'s straightforward two-part test.

1

a

First, the Court describes Congress' lawmaking power under the Necessary and Proper Clause as "broad," relying on precedents that have upheld federal laws under the Clause after finding a "'rationa[l]'" fit between the law and

an enumerated power. *Ante,* at 134 (quoting *Sabri* v. *United States,* 541 U. S. 600, 605 (2004)). It is true that this Court's precedents allow Congress a certain degree of latitude in selecting the means for "carrying into Execution" an end that is "legitimate."[7] See, *e. g., Jinks* v. *Richland County,* 538 U. S. 456, 462–463 (2003) (citing *McCulloch,* 4 Wheat., at 417, 421). But in citing these cases, the Court puts the cart before the horse: The fit between means and ends matters only if the end is in fact legitimate—*i. e.*, only if it is one of the Federal Government's enumerated powers.

By starting its inquiry with the degree of deference owed to Congress in selecting means to further a legitimate end, the Court bypasses *McCulloch*'s first step and fails carefully to examine whether the end served by § 4248 is actually one of those powers. See Part III–A–2, *infra.*

b

Second, instead of asking the simple question of what enumerated power § 4248 "carr[ies] into Execution" at *McCulloch*'s first step, the Court surveys other laws Congress has enacted and concludes that, because § 4248 is related to those laws, the "links" between § 4248 and an enumerated power are not "too attenuated"; hence, § 4248 is a valid exercise of Congress' Necessary and Proper Clause authority. *Ante,*

[7] JUSTICE KENNEDY concludes that the Necessary and Proper Clause requires something beyond rational-basis scrutiny when assessing the fit between an enumerated power and the means Congress selects to execute it. *Ante,* at 151–153 (opinion concurring in judgment). Other arguments regarding the degree of fit between means and end have been lodged elsewhere. See, *e. g., Gonzales* v. *Raich,* 545 U. S. 1, 61 (2005) (THOMAS, J., dissenting) (arguing that, for a law to be within the Necessary and Proper Clause, it must bear an "'obvious, simple, and direct relation'" to an exercise of Congress' enumerated powers and must not subvert basic principles of federalism and dual sovereignty). But I find that debate beside the point here, because it concerns the analysis employed at *McCulloch*'s second step, see *McCulloch* v. *Maryland,* 4 Wheat. 316 (1819), while the Court's decision today errs by skipping the first.

at 146. This unnecessarily confuses the analysis and, if followed to its logical extreme, would result in an unwarranted expansion of federal power.

The Court observes that Congress has the undisputed authority to "criminalize conduct" that interferes with enumerated powers; to "imprison individuals who engage in that conduct"; to "enact laws governing [those] prisons"; and to serve as a "custodian of its prisoners." *Ante*, at 137, 142. From this, the Court assumes that § 4248 must also be a valid exercise of congressional power because it is "'reasonably adapted'" to *those* exercises of Congress' incidental—and thus unenumerated—authorities. See *ante*, at 143 (concluding that "§ 4248 is 'reasonably adapted' to Congress' power to act as a responsible federal custodian" (citation omitted)); *ante*, at 149 (concluding that "the statute is a 'necessary and proper' means of exercising the federal authority that permits Congress to create federal criminal laws, to punish their violation, to imprison violators, to provide appropriately for those imprisoned, and to maintain the security of those who are not imprisoned but who may be affected by the federal imprisonment of others"). But that is not the question. 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.[8]

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[8] *McCulloch* makes this point clear. As the Court notes, *ante*, at 146, *McCulloch* states, in discussing a hypothetical, that from Congress' enumerated power to establish post offices and post roads "has been inferred the power and duty of carrying the mail," and, "from this implied power, has again been inferred the right to punish those who steal letters from the post office, or rob the mail." 4 Wheat., at 417. Contrary to the Court's interpretation, this dictum does not suggest that the relationship between Congress' implied power to punish postal crimes and its implied power to carry the mail is alone sufficient to satisfy review under the

Federal laws that criminalize conduct that interferes with enumerated powers, 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 satisfy this test because each helps to "carr[y] into Execution" the enumerated powers that justify a criminal defendant's arrest or conviction. For example, Congress' enumerated power "[t]o establish Post Offices and post Roads," Art. I, §8, cl. 7, would lack force or practical effect if Congress lacked the authority to enact criminal laws "to punish those who steal letters from the post office, or rob the mail." *McCulloch*, *supra*, at 417. Similarly, that enumerated power would be compromised if there were no prisons to hold persons who violate those laws, or if those prisons were so poorly managed that prisoners could escape or demand their release on the grounds that the conditions of their confinement violate their constitutional rights, at least as we have defined them. See, *e. g.*, *Estelle* v. *Gamble*, 429 U. S. 97

Necessary and Proper Clause. Instead, *McCulloch* directly links the constitutionality of the former to Congress' enumerated power "'to establish post offices and post roads.'" *Ibid.* (explaining that "the right to . . . punish those who rob [the mail] is not indispensably necessary to the establishment of a post office and post road," but is "essential to the beneficial exercise of th[at] power"). More importantly, *McCulloch*'s holding, as well as the holdings of this Court's subsequent decisions, make plain that congressional action is valid under the Necessary and Proper Clause only if it carries into execution one or more enumerated powers. *Id.*, at 422 (upholding Congress' incorporation of a bank because it was a "means . . . to be employed only for the purpose of carrying into execution *the given powers*" (emphasis added)); see *Sabri* v. *United States*, 541 U. S. 600, 605 (2004) ("Congress has authority *under the Spending Clause* to appropriate federal moneys to promote the general welfare, and it has *corresponding authority* under the Necessary and Proper Clause to see to it that taxpayer dollars appropriated under that power are in fact spent for the general welfare" (emphasis added; citations omitted)); *Stewart* v. *Kahn*, 11 Wall. 493, 506–507 (1871) ("The power to pass [the Act in question] is necessarily implied from the *powers to make war and suppress insurrections*" (referring to Art. I, §8, cls. 11 and 15; emphasis added)).

(1976). Civil detention under § 4248, on the other hand, lacks any such connection to an enumerated power.

2

After focusing on the relationship between § 4248 and several of Congress' implied powers, the Court finally concludes that the civil detention of a "sexually dangerous person" under § 4248 carries into execution the enumerated power that justified that person's arrest or conviction in the first place. In other words, the Court analogizes § 4248 to federal laws that authorize prison officials to care for federal inmates while they serve sentences or await trial. But while those laws help to "carr[y] into Execution" the enumerated power that justifies the imposition of criminal sanctions on the inmate, § 4248 does not bear that essential characteristic for three reasons.

First, the statute's definition of a "sexually dangerous person" contains no element relating to the subject's crime. See §§ 4247(a)(5)–(6). It thus does not require a federal court to find any connection between the reasons supporting civil commitment and the enumerated power with which that person's criminal conduct interfered. As a consequence, § 4248 allows a court to civilly commit an individual without finding that he was ever charged with or convicted of a federal crime involving sexual violence. §§ 4248(a), (d). That possibility is not merely hypothetical: The Government concedes that nearly 20% of individuals against whom § 4248 proceedings have been brought fit this description.[9] Tr. of Oral Arg. 23–25.

Second, § 4248 permits the term of federal civil commitment to continue beyond the date on which a convicted pris-

[9] The statute does require the court to find that the subject "has engaged or attempted to engage in sexually violent conduct or child molestation," § 4247(a)(5), but that factual predicate can be established by a *state* conviction, or by clear and convincing evidence that the person committed a sex crime for which he was never charged.

oner's sentence expires or the date on which the statute of limitations on an untried defendant's crime has run. The statute therefore authorizes federal custody over a person at a time when the Government would lack jurisdiction to detain him for violating a criminal law that executes an enumerated power.

The statute this Court upheld in *Greenwood* v. *United States*, 350 U. S. 366 (1956), provides a useful contrast. That statute authorized the Federal Government to exercise civil custody over a federal defendant declared mentally unfit to stand trial only " 'until the accused shall be mentally competent to stand trial or until the pending charges against him are disposed of according to law.' " *Id.*, at 368, n. 2 (quoting 18 U. S. C. § 4246 (1952 ed.)). Thus, that statute's "end" reasonably could be interpreted as preserving the Government's power to enforce a criminal law against the accused. Section 4248 (2006 ed.), however, authorizes federal detention of a person even *after* the Government loses the authority to prosecute him for a federal crime.

Third, the definition of a "sexually dangerous person" relevant to § 4248 does not require the court to find that the person is likely to violate a law executing an enumerated power in the future. Although the Federal Government has no express power to regulate sexual violence generally, Congress has passed a number of laws proscribing such conduct in special circumstances. All of these statutes contain jurisdictional elements that require a connection to one of Congress' enumerated powers—such as interstate commerce, *e. g.*, § 2252(a)(2)—or that limit the statute's coverage to jurisdictions in which Congress has plenary authority, *e. g.*, § 2243(a). Section 4248, by contrast, authorizes civil commitment upon a showing that the person is "sexually dangerous," and presents a risk "to others," § 4247(a)(5). It requires no evidence that this sexually dangerous condition will manifest itself in a way that interferes with a federal

law that executes an enumerated power or in a geographic location over which Congress has plenary authority.[10]

In sum, the enumerated powers that justify a criminal defendant's arrest or conviction cannot justify his subsequent civil detention under § 4248.

B

The remaining "considerations" in the Court's five-part inquiry do not alter this conclusion.

1

First, in a final attempt to analogize § 4248 to laws that authorize the Federal Government to provide care and treatment to prisoners while they await trial or serve a criminal sentence, the Court cites the Second Restatement of Torts for the proposition that the Federal Government has a "custodial interest" in its prisoners, *ante*, at 149, and, thus, a broad "constitutional power to act in order to protect nearby

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[10] The Constitution grants Congress plenary authority over certain jurisdictions where no other sovereign exists, including the District of Columbia, Art. I, § 8, cl. 17, and federal territories, Art. IV, § 3, cl. 2. In addition, Congress has "broad general powers to legislate in respect to Indian tribes," *United States* v. *Lara*, 541 U. S. 193, 200 (2004) (citing Art. I, § 8, cl. 3; Art. II, § 2, cl. 2), including certain special responsibilities over "Indian country," 18 U. S. C. § 1151. Although the Necessary and Proper Clause did not authorize Congress to enact § 4248, I do not rule out the possibility that Congress could provide for the civil commitment of individuals who enter federal custody as a result of acts committed in these jurisdictions. See, *e. g.*, *United States* v. *Cohen*, 733 F. 2d 128 (CADC 1984) (en banc) (upholding civil commitment of a defendant under a District of Columbia statute authorizing the institutionalization of persons acquitted by reason of insanity). Although two of the respondents in this case were either charged with or convicted of criminal acts committed in such jurisdictions, see *ante*, at 131–132; 507 F. Supp. 2d 522, 527, and n. 2 (EDNC 2007), that question is not presented here because § 4248 does not make that fact essential to an individual's placement in civil detention.

(and other) communities" from the dangers they may pose,[11] *ante*, at 142. That citation is puzzling because federal authority derives from the Constitution, not the common law. In any event, nothing in the Restatement suggests that a common-law custodian has the powers that Congress seeks here. While the Restatement provides that a custodian has a duty to take reasonable steps to ensure that a person in his care does not cause "bodily harm to others," 2 Restatement (Second) of Torts § 319, p. 129 (1963–1964), that duty terminates once the legal basis for custody expires:

> "There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless
>
> "(a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or
>
> "(b) a special relation exists between the actor and the other which gives to the other a right to protection." *Id.*, § 315, at 122.

Once the Federal Government's criminal jurisdiction over a prisoner ends, so does any "special relation[ship]" between the Government and the former prisoner.[12]

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[11] The Court also cites *Youngberg* v. *Romeo*, 457 U. S. 307 (1982), but that case lends even less support than the Restatement. In *Youngberg*, an inmate at a state hospital argued that hospital workers violated his constitutional rights when they applied restraints to keep him in his bed at the hospital infirmary. *Id.*, at 310–311. In assessing that claim, this Court noted that the hospital had a responsibility to "protect *its residents*" from the danger of violence. *Id.*, at 320 (emphasis added). The Court never suggested that this responsibility extended to "nearby (and other) communities." *Ante*, at 142. Moreover, the hospital was a *state* institution. Nothing in *Youngberg* suggests that the Federal Government can detain a person beyond the date on which its criminal jurisdiction expires for fear that he may later pose a threat to the surrounding community.

[12] Federal law permits a sentencing court to order that a defendant be placed on a term of "supervised release" after his term of imprisonment

For this reason, I cannot agree with JUSTICE ALITO that § 4248 is a necessary and proper incident of Congress' power "to protect the public from dangers created by the federal criminal justice and prison systems." *Ante*, at 157 (opinion concurring in judgment). A federal criminal defendant's "sexually dangerous" propensities are not "created by" the fact of his incarceration or his relationship with the federal prison system. The fact that the Federal Government has the authority to imprison a person for the purpose of punishing him for a federal crime—sex-related or otherwise—does not provide the Government with the additional power to exercise indefinite civil control over that person.[13]

2

Second, the Court describes § 4248 as a "modest" expansion on a statutory framework with a long historical pedigree. *Ante*, at 137. Yet even if the antiquity of a practice could serve as a substitute for its constitutionality—and the Court admits that it cannot, *ibid.*—the Court overstates the relevant history.

Congress' first foray into this general area occurred in 1855, when it established St. Elizabeth's Hospital to provide treatment to "insane" persons in the military and the District of Columbia. Act of Mar. 3, 1855, 10 Stat. 682. But

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is complete. 18 U. S. C. §§ 3583, 3624(e). Contrary to the Government's suggestion, federal authority to exercise control over individuals serving terms of "supervised release" does not derive from the Government's "relationship" with the prisoner, see Brief for United States 38, but from the original criminal sentence itself. Supervised release thus serves to execute the enumerated power that justifies the defendant's statute of conviction, just like any other form of punishment imposed at sentencing.

[13] The fact that Congress has the authority to "provide for the apprehension of escaped federal prisoners," see *ante*, at 157 (ALITO, J., concurring in judgment), does not change this conclusion. That authority derives from Congress' power to vindicate the enumerated power with which the escaped defendant's crime of conviction interfered, not a freestanding police power.

Congress was acting pursuant to *enumerated* powers when it took this step. See Art. I, § 8, cl. 17 (granting Congress plenary authority over the District of Columbia); Art. I, § 8, cl. 14 (authorizing Congress to "make Rules for the Government and Regulation of the land and naval Forces"). This enactment therefore provides no support for Congress' claimed power to detain sexually dangerous persons without an otherwise valid basis for jurisdiction.

Later, Congress provided for the federal civil commitment of "insane" persons charged with or convicted of a federal crime. Act of Feb. 7, 1857, §§ 5–6, 11 Stat. 158; see 17 Op. Atty. Gen. 211, 212–213 (1881); Act of June 23, 1874, ch. 465, 18 Stat. 251; Act of Aug. 7, 1882, 22 Stat. 330. As the Court explains, however, these statutes did not authorize federal custody beyond the completion of the "term" of federal "imprisonment," §§ 2–3, 18 Stat. 252; see 35 Op. Atty. Gen. 366, 368 (1927); 30 Op. Atty. Gen. 569, 570–571 (1916); Act of May 13, 1930, ch. 254, § 6, 46 Stat. 271, and thus shed no light on the question presented here.

In 1949, Congress enacted a more comprehensive regime, authorizing the civil commitment of mentally ill persons in BOP custody. See 18 U. S. C. §§ 4246, 4247 (1952 ed.). This Court addressed that regime in *Greenwood*, but never endorsed the proposition that the Federal Government could rely on that statute to detain a person in the absence of a pending criminal charge or ongoing criminal sentence.[14]

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[14] In addition, at least some courts questioned the Federal Government's power to detain a person in such circumstances. See *Dixon* v. *Steele*, 104 F. Supp. 904, 908 (WD Mo. 1952) (holding that the Federal Government lacked authority to detain an individual declared mentally unfit to stand trial once it was determined that he was unlikely to recover in time to be prosecuted); *Higgins* v. *United States*, 205 F. 2d 650, 653 (CA9 1953) (avoiding this constitutional question by interpreting the statute to permit federal civil detention only for a period reasonably related to a criminal prosecution); *Wells* v. *Attorney General of United States*, 201 F. 2d 556, 560 (CA10 1953) (same).

As already noted, *Greenwood* upheld the commitment of a federal defendant declared unfit to stand trial on the narrow ground that the Government's criminal jurisdiction over the defendant—its "power to prosecute for federal offenses—[wa]s not exhausted," but rather "persist[ed]" in the form of a "pending indictment." 350 U. S., at 375; see *supra*, at 171. The Court was careful to state that "*[t]his* commitment, and therefore the legislation authorizing commitment *in the context of this case*, involve[d] an assertion of authority" within "congressional power under the Necessary and Proper Clause." *Greenwood*, 350 U. S., at 375 (emphasis added). But it painstakingly limited its holding to "the narrow constitutional issue raised by th[at] order of commitment." *Ibid.*

The historical record thus supports the Federal Government's authority to detain a mentally ill person against whom it has the authority to enforce a criminal law. But it provides no justification whatsoever for reading the Necessary and Proper Clause to grant Congress the power to authorize the detention of persons without a basis for federal criminal jurisdiction.

3

Finally, the Court offers two arguments regarding § 4248's impact on the relationship between the Federal Government and the States. First, the Court and both concurrences suggest that Congress must have had the power to enact § 4248 because a long period of federal incarceration might "seve[r]" a sexually dangerous prisoner's "claim to 'legal residence'" in any particular State, *ante*, at 143 (opinion of the Court), thus leaving the prisoner without any "home State to take charge" of him upon release, *ante*, at 154 (KENNEDY, J., concurring in judgment); see *ante*, at 156 (ALITO, J., concurring in judgment) (noting that many federal prisoners, "as a result of lengthy federal incarceration, no longer ha[ve] any substantial ties to any State"). I disagree with the premise of that argument. As an initial matter, States plainly have the constitutional authority to "take charge" of a federal

prisoner released within their jurisdiction. See Amdt. 10 (stating that powers not delegated to the Federal Government are "reserved" to the States, and to the people). In addition, the assumption that a State knowingly would fail to exercise that authority is, in my view, implausible. The Government stated at oral argument that its "default position" is to release a federal prisoner to the State in which he was convicted, Tr. of Oral Arg. 15; see also 28 CFR § 2.33(b) (2009), and neither the Court nor the concurrences argue that a State has the power to refuse such a person domicile within its borders. Thus, they appear to assume that, in the absence of 18 U. S. C. § 4248, a State would take no action when informed by the BOP that a sexually dangerous federal prisoner was about to be released within its jurisdiction. In light of the plethora of state laws enacted in recent decades to protect communities from sex offenders,[15] the likelihood

[15] As we have noted before, all 50 States have developed "some variation" of a system "for mandatory registration of sex offenders and corresponding community notification." *Smith* v. *Doe*, 538 U. S. 84, 89–90 (2003). In addition, several States have taken further steps; some impose residency restrictions on sex offenders, see, *e. g.*, *Kennedy* v. *Louisiana*, 554 U. S. 407, 457–458, n. 5 (2008) (ALITO, J., dissenting) (collecting statutes), and, most relevant here, 22 States have enacted involuntary civil-commitment laws substantially similar to § 4248, see Ariz. Rev. Stat. Ann. § 36–3701 *et seq.* (West 2009); Cal. Welf. & Inst. Code Ann. § 6600 *et seq.* (West 1998 and Supp. 2010); Fla. Stat. § 394.910 *et seq.* (2007); Ill. Comp. Stat., ch. 725, § 205 *et seq.* (West 2008); Iowa Code § 229A.1 *et seq.* (2009); Kan. Stat. Ann. § 59–29a01 *et seq.* (2005 and 2008 Cum. Supp.); Mass. Gen. Laws, ch. 123A (West 2008); Minn. Stat. § 253B (2008 and 2009 Supp.); Mo. Rev. Stat. § 632.480 *et seq.* (2009 Cum. Supp.); Neb. Rev. Stat. § 29–2923 *et seq.* (2008); N. H. Rev. Stat. Ann. § 135–E:1 *et seq.* (West Cum. Supp. 2009); N. J. Stat. Ann. § 30:4–82.4 *et seq.* (West 2008); N. M. Stat. Ann. § 43–1–1 *et seq.* (2000 and Cum. Supp. 2009); N. Y. Mental Hyg. Law Ann. § 10.01 *et seq.* (West Supp. 2010); N. D. Cent. Code Ann. § 25–03.3–01 *et seq.* (Lexis 2002 and Supp. 2009); Ore. Rev. Stat. § 426.510 *et seq.* (2007); S. C. Code Ann. § 44–48–10 *et seq.* (Supp. 2009); Tenn. Code Ann. § 33–6–801 *et seq.* (2007); Tex. Health & Safety Code Ann. § 841.001 *et seq.* (West Supp. 2009); Va. Code Ann. § 37.2–900 *et seq.* (Lexis Cum. Supp. 2009); Wash. Rev. Code § 71.09.010 *et seq.* (2008); Wis. Stat. Ann. § 980.01 *et seq.* (West 2007 and Supp. 2009).

of such an occurrence seems quite remote. But even in the event a State made such a decision, the Constitution assigns the responsibility for that decision, and its consequences, to the state government alone.

Next, the Court submits that § 4248 does not upset the balance of federalism or invade the States' reserved powers because it "requires accommodation of state interests" by instructing the Attorney General to release a committed person to the State in which he was domiciled or tried if that State wishes to "'assume . . . responsibility'" for him. *Ante*, at 144 (emphasis deleted), 145 (quoting § 4248(d)). This right of first refusal is mere window dressing. Tr. of Oral Arg. 5 ("It is not the usual course that the State does take responsibility"). More importantly, it is an altogether hollow assurance that § 4248 preserves the principle of dual sovereignty—the "letter and spirit" of the Constitution—as the Necessary and Proper Clause requires.[16] *McCulloch*, 4 Wheat., at 421; *Printz* v. *United States*, 521 U. S. 898, 923–924 (1997). For once it is determined that Congress has the authority to provide for the civil detention of sexually dangerous persons, Congress "is acting within the powers granted it under the Constitution," and "may impose its will on the States." *Gregory*, 501 U. S., at 460; see Art. VI, cl. 2. Section 4248's right of first refusal is thus not a matter of constitutional necessity, but an act of legislative grace.

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[16] The Court describes my argument as a claim that "§ 4248 violates the Tenth Amendment." *Ante*, at 143. Yet, I agree entirely with the Court that "'it makes no difference whether one views the question at issue [here] as one of ascertaining the limits of the power delegated to the Federal Government under the affirmative provisions of the Constitution or one of discerning the core of sovereignty retained by the States under the Tenth Amendment.'" *Ante*, at 144 (quoting *New York* v. *United States*, 505 U. S. 144, 159 (1992)). Section 4248 is unconstitutional because it does not "carr[y] into Execution" an enumerated power. Therefore, it necessarily intrudes upon the powers our Constitution reserves to the States and to the people.

Nevertheless, 29 States appear as *amici* and argue that § 4248 is constitutional. They tell us that they do not object to Congress retaining custody of "sexually dangerous persons" after their criminal sentences expire because the cost of detaining such persons is "expensive"—approximately $64,000 per year—and these States would rather the Federal Government bear this expense. Brief for Kansas et al. 2; *ibid.* ("[S]ex offender civil commitment programs are expensive to operate"); *id.*, at 4 ("[T]hese programs are expensive"); *id.*, at 8 ("[T]here are very practical reasons to prefer a system that includes a federal sex offender civil commitment program . . . . One such reason is the significant cost").

Congress' power, however, is fixed by the Constitution; it does not expand merely to suit the States' policy preferences, or to allow state officials to avoid difficult choices regarding the allocation of state funds. By assigning the Federal Government power over "certain enumerated objects only," the Constitution "leaves to the several States a residuary and inviolable sovereignty over all other objects." The Federalist No. 39, at 285 (J. Madison). The purpose of this design is to preserve the "balance of power between the States and the Federal Government . . . [that] protect[s] our fundamental liberties." *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528, 572 (1985) (Powell, J., dissenting); *New York* v. *United States*, 505 U. S., at 181. It is the States' duty to act as the "immediate and visible guardian" of those liberties because federal powers extend no further than those enumerated in the Constitution. The Federalist No. 17, at 169 (A. Hamilton). The Constitution gives States no more power to decline this responsibility than it gives them to infringe upon those liberties in the first instance. *FTC* v. *Ticor Title Ins. Co.*, 504 U. S. 621, 636 (1992) ("Federalism serves to assign political responsibility, not to obscure it").

Absent congressional action that is in accordance with, or necessary and proper to, an enumerated power, the duty to

protect citizens from violent crime, including acts of sexual violence, belongs solely to the States. *Morrison*, 529 U. S., at 618 ("[W]e can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime"); see *Cohens* v. *Virginia*, 6 Wheat. 264, 426 (1821) (Marshall, C. J.) (stating that Congress has "no general right to punish murder committed within any of the States").

* * *

Not long ago, this Court described the Necessary and Proper Clause as "the last, best hope of those who defend ultra vires congressional action." *Printz*, *supra*, at 923. Regrettably, today's opinion breathes new life into that Clause, and—the Court's protestations to the contrary notwithstanding, see *ante*, at 148—comes perilously close to transforming the Necessary and Proper Clause into a basis for the federal police power that "we *always* have rejected," *Lopez*, 514 U. S., at 584 (THOMAS, J., concurring) (citing *Gregory*, *supra*, at 457; *Wirtz*, 392 U. S., at 196; *Jones & Laughlin Steel Corp.*, 301 U. S., at 37). In so doing, the Court endorses the precise abuse of power Article I is designed to prevent—the use of a limited grant of authority as a "pretext . . . for the accomplishment of objects not intrusted to the government." *McCulloch*, *supra*, at 423.

I respectfully dissent.

Syllabus

SULLIVAN *v.* FLORIDA

CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

No. 08–7621. Argued November 9, 2009—Decided May 17, 2010

Certiorari dismissed. Reported below: 987 So. 2d 83.

Bryan A. Stevenson argued the cause for petitioner. With him on the briefs were *Aaryn M. Urell* and *Alicia A. D'Addario*.

Scott D. Makar, Solicitor General of Florida, argued the cause for respondent. With him on the brief were *Bill McCollum*, Attorney General, *Louis F. Hubener*, Chief Deputy Solicitor General, and *Timothy D. Osterhaus*, *Craig D. Feiser*, *Courtney Brewer*, and *Ronald A. Lathan*, Deputy Solicitors General.*

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*Briefs of *amici curiae* urging reversal were filed for the American Bar Association by *H. Thomas Wells, Jr.*, and *Lawrence A. Wojcik;* for the American Psychological Association et al. by *Danielle M. Spinelli*, *Anne Harkavy*, *Shirley C. Woodward*, *Nathalie F. P. Gilfoyle*, *Richard G. Taranto*, *Carolyn I. Polowy*, and *Mark J. Heyrman;* for Amnesty International et al. by *Constance de la Vega*, *Michelle T. Leighton*, and *Neil A. F. Popovic;* for the Disability Rights Legal Center by *Neil M. Soltman* and *Donald M. Falk;* for Educators et al. by *John J. Gibbons*, *Lawrence S. Lustberg*, and *Jennifer B. Condon;* for Former Juvenile Offender Charles S. Dutton et al. by *David W. DeBruin;* for the Juvenile Law Center et al. by *Marsha L. Levick;* for the Mothers Against Murderers Association et al. by *Angela C. Vigil*, *William Lynch Schaller*, and *Michael A. Pollard;* for the Sentencing Project by *Matthew M. Shors* and *Shannon M. Pazur;* and for J. Lawrence Aber et al. by *Stephen M. Nickelsburg*.

Briefs of *amici curiae* urging affirmance were filed for the State of Louisiana et al. by *James D. "Buddy" Caldwell*, Attorney General of Louisiana, and *Kyle Duncan*, Appellate Chief, by *Richard S. Gebelein*, Chief Deputy Attorney General of Delaware, and by the Attorneys General for their respective States as follows: *Troy King* of Alabama, *Gregory F. Zoeller* of Indiana, *Jack Conway* of Kentucky, *Michael A. Cox* of Michigan, *Jim Hood* of Mississippi, *Roy Cooper* of North Carolina, *Wayne Stenehjem* of North Dakota, *W. A. Drew Edmondson* of Oklahoma, *Thomas W. Cor-*

PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

It is so ordered.

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bett, Jr., of Pennsylvania, *Henry D. McMaster* of South Carolina, *Marty J. Jackley* of South Dakota, *Robert E. Cooper, Jr.*, of Tennessee, *Greg Abbott* of Texas, *Mark L. Shurtleff* of Utah, *William C. Mims* of Virginia, *Robert M. McKenna* of Washington, and *Bruce A. Salzburg* of Wyoming; for the National District Attorneys Association by *Gene C. Schaerr* and *Linda T. Coberly;* for the Solidarity Center for Law and Justice et al. by *James P. Kelly III;* and for Sixteen Members of the United States House of Representatives by *Michael P. Farris.*

Briefs of *amici curiae* were filed for the American Association of Jewish Lawyers and Jurists et al. by *Michael B. de Leeuw;* for the American Medical Association et al. by *E. Joshua Rosenkranz;* for the Center on the Administration of Criminal Law by *Richard K. Willard* and *Anthony S. Barkow;* for the Center for Constitutional Jurisprudence by *Anthony T. Caso, Edwin Meese III*, and *John C. Eastman;* for the Council of Juvenile Correctional Administrators et al. by *Corrine A. Irish;* for the Criminal Justice Legal Foundation by *Kent S. Scheidegger;* for the NAACP Legal Defense & Educational Fund, Inc., et al. by *John A. Payton, Debo P. Adegbile, Christina Swarns, Jin Hee Lee, Vincent M. Southerland, Charles J. Ogletree, Jr., Robert J. Smith*, and *Jeffrey L. Fisher;* and for the National Organization of Victims of Juvenile Lifers et al. by *Shannon Lee Goessling.*

Syllabus

AMERICAN NEEDLE, INC. *v.* NATIONAL FOOTBALL LEAGUE ET AL.

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

No. 08–661. Argued January 13, 2010—Decided May 24, 2010

Respondent National Football League (NFL) is an unincorporated association of 32 separately owned professional football teams, also respondents here. The teams, each of which owns its own name, colors, logo, trademarks, and related intellectual property, formed respondent National Football League Properties (NFLP) to develop, license, and market that property. At first, NFLP granted nonexclusive licenses to petitioner and other vendors to manufacture and sell team-labeled apparel. In December 2000, however, the teams authorized NFLP to grant exclusive licenses. NFLP granted an exclusive license to respondent Reebok International Ltd. to produce and sell trademarked headwear for all 32 teams. When petitioner's license was not renewed, it filed this action alleging that the agreements between respondents violated the Sherman Act, § 1 of which makes "[e]very contract, combination . . . , or conspiracy, in restraint of trade" illegal. Respondents answered that they were incapable of conspiring within § 1's meaning because the NFL and its teams are, in antitrust law jargon, a single entity with respect to the conduct challenged. The District Court granted respondents summary judgment, and the Seventh Circuit affirmed.

Held: The alleged conduct related to licensing of intellectual property constitutes concerted action that is not categorically beyond § 1's coverage. Pp. 189–204.

(a) The meaning of "contract, combination . . . , or conspiracy" in § 1 of the Sherman Act is informed by the Act's " 'basic distinction between concerted and independent action.' " *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U. S. 752, 767. Section 1 "treat[s] concerted behavior more strictly than unilateral behavior," *id.*, at 768, because, unlike independent action, "[c]oncerted activity inherently is fraught with anticompetitive risk" insofar as it "deprives the marketplace of independent centers of decisionmaking that competition assumes and demands," *id.*, at 768–769. And because concerted action is discrete and distinct, a limit on such activity leaves untouched a vast amount of business conduct. That creates less risk of deterring a firm's necessary

conduct and leaves courts to examine only discrete agreements. An arrangement must therefore embody concerted action in order to be a "contract, combination . . . , or conspiracy" under § 1. Pp. 189–191.

(b) In determining whether there is concerted action under § 1, the Court has eschewed formalistic distinctions, such as whether the alleged conspirators are legally distinct entities, in favor of a functional consideration of how they actually operate. The Court has repeatedly found instances in which members of a legally single entity violated § 1 when the entity was controlled by a group of competitors and served, in essence, as a vehicle for ongoing concerted activity. See, *e. g.*, *United States* v. *Sealy, Inc.*, 388 U. S. 350, 352–356. Conversely, the Court has found that although the entities may be "separate" for purposes of incorporation or formal title, if they are controlled by a single center of decisionmaking and they control a single aggregation of economic power, an agreement between them does not constitute a "contract, combination . . . , or conspiracy." *Copperweld*, 467 U. S., at 769. Pp. 191–194.

(c) The relevant inquiry is therefore one of substance, not form, which does not turn on whether the alleged parties to contract, combination, or conspiracy are part of a legally single entity or seem like one firm or multiple firms in any metaphysical sense. The inquiry is whether the agreement in question joins together "separate economic actors pursuing separate economic interests," *Copperweld*, 467 U. S., at 768, such that it "deprives the marketplace of independent centers of decisionmaking," *id.*, at 769, and therefore of diversity of entrepreneurial interests and thus of actual or potential competition. If it does, then there is concerted action covered by § 1, and the court must decide whether the restraint of trade is unreasonable and therefore illegal. Pp. 195–196.

(d) The NFL teams do not possess either the unitary decisionmaking quality or the single aggregation of economic power characteristic of independent action. Each of them is a substantial, independently owned, independently managed business, whose "general corporate actions are guided or determined" by "separate corporate consciousnesses," and whose "objectives are" not "common." *Copperweld*, 467 U. S., at 771. They compete with one another, not only on the playing field, but to attract fans, for gate receipts, and for contracts with managerial and playing personnel. See, *e. g.*, *Brown* v. *Pro Football, Inc.*, 518 U. S. 231, 249. Directly relevant here, the teams are potentially competing suppliers in the market for intellectual property. When teams license such property, they are not pursuing the "common interests of the whole" league, but, instead, the interests of each "corporation itself." *Copperweld*, 467 U. S., at 770. It is not dispositive, as respondents argue, that, by forming NFLP, they have formed a single entity,

akin to a merger, and market their NFL brands through a single outlet. Although the NFL respondents may be similar in some sense to a single enterprise, they are not similar in the relevant functional sense. While teams have common interests such as promoting the NFL brand, they are still separate, profit-maximizing entities, and their interests in licensing team trademarks are not necessarily aligned. Nor does it matter that the teams may find the alleged cooperation necessary to compete against other forms of entertainment. Although decisions made by NFLP are not as easily classified as concerted activity, NFLP's decisions about licensing the teams' separately owned intellectual property are concerted activity and thus covered by § 1 for the same reason that decisions made directly by the 32 teams are covered by § 1. In making the relevant licensing decisions, NFLP is "an instrumentality" of the teams. *Sealy,* 388 U. S., at 352–354. Pp. 196–202.

(e) Football teams that need to cooperate are not trapped by antitrust law. The fact that the NFL teams share an interest in making the entire league successful and profitable, and that they must cooperate to produce games, provides a perfectly sensible justification for making a host of collective decisions. Because some of these restraints on competition are necessary to produce the NFL's product, the Rule of Reason generally should apply, and teams' cooperation is likely to be permissible. And depending upon the activity in question, the Rule of Reason can at times be applied without detailed analysis. But the activity at issue in this case is still concerted activity covered for § 1 purposes. Pp. 202–204.

538 F. 3d 736, reversed and remanded.

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

Glen D. Nager argued the cause for petitioner. With him on the briefs were *Joe Sims*, *Meir Feder*, and *Jeffrey M. Carey.*

Deputy Solicitor General Stewart argued the cause for the United States as *amicus curiae.* With him on the brief were *Solicitor General Kagan*, *Assistant Attorney General Varney*, *Deputy Assistant Attorney General Weiser*, *Benjamin J. Horwich*, *Catherine G. O'Sullivan*, *Nickolai G. Levin*, and *Willard K. Tom.*

Gregg H. Levy argued the cause for respondents. With him on the brief for the NFL respondents were *Derek Lud-*

win and *Eugene E. Gozdecki. Timothy B. Hardwicke* and *Lori Alvino McGill* filed a brief for respondent Reebok International Ltd.*

JUSTICE STEVENS delivered the opinion of the Court.

"Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade" is made illegal by § 1 of the Sherman Act, ch. 647, 26 Stat. 209, as amended, 15 U. S. C. § 1. The question whether an arrangement is a contract, combination, or conspiracy is different from and antecedent to the question whether it unreasonably restrains trade. This case raises that antecedent question about the business of the 32 teams in the National Football League (NFL) and a corporate entity that they formed to manage their intellectual property. We conclude that the NFL's licensing activities constitute concerted action that is not categorically beyond the coverage of § 1. The legality of that concerted action must be judged under the Rule of Reason.

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*Briefs of *amici curiae* urging reversal were filed for the American Antitrust Institute et al. by *Richard M. Brunell*, *Albert A. Foer*, and *Stephen F. Ross;* and for Merchant Trade Associations by *W. Joseph Bruckner* and *K. Craig Wildfang.*

Briefs of *amici curiae* urging affirmance were filed for ATP Tour, Inc., et al. by *Bradley I. Ruskin* and *Mark V. Young;* for Electronic Arts Inc. by *Stephen M. Nickelsburg;* for MasterCard Worldwide et al. by *Ryan A. Shores;* for the National Basketball Association et al. by *Richard W. Buchanan* and *Jeffrey A. Mishkin;* for the National Collegiate Athletic Association by *Gregory L. Curtner*, *Atleen Kaur*, and *Elsa Kircher Cole;* for the National Hockey League by *Shepard Goldfein;* and for VF Imageware, Inc., by *Mark E. Solomons*, *Laura Metcoff Klaus*, and *James I. Serota.*

Briefs of *amici curiae* were filed for Robert Baade et al. by *Craig C. Corbitt;* for George Daly et al. by *James T. McKeown* and *Michael D. Leffel;* for the National Football League Coaches Association by *Roy I. Liebman;* and for the National Football League Players Association et al. by *Jeffrey L. Kessler*, *David G. Feher*, *David S. Turetsky*, *James W. Quinn*, *Caitlin J. Halligan*, *Steven A. Fehr*, *G. William Hunter*, and *Laurence Gold.*

I

Originally organized in 1920, the NFL is an unincorporated association that now includes 32 separately owned professional football teams.[1] Each team has its own name, colors, and logo, and owns related intellectual property. Like each of the other teams in the league, the New Orleans Saints and the Indianapolis Colts, for example, have their own distinctive names, colors, and marks that are well known to millions of sports fans.

Prior to 1963, the teams made their own arrangements for licensing their intellectual property and marketing trademarked items such as caps and jerseys. In 1963, the teams formed National Football League Properties (NFLP) to develop, license, and market their intellectual property. Most, but not all, of the substantial revenues generated by NFLP have either been given to charity or shared equally among the teams. However, the teams are able to and have at times sought to withdraw from this arrangement.

Between 1963 and 2000, NFLP granted nonexclusive licenses to a number of vendors, permitting them to manufacture and sell apparel bearing team insignias. Petitioner, American Needle, Inc., was one of those licensees. In December 2000, the teams voted to authorize NFLP to grant exclusive licenses, and NFLP granted Reebok International Ltd. an exclusive 10-year license to manufacture and sell trademarked headwear for all 32 teams. It thereafter declined to renew American Needle's nonexclusive license.

American Needle filed this action in the Northern District of Illinois, alleging that the agreements between the NFL, its teams, NFLP, and Reebok violated §§ 1 and 2 of the Sherman Act. In their answer to the complaint, the defendants

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[1] The NFL was founded in Canton, Ohio, as the "American Professional Football Association." *United States Football League* v. *National Football League*, 842 F. 2d 1335, 1343 (CA2 1988). It took its current name in 1922. *Ibid.* Forty-one franchises failed in the first 41 years of the league's existence. *Ibid.*

averred that the teams, the NFL, and NFLP were incapable of conspiring within the meaning of § 1 "because they are a single economic enterprise, at least with respect to the conduct challenged." App. 99. After limited discovery, the District Court granted summary judgment on the question "whether, with regard to the facet of their operations respecting exploitation of intellectual property rights, the NFL and its 32 teams are, in the jargon of antitrust law, acting as a single entity." *American Needle, Inc.* v. *New Orleans La. Saints*, 496 F. Supp. 2d 941, 943 (2007). The court concluded "that in that facet of their operations they have so integrated their operations that they should be deemed a single entity rather than joint ventures cooperating for a common purpose." *Ibid.*

The Court of Appeals for the Seventh Circuit affirmed. The panel observed that "in some contexts, a league seems more aptly described as a single entity immune from antitrust scrutiny, while in others a league appears to be a joint venture between independently owned teams that is subject to review under § 1." 538 F. 3d 736, 741 (2008). Relying on Circuit precedent, the court limited its inquiry to the particular conduct at issue, licensing of teams' intellectual property. The panel agreed with petitioner that "when making a single-entity determination, courts must examine whether the conduct in question deprives the marketplace of the independent sources of economic control that competition assumes." *Id.*, at 742. The court, however, discounted the significance of potential competition among the teams regarding the use of their intellectual property because the teams "can function only as one source of economic power when collectively producing NFL football." *Id.*, at 743. The court noted that football itself can only be carried out jointly. See *ibid.* ("Asserting that a single football team could produce a football game . . . is a Zen riddle: Who wins when a football team plays itself"). Moreover, "NFL teams share a vital economic interest in collectively promoting

NFL football . . . [to] compet[e] with other forms of entertainment." *Ibid.* "It thus follows," the court found, "that only one source of economic power controls the promotion of NFL football," and "it makes little sense to assert that each individual team has the authority, if not the responsibility, to promote the jointly produced NFL football." *Ibid.* Recognizing that NFL teams have "license[d] their intellectual property collectively" since 1963, the court held that § 1 did not apply. *Id.*, at 744.

We granted certiorari. 557 U. S. 933 (2009).

II

As the case comes to us, we have only a narrow issue to decide: whether the NFL respondents are capable of engaging in a "contract, combination . . . , or conspiracy" as defined by § 1 of the Sherman Act, 15 U. S. C. § 1, or, as we have sometimes phrased it, whether the alleged activity by the NFL respondents "must be viewed as that of a single enterprise for purposes of § 1." *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U. S. 752, 771 (1984).

Taken literally, the applicability of § 1 to "every contract, combination . . . , or conspiracy" could be understood to cover every conceivable agreement, whether it be a group of competing firms fixing prices or a single firm's chief executive telling her subordinate how to price their company's product. But even though, "read literally," § 1 would address "the entire body of private contract," that is not what the statute means. *National Soc. of Professional Engineers* v. *United States*, 435 U. S. 679, 688 (1978); see also *Texaco Inc.* v. *Dagher*, 547 U. S. 1, 5 (2006) ("This Court has not taken a literal approach to this language"); cf. *Board of Trade of Chicago* v. *United States*, 246 U. S. 231, 238 (1918) (reasoning that the term "restraint of trade" in § 1 cannot possibly refer to any restraint on competition because "[e]very agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence"). Not every in-

stance of cooperation between two people is a potential "contract, combination . . . , or conspiracy, in restraint of trade." 15 U. S. C. § 1.

The meaning of the term "contract, combination . . . , or conspiracy" is informed by the "'basic distinction'" in the Sherman Act "'between concerted and independent action'" that distinguishes § 1 of the Sherman Act from § 2. *Copperweld*, 467 U. S., at 767 (quoting *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U. S. 752, 761 (1984)). Section 1 applies only to concerted action that restrains trade. Section 2, by contrast, covers both concerted and independent action, but only if that action "monopolize[s]," 15 U. S. C. § 2, or "threatens actual monopolization," *Copperweld*, 467 U. S., at 767, a category that is narrower than restraint of trade. Monopoly power may be equally harmful whether it is the product of joint action or individual action.

Congress used this distinction between concerted and independent action to deter anticompetitive conduct and compensate its victims, without chilling vigorous competition through ordinary business operations. The distinction also avoids judicial scrutiny of routine, internal business decisions.

Thus, in § 1 Congress "treated concerted behavior more strictly than unilateral behavior." *Id.*, at 768. This is so because unlike independent action, "[c]oncerted activity inherently is fraught with anticompetitive risk" insofar as it "deprives the marketplace of independent centers of decisionmaking that competition assumes and demands." *Id.*, at 768–769. And because concerted action is discrete and distinct, a limit on such activity leaves untouched a vast amount of business conduct. As a result, there is less risk of deterring a firm's necessary conduct; courts need only examine discrete agreements; and such conduct may be remedied simply through prohibition.[2] See Areeda & Hovenkamp

[2] If Congress prohibited independent action that merely restrains trade (even if it does not threaten monopolization), that prohibition could deter perfectly competitive conduct by firms that are fearful of litigation costs

¶ 1464c, at 206. Concerted activity is thus "judged more sternly than unilateral activity under § 2," *Copperweld*, 467 U. S., at 768. For these reasons, § 1 prohibits any concerted action "in restraint of trade or commerce," even if the action does not "threate[n] monopolization," *ibid.* And therefore, an arrangement must embody concerted action in order to be a "contract, combination . . . , or conspiracy" under § 1.

III

We have long held that concerted action under § 1 does not turn simply on whether the parties involved are legally distinct entities. Instead, we have eschewed such formalistic distinctions in favor of a functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate.

As a result, we have repeatedly found instances in which members of a legally single entity violated § 1 when the entity was controlled by a group of competitors and served, in essence, as a vehicle for ongoing concerted activity. In *United States* v. *Sealy, Inc.*, 388 U. S. 350 (1967), for example, a group of mattress manufacturers operated and controlled Sealy, Inc., a company that licensed the Sealy trademark to the manufacturers, and dictated that each operate within a specific geographic area. *Id.*, at 352–353. The Government alleged that the licensees and Sealy were conspiring in violation of § 1, and we agreed. *Id.*, at 352–354. We explained that "[w]e seek the central substance of the situation" and

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and judicial error. See *Copperweld*, 467 U. S., at 768 ("Judging unilateral conduct in this manner reduces the risk that the antitrust laws will dampen the competitive zeal of a single aggressive entrepreneur"); cf. *United States* v. *United States Gypsum Co.*, 438 U. S. 422, 441 (1978) ("[S]alutary and procompetitive conduct . . . might be shunned by businessmen who chose to be excessively cautious in the face of uncertainty"). Moreover, if every unilateral action that restrained trade were subject to antitrust scrutiny, then courts would be forced to judge almost every internal business decision. See 7 P. Areeda & H. Hovenkamp, Antitrust Law ¶ 1464c, p. 206 (2d ed. 2003) (hereinafter Areeda & Hovenkamp) (unilateral behavior is "often difficult to evaluate or remedy").

therefore "we are moved by the identity of the persons who act, rather than the label of their hats." *Id.*, at 353. We thus held that Sealy was not a "separate entity, but . . . an instrumentality of the individual manufacturers." *Id.*, at 356. In similar circumstances, we have found other formally distinct business organizations covered by §1. See, *e. g.*, *Northwest Wholesale Stationers, Inc.* v. *Pacific Stationery & Printing Co.*, 472 U. S. 284 (1985); *National Collegiate Athletic Assn.* v. *Board of Regents of Univ. of Okla.*, 468 U. S. 85 (1984) *(NCAA); United States* v. *Topco Associates, Inc.*, 405 U. S. 596, 609 (1972); *Associated Press* v. *United States*, 326 U. S. 1 (1945); *id.*, at 26 (Frankfurter, J., concurring); *United States* v. *Terminal Railroad Assn. of St. Louis*, 224 U. S. 383 (1912); see also Rock, Corporate Law Through an Antitrust Lens, 92 Colum. L. Rev. 497, 506–510 (1992) (discussing cases). We have similarly looked past the form of a legally "single entity" when competitors were part of professional organizations[3] or trade groups.[4]

Conversely, there is not necessarily concerted action simply because more than one legally distinct entity is involved. Although, under a now-defunct doctrine known as the "intraenterprise conspiracy doctrine," we once treated cooperation between legally separate entities as necessarily covered by §1, we now embark on a more functional analysis.

The roots of this functional analysis can be found in the very decision that established the intraenterprise conspiracy doctrine. In *United States* v. *Yellow Cab Co.*, 332 U. S. 218 (1947), we observed that "corporate interrelationships . . .

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[3] See, *e. g.*, *FTC* v. *Indiana Federation of Dentists*, 476 U. S. 447 (1986); *Arizona* v. *Maricopa County Medical Soc.*, 457 U. S. 332 (1982); *National Soc. of Professional Engineers* v. *United States*, 435 U. S. 679 (1978); *Goldfarb* v. *Virginia State Bar*, 421 U. S. 773 (1975).

[4] See, *e. g.*, *Allied Tube & Conduit Corp.* v. *Indian Head, Inc.*, 486 U. S. 492 (1988); *Radiant Burners, Inc.* v. *Peoples Gas Light & Coke Co.*, 364 U. S. 656 (1961) *(per curiam); Fashion Originators' Guild of America, Inc.* v. *FTC*, 312 U. S. 457 (1941).

are not determinative of the applicability of the Sherman Act" because the Act "is aimed at substance rather than form." *Id.*, at 227. We nonetheless held that cooperation between legally separate entities was necessarily covered by § 1 because an unreasonable restraint of trade "may result as readily from a conspiracy among those who are affiliated or integrated under common ownership as from a conspiracy among those who are otherwise independent." *Ibid.;* see also *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U. S. 211, 215 (1951).

The decline of the intraenterprise conspiracy doctrine began in *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 370 U. S. 19 (1962). In that case, several agricultural cooperatives that were owned by the same farmers were sued for violations of § 1 of the Sherman Act. *Id.*, at 24–25. Applying a specific immunity provision for agricultural cooperatives, we held that the three cooperatives were "in practical effect" one "organization," even though the controlling farmers "have formally organized themselves into three separate legal entities." *Id.*, at 29. "To hold otherwise," we explained, "would be to impose grave legal consequences upon organizational distinctions that are of *de minimis* meaning and effect" insofar as "use of separate corporations had [no] economic significance." *Ibid.*

Next, in *United States* v. *Citizens & Southern Nat. Bank*, 422 U. S. 86 (1975), a large bank, Citizens and Southern (C&S), formed a holding company that operated *de facto* suburban branch banks in the Atlanta area through ownership of the maximum amount of stock in each local branch that was allowed by law, "ownership of much of the remaining stock by parties friendly to C&S, use by the suburban banks of the C&S logogram and all of C&S's banking services, and close C&S oversight of the operation and governance of the suburban banks." *Id.*, at 89 (footnote omitted). The Government challenged the cooperation between the banks. In our analysis, we observed that "'corporate interrelation-

ships . . . are not determinative,'" *id.*, at 116, "looked to economic substance," and observed that "because the sponsored banks were not set up to be competitors, § 1 did not compel them to compete." Areeda & Hovenkamp ¶ 1463g, at 200–201; see also *Citizens & Southern*, 422 U. S., at 119–120; Areeda, Intraenterprise Conspiracy in Decline, 97 Harv. L. Rev. 451, 461 (1983).

We finally reexamined the intraenterprise conspiracy doctrine in *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U. S. 752 (1984), and concluded that it was inconsistent with the "'basic distinction between concerted and independent action.'" *Id.*, at 767. Considering it "perfectly plain that an internal agreement to implement a single, unitary firm's policies does not raise the antitrust dangers that § 1 was designed to police," *id.*, at 769, we held that a parent corporation and its wholly owned subsidiary "are incapable of conspiring with each other for purposes of § 1 of the Sherman Act," *id.*, at 777. We explained that although a parent corporation and its wholly owned subsidiary are "separate" for the purposes of incorporation or formal title, they are controlled by a single center of decisionmaking and they control a single aggregation of economic power. Joint conduct by two such entities does not "depriv[e] the marketplace of independent centers of decisionmaking," *id.*, at 769, and as a result, an agreement between them does not constitute a "contract, combination . . . , or conspiracy" for the purposes of § 1.[5]

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[5] This focus on "substance, not form," *Copperweld*, 467 U. S., at 773, n. 21, can also be seen in our cases about whether a company and its agent are capable of conspiring under § 1. See, *e. g.*, *Simpson* v. *Union Oil Co. of Cal.*, 377 U. S. 13, 20–21 (1964); see also E. Elhauge & D. Geradin, Global Antitrust Law and Economics 787–788, and n. 7 (2007) (hereinafter Elhauge & Geradin) (explaining the functional difference between *Simpson* and *United States* v. *General Elec. Co.*, 272 U. S. 476 (1926), in which we treated a similar agreement as beyond the reach of § 1).

IV

As *Copperweld* exemplifies, "substance, not form, should determine whether a[n] . . . entity is capable of conspiring under § 1." 467 U. S., at 773, n. 21. This inquiry is sometimes described as asking whether the alleged conspirators are a single entity. That is perhaps a misdescription, however, because the question is not whether the defendant is a legally single entity or has a single name; nor is the question whether the parties involved "seem" like one firm or multiple firms in any metaphysical sense. The key is whether the alleged "contract, combination . . . , or conspiracy" is concerted action—that is, whether it joins together separate decisionmakers. The relevant inquiry, therefore, is whether there is a "contract, combination . . . , or conspiracy" amongst "separate economic actors pursuing separate economic interests," *id.*, at 769, such that the agreement "deprives the marketplace of independent centers of decisionmaking," *ibid.*, and therefore of "diversity of entrepreneurial interests," *Fraser* v. *Major League Soccer, L. L. C.*, 284 F. 3d 47, 57 (CA1 2002) (Boudin, C. J.), and thus of actual or potential competition, see *Freeman* v. *San Diego Assn. of Realtors*, 322 F. 3d 1133, 1148–1149 (CA9 2003) (Kozinski, J.); *Rothery Storage & Van Co.* v. *Atlas Van Line, Inc.*, 792 F. 2d 210, 214–215 (CADC 1986) (Bork, J.); see also Areeda & Hovenkamp ¶ 1462b, at 193–194 (noting that the "central evil addressed by Sherman Act § 1" is the "elimin[ation of] competition that would otherwise exist").

Thus, while the president and a vice president of a firm could (and regularly do) act in combination, their joint action generally is not the sort of "combination" that § 1 is intended to cover. Such agreements might be described as "really unilateral behavior flowing from decisions of a single enterprise." *Copperweld*, 467 U. S., at 767. Nor, for this reason, does § 1 cover "internally coordinated conduct of a corporation and one of its unincorporated divisions," *id.*, at 770, be-

cause "[a] division within a corporate structure pursues the common interests of the whole," *ibid.*, and therefore "coordination between a corporation and its division does not represent a sudden joining of two independent sources of economic power previously pursuing separate interests," *id.*, at 770–771. Nor, for the same reasons, is "the coordinated activity of a parent and its wholly owned subsidiary" covered. See *id.*, at 771. They "have a complete unity of interest" and thus "[w]ith or without a formal 'agreement,' the subsidiary acts for the benefit of the parent, its sole shareholder." *Ibid.*

Because the inquiry is one of competitive reality, it is not determinative that two parties to an alleged § 1 violation are legally distinct entities. Nor, however, is it determinative that two legally distinct entities have organized themselves under a single umbrella or into a structured joint venture. The question is whether the agreement joins together "independent centers of decisionmaking." *Id.*, at 769. If it does, the entities are capable of conspiring under § 1, and the court must decide whether the restraint of trade is an unreasonable and therefore illegal one.

V

The NFL teams do not possess either the unitary decisionmaking quality or the single aggregation of economic power characteristic of independent action. Each of the teams is a substantial, independently owned, and independently managed business. "[T]heir general corporate actions are guided or determined" by "separate corporate consciousnesses," and "[t]heir objectives are" not "common." *Copperweld*, 467 U. S., at 771; see also *North American Soccer League* v. *NFL*, 670 F. 2d 1249, 1252 (CA2 1982) (discussing ways that "the financial performance of each team, while related to that of the others, does not . . . necessarily rise and fall with that of the others"). The teams compete with one another, not only on the playing field, but to attract fans, for

gate receipts, and for contracts with managerial and playing personnel. See *Brown* v. *Pro Football, Inc.*, 518 U. S. 231, 249 (1996); *Sullivan* v. *NFL*, 34 F. 3d 1091, 1098 (CA1 1994); *Mid-South Grizzlies* v. *NFL*, 720 F. 2d 772, 787 (CA3 1983); cf. *NCAA*, 468 U. S., at 99.

Directly relevant to this case, the teams compete in the market for intellectual property. To a firm making hats, the Saints and the Colts are two potentially competing suppliers of valuable trademarks. When each NFL team licenses its intellectual property, it is not pursuing the "common interests of the whole" league but is instead pursuing interests of each "corporation itself," *Copperweld*, 467 U. S., at 770; teams are acting as "separate economic actors pursuing separate economic interests," and each team therefore is a potential "independent cente[r] of decisionmaking," *id.*, at 769. Decisions by NFL teams to license their separately owned trademarks collectively and to only one vendor are decisions that "depriv[e] the marketplace of independent centers of decisionmaking," *ibid.*, and therefore of actual or potential competition. See *NCAA*, 468 U. S., at 109, n. 39 (observing a possible § 1 violation if two separately owned companies sold their separate products through a "single selling agent"); cf. Areeda & Hovenkamp ¶ 1478a, at 318 ("Obviously, the most significant competitive threats arise when joint venture participants are actual or potential competitors").

In defense, respondents argue that by forming NFLP, they have formed a single entity, akin to a merger, and market their NFL brands through a single outlet. But it is not dispositive that the teams have organized and own a legally separate entity that centralizes the management of their intellectual property. An ongoing § 1 violation cannot evade § 1 scrutiny simply by giving the ongoing violation a name and label. "Perhaps every agreement and combination in restraint of trade could be so labeled." *Timken Roller Bearing Co.* v. *United States*, 341 U. S. 593, 598 (1951).

The NFL respondents may be similar in some sense to a single enterprise that owns several pieces of intellectual property and licenses them jointly, but they are not similar in the relevant functional sense. Although NFL teams have common interests such as promoting the NFL brand, they are still separate, profit-maximizing entities, and their interests in licensing team trademarks are not necessarily aligned. See generally Hovenkamp, Exclusive Joint Ventures and Antitrust Policy, 1995 Colum. Bus. L. Rev. 1, 52–61 (1995); Shishido, Conflicts of Interest and Fiduciary Duties in the Operation of a Joint Venture, 39 Hastings L. J. 63, 69–81 (1987). Common interests in the NFL brand "*partially* unit[e] the economic interests of the parent firms," Broadley, Joint Ventures and Antitrust Policy, 95 Harv. L. Rev. 1521, 1526 (1982) (emphasis added), but the teams still have distinct, potentially competing interests.

It may be, as respondents argue, that NFLP "has served as the 'single driver'" of the teams' "promotional vehicle, 'pursu[ing] the common interests of the whole.'" Brief for NFL Respondents 28 (quoting *Copperweld*, 467 U. S., at 770–771; brackets in original). But illegal restraints often are in the common interests of the parties to the restraint, at the expense of those who are not parties. It is true, as respondents describe, that they have for some time marketed their trademarks jointly. But a history of concerted activity does not immunize conduct from § 1 scrutiny. "Absence of actual competition may simply be a manifestation of the anticompetitive agreement itself." *Freeman*, 322 F. 3d, at 1149.

Respondents argue that nonetheless, as the Court of Appeals held, they constitute a single entity because without their cooperation, there would be no NFL football. It is true that "the clubs that make up a professional sports league are not completely independent economic competitors, as they depend upon a degree of cooperation for economic survival." *Brown*, 518 U. S., at 248. But the Court of Appeals' reasoning is unpersuasive.

The justification for cooperation is not relevant to whether that cooperation is concerted or independent action.[6] A "contract, combination . . . , or conspiracy," § 1, that is necessary or useful to a joint venture is still a "contract, combination . . . , or conspiracy" if it "deprives the marketplace of independent centers of decisionmaking," *Copperweld*, 467 U. S., at 769. See *NCAA*, 468 U. S., at 113 ("[J]oint ventures have no immunity from antitrust laws"). Any joint venture involves multiple sources of economic power cooperating to produce a product. And for many such ventures, the participation of others is necessary. But that does not mean that necessity of cooperation transforms concerted action into independent action; a nut and a bolt can only operate together, but an agreement between nut and bolt manufacturers is still subject to § 1 analysis. Nor does it mean that once a group of firms agree to produce a joint product, cooperation amongst those firms must be treated as independent conduct. The mere fact that the teams operate jointly in some sense does not mean that they are immune.[7]

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[6] As discussed *infra*, necessity of cooperation is a factor relevant to whether the agreement is subject to the Rule of Reason. See *NCAA*, 468 U. S. 85, 101 (1984) (holding that NCAA restrictions on televising college football games are subject to Rule of Reason analysis for the "critical" reason that "horizontal restraints on competition are essential if the product is to be available at all").

[7] In any event, it simply is not apparent that the alleged conduct was necessary at all. Although two teams are needed to play a football game, not all aspects of elaborate interleague cooperation are necessary to produce a game. Moreover, even if leaguewide agreements are necessary to produce football, it does not follow that concerted activity in marketing intellectual property is necessary to produce football.

The Court of Appeals carved out a zone of antitrust immunity for conduct arguably related to league operations by reasoning that coordinated team trademark sales are necessary to produce "NFL football," a single NFL brand that competes against other forms of entertainment. But defining the product as "NFL football" puts the cart before the horse: Of course the NFL produces NFL football; but that does not mean that cooperation amongst NFL teams is immune from § 1 scrutiny. Members of

The question whether NFLP decisions can constitute concerted activity covered by § 1 is closer than whether decisions made directly by the 32 teams are covered by § 1. This is so both because NFLP is a separate corporation with its own management and because the record indicates that most of the revenues generated by NFLP are shared by the teams on an equal basis. Nevertheless we think it clear that for the same reasons the 32 teams' conduct is covered by § 1, NFLP's actions also are subject to § 1, at least with regards to its marketing of property owned by the separate teams. NFLP's licensing decisions are made by the 32 potential competitors, and each of them actually owns its share of the jointly managed assets. Cf. *Sealy*, 388 U. S., at 352–354. Apart from their agreement to cooperate in exploiting those assets, including their decisions as the NFLP, there would be nothing to prevent each of the teams from making its own market decisions relating to purchases of apparel and headwear, to the sale of such items, and to the granting of licenses to use its trademarks.

We generally treat agreements within a single firm as independent action on the presumption that the components of the firm will act to maximize the firm's profits. But in rare cases, that presumption does not hold. Agreements made within a firm can constitute concerted action covered by § 1 when the parties to the agreement act on interests separate from those of the firm itself,[8] and the intrafirm agreements may simply be a formalistic shell for ongoing concerted ac-

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any cartel could insist that their cooperation is necessary to produce the "cartel product" and compete with other products.

[8] See Areeda & Hovenkamp ¶ 1471; Elhauge & Geradin 786–787, and n. 6; see also *Capital Imaging Assoc.* v. *Mohawk Valley Medical Assoc., Inc.*, 996 F. 2d 537, 544 (CA2 1993); *Bolt* v. *Halifax Hospital Medical Center*, 891 F. 2d 810, 819 (CA11 1990); *Oksanen* v. *Page Memorial Hospital*, 945 F. 2d 696, 706 (CA4 1991); *Motive Parts Warehouse* v. *Facet Enterprises*, 774 F. 2d 380, 387–388 (CA10 1985); *Victorian House, Inc.* v. *Fisher Camuto Corp.*, 769 F. 2d 466, 469 (CA8 1985); *Weiss* v. *York Hospital*, 745 F. 2d 786, 828 (CA3 1984).

tion. See, *e. g.*, *Topco Associates, Inc.*, 405 U. S., at 609; *Sealy*, 388 U. S., at 352–354.

For that reason, decisions by NFLP regarding the teams' separately owned intellectual property constitute concerted action. Thirty-two teams operating independently through the vehicle of NFLP are not like the components of a single firm that act to maximize the firm's profits. The teams remain separately controlled, potential competitors with economic interests that are distinct from NFLP's financial well-being. See generally Hovenkamp, 1995 Colum. Bus. L. Rev., at 52–61. Unlike typical decisions by corporate shareholders, NFLP licensing decisions effectively require the assent of more than a mere majority of shareholders. And each team's decision reflects not only an interest in NFLP's profits but also an interest in the team's individual profits. See generally Shusido, 39 Hastings L. J., at 69–71. The 32 teams capture individual economic benefits separate and apart from NFLP profits as a result of the decisions they make for NFLP. NFLP's decisions thus affect each team's profits from licensing its own intellectual property. "Although the business interests of" the teams "will *often* coincide with those of" NFLP "as an entity in itself, that commonality of interest exists in every cartel." *Los Angeles Memorial Coliseum Comm'n* v. *NFL*, 726 F. 2d 1381, 1389 (CA9 1984) (emphasis added). In making the relevant licensing decisions, NFLP is therefore "an instrumentality" of the teams. *Sealy*, 388 U. S., at 352–354; see also *Topco Associates, Inc.*, 405 U. S., at 609.

If the fact that potential competitors shared in profits or losses from a venture meant that the venture was immune from § 1, then any cartel "could evade the antitrust laws simply by creating a 'joint venture' to serve as the exclusive seller of their competing products." *Major League Baseball Properties, Inc.* v. *Salvino, Inc.*, 542 F. 3d 290, 335 (CA2 2008) (Sotomayor, J., concurring in judgment). "So long as no agreement," other than one made by the cartelists sitting

on the board of the joint venture, "explicitly listed the prices to be charged, the companies could act as monopolies through the 'joint venture.'" *Ibid.* (Indeed, a joint venture with a single management structure is generally a better way to operate a cartel because it decreases the risks of a party to an illegal agreement defecting from that agreement.) However, competitors "cannot simply get around" antitrust liability by acting "through a third-party intermediary or 'joint venture'." *Id.*, at 336.[9]

VI

Football teams that need to cooperate are not trapped by antitrust law. "[T]he special characteristics of this industry may provide a justification" for many kinds of agreements. *Brown*, 518 U. S., at 252 (STEVENS, J., dissenting). The fact that NFL teams share an interest in making the entire league successful and profitable, and that they must cooperate in the production and scheduling of games, provides a perfectly sensible justification for making a host of collective decisions. But the conduct at issue in this case is still con-

[9] For the purposes of resolving this case, there is no need to pass upon the Government's position that entities are incapable of conspiring under § 1 if they "have effectively merged the relevant aspect of their operations, thereby eliminating actual and potential competition . . . in that operational sphere" and "the challenged restraint [does] not significantly affect actual or potential competition . . . outside their merged operations." Brief for United States as *Amicus Curiae* 17. The Government urges that the choices "to offer only a blanket license" and "to have only a single headwear licensee" might not constitute concerted action under its test. *Id.*, at 32. However, because the teams still own their own trademarks and are free to market those trademarks as they see fit, even those two choices were agreements amongst potential competitors and would constitute concerted action under the Government's own standard. At any point, the teams could decide to license their own trademarks. It is significant, moreover, that the teams here control NFLP. The two choices that the Government might treat as independent action, although nominally made by NFLP, are for all functional purposes choices made by the 32 entities with potentially competing interests.

certed activity under the Sherman Act that is subject to § 1 analysis.

When "restraints on competition are essential if the product is to be available at all," *per se* rules of illegality are inapplicable, and instead the restraint must be judged according to the flexible Rule of Reason.[10] *NCAA*, 468 U. S., at 101; see *id.*, at 117 ("Our decision not to apply a *per se* rule to this case rests in large part on our recognition that a certain degree of cooperation is necessary if the type of competition that petitioner and its member institutions seek to market is to be preserved"); see also *Dagher*, 547 U. S., at 6. In such instances, the agreement is likely to survive the Rule of Reason. See *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U. S. 1, 23 (1979) ("Joint ventures and other cooperative arrangements are also not usually unlawful . . . where the agreement . . . is necessary to market the product at all"). And depending upon the concerted activity in question, the Rule of Reason may not require a detailed analysis; it "can sometimes be applied in the twinkling of an eye." *NCAA*, 468 U. S., at 110, n. 39.

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[10] Justice Brandeis provided the classic formulation of the Rule of Reason in *Board of Trade of Chicago* v. *United States*, 246 U. S. 231, 238 (1918):

"The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint is imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences."

See also *Leegin Creative Leather Products, Inc.* v. *PSKS, Inc.*, 551 U. S. 877, 885–887 (2007); *National Soc. of Professional Engineers*, 435 U. S., at 688–691.

Other features of the NFL may also save agreements amongst the teams. We have recognized, for example, "that the interest in maintaining a competitive balance" among "athletic teams is legitimate and important," *id.*, at 117. While that same interest applies to the teams in the NFL, it does not justify treating them as a single entity for § 1 purposes when it comes to the marketing of the teams' individually owned intellectual property. It is, however, unquestionably an interest that may well justify a variety of collective decisions made by the teams. What role it properly plays in applying the Rule of Reason to the allegations in this case is a matter to be considered on remand.

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

It is so ordered.

Syllabus

LEWIS ET AL. *v.* CITY OF CHICAGO, ILLINOIS

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

No. 08–974. Argued February 22, 2010—Decided May 24, 2010

In 1995, respondent the city of Chicago (City) gave a written examination to applicants seeking firefighter positions. In January 1996, the City announced it would draw candidates randomly from a list of applicants who scored at least 89 out of 100 points on the examination, whom it designated as "well qualified." It informed those who scored below 65 that they had failed and would not be considered further. It informed applicants who scored between 65 and 88, whom it designated as "qualified," that it was unlikely they would be called for further processing but that the City would keep them on the eligibility list for as long as that list was used. That May, the City selected its first class of applicants to advance, and it repeated this process multiple times over the next six years. Beginning in March 1997, several African-American applicants who scored in the "qualified" range but had not been hired filed discrimination charges with the Equal Employment Opportunity Commission (EEOC) and received right-to-sue letters. They then filed suit, alleging (as relevant here) that the City's practice of selecting only applicants who scored 89 or above had a disparate impact on African-Americans in violation of Title VII of the Civil Rights Act of 1964, see 42 U. S. C. § 2000e–2(k)(1)(A)(i). The District Court certified a class—petitioners here—of African-Americans who scored in the "qualified" range but were not hired. The court denied the City's summary judgment motion, rejecting its claim that petitioners had failed to file EEOC charges within 300 days "after the unlawful employment practice occurred," § 2000e–5(e)(1), and finding instead that the City's "ongoing reliance" on the 1995 test results constituted a continuing Title VII violation. The litigation then proceeded, and petitioners prevailed on the merits. The Seventh Circuit reversed the judgment in their favor, holding that the suit was untimely because the earliest EEOC charge was filed more than 300 days after the only discriminatory act—sorting the scores into the "well qualified," "qualified," and "not qualified" categories. The later hiring decisions, the Seventh Circuit held, were an automatic consequence of the test scores, not new discriminatory acts.

Held: A plaintiff who does not file a timely charge challenging the *adoption* of a practice may assert a disparate-impact claim in a timely charge challenging the employer's later *application* of that practice

as long as he alleges each of the elements of a disparate-impact claim. Pp. 210–217.

(a) Determining whether petitioners' charges were timely requires "identify[ing] precisely the 'unlawful employment practice' of which" they complain. *Delaware State College* v. *Ricks*, 449 U. S. 250, 257. With the exception of the first selection round, all agree that the challenged practice here—the City's selection of firefighter hires on the basis announced in 1996—occurred within the charging period. Thus, the question is not whether a claim predicated on that conduct is *timely*, but whether the practice thus defined can be the basis for a disparate-impact claim *at all*. It can. A Title VII plaintiff establishes a prima facie claim by showing that the employer "uses a particular employment practice that causes a disparate impact" on one of the prohibited bases. § 2000e–2(k). The term "employment practice" clearly encompasses the conduct at issue: exclusion of passing applicants who scored below 89 when selecting those who would advance. The City "use[d]" that practice each time it filled a new class of firefighters, and petitioners allege that doing so caused a disparate impact. It is irrelevant that subsection (k) does not address "accrual" of disparate-impact claims, since the issue here is not when the claims accrued but whether the claims stated a violation. They did. Whether petitioners proved a violation is not before the Court. Pp. 210–213.

(b) The City argues that the only actionable discrimination occurred in 1996 when it used the test results to create the hiring list, which it concedes was unlawful. It may be true that the City's adoption in 1996 of the cutoff score gave rise to a freestanding disparate-impact claim. If so, because no timely charge was filed, the City is now "entitled to treat that past act as lawful," *United Air Lines, Inc.* v. *Evans*, 431 U. S. 553, 558. But it does not follow that no new violation occurred—and no new claims could arise—when the City later implemented the 1996 decision. *Evans* and later cases the City cites establish only that a Title VII plaintiff must show a "present violation" within the limitations period. For disparate-treatment claims—which require discriminatory intent—the plaintiff must demonstrate deliberate discrimination within the limitations period. But no such demonstration is needed for claims, such as this one, that do not require discriminatory intent. Cf., *e. g.*, *Ledbetter* v. *Goodyear Tire & Rubber Co.*, 550 U. S. 618, 640. Contrary to the Seventh Circuit's reasoning, even if both types of claims take aim at prohibited discrimination, it does not follow that their reach is coextensive. Pp. 213–216.

(c) The City and its *amici* warn that this reading will result in a host of practical problems for employers and employees alike. The Court,

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however, must give effect to the law Congress enacted, not assess the consequences of each approach and adopt the one that produces the least mischief. Pp. 216–217.

(d) It is left to the Seventh Circuit to determine whether the judgment must be modified to the extent that the District Court awarded relief based on the first round of hiring, which occurred outside the charging period even for the earliest EEOC charge. P. 217.

528 F. 3d 488, reversed and remanded.

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

John Payton argued the cause for petitioners. With him on the briefs were *Debo P. Adegbile*, *Matthew Colangelo*, *Joshua Civin*, *Clyde E. Murphy*, *Judson H. Miner*, *George F. Galland, Jr.*, *Matthew J. Piers*, *Patrick O. Patterson, Jr.*, *Fay Clayton*, *Cynthia H. Hyndman*, and *Bridget Arimond*.

Deputy Solicitor General Katyal argued the cause for the United States as *amicus curiae* supporting petitioners. With him on the brief were *Solicitor General Kagan*, *Assistant Attorney General Perez*, *Deputy Assistant Attorney General Bagenstos*, *Leondra R. Kruger*, *Dennis J. Dimsey*, *Teresa Kwong*, *Lorraine C. Davis*, and *Anne Noel Occhialino*.

Benna Ruth Solomon argued the cause for respondent. With her on the brief were *Myriam Zreczny Kasper* and *Nadine Jean Wichern*.*

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*Briefs of *amici curiae* urging reversal were filed for the International Association of Official Human Rights Agencies by *Kevin K. Russell*, *Amy Howe*, *Pamela S. Karlan*, and *Jeffrey L. Fisher;* and for the National Partnership for Women & Families et al. by *Helen Norton*, *Judith L. Lichtman*, *Marcia D. Greenberger*, *Audrey Wiggins*, *Sarah Crawford*, and *Michael L. Foreman*.

Briefs of *amici curiae* urging affirmance were filed for the City of New York et al. by *Michael A. Cardozo*, *Leonard J. Koerner*, and *Elizabeth Susan Natrella;* and for the Equal Employment Advisory Council et al. by *Rae T. Vann*, *Karen R. Harned*, and *Elizabeth Milito*.

Sharon L. Browne filed a brief for the Pacific Legal Foundation as *amicus curiae*.

JUSTICE SCALIA delivered the opinion of the Court.

Title VII of the Civil Rights Act of 1964 prohibits employers from using employment practices that cause a disparate impact on the basis of race (among other bases). 42 U. S. C. §2000e–2(k)(1)(A)(i). It also requires plaintiffs, before beginning a federal lawsuit, to file a timely charge of discrimination with the Equal Employment Opportunity Commission (EEOC). §2000e–5(e)(1). We consider whether a plaintiff who does not file a timely charge challenging the *adoption* of a practice—here, an employer's decision to exclude employment applicants who did not achieve a certain score on an examination—may assert a disparate-impact claim in a timely charge challenging the employer's later *application* of that practice.

I

In July 1995, the city of Chicago (City) administered a written examination to over 26,000 applicants seeking to serve in the Chicago Fire Department. After scoring the examinations, the City reported the results. It announced in a January 26, 1996, press release that it would begin drawing randomly from the top tier of scorers, *i. e.*, those who scored 89 or above (out of 100), whom the City called "well qualified." Those drawn from this group would proceed to the next phase—a physical-abilities test, background check, medical examination, and drug test—and if they cleared those hurdles would be hired as candidate firefighters. Those who scored below 65, on the other hand, learned by letters sent the same day that they had failed the test. Each was told he had not achieved a passing score, would no longer be considered for a firefighter position, and would not be contacted again about the examination.

The applicants in-between—those who scored between 65 and 88, whom the City called "qualified"[1]—were notified that

[1] Certain paramedics who scored between 65 and 88 were deemed "well qualified" pursuant to a collective-bargaining agreement, and certain vet-

they had passed the examination but that, based on the City's projected hiring needs and the number of "well-qualified" applicants, it was not likely they would be called for further processing. The individual notices added, however, that because it was not possible to predict how many applicants would be hired in the next few years, each "qualified" applicant's name would be kept on the eligibility list maintained by the department of personnel for as long as that list was used. Eleven days later, the City officially adopted an "Eligible List" reflecting the breakdown described above.

On May 16, 1996, the City selected its first class of applicants to advance to the next stage. It selected a second on October 1, 1996, and repeated the process nine more times over the next six years. As it had announced, in each round the City drew randomly from among those who scored in the "well-qualified" range on the 1995 test. In the last round it exhausted that pool, so it filled the remaining slots with "qualified" candidates instead.

On March 31, 1997, Crawford M. Smith, an African-American applicant who scored in the "qualified" range and had not been hired as a candidate firefighter, filed a charge of discrimination with the EEOC. Five others followed suit, and on July 28, 1998, the EEOC issued all six of them right-to-sue letters. Two months later, they filed this civil action against the City, alleging (as relevant here) that its practice of selecting for advancement only applicants who scored 89 or above caused a disparate impact on African-Americans in violation of Title VII. The District Court certified a class—petitioners here—consisting of the more than 6,000 African-Americans who scored in the "qualified" range on the 1995 examination but had not been hired.[2]

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erans in the "qualified" range had five points added to their scores and therefore became "well qualified."

[2] In addition to the class members, the African American Fire Fighters League of Chicago, Inc., also joined the suit as a plaintiff.

The City sought summary judgment on the ground that petitioners had failed to file EEOC charges within 300 days after their claims accrued. See § 2000e–5(e)(1). The District Court denied the motion, concluding that the City's "ongoing reliance" on the 1995 test results constituted a "continuing violation" of Title VII. App. to Pet. for Cert. 45a. The City stipulated that the 89-point cutoff had a "severe disparate impact against African Americans," Final Pretrial Order, Record, Doc. 223, Schedule A, p. 2, but argued that its cutoff score was justified by business necessity. After an 8-day bench trial, the District Court ruled for petitioners, rejecting the City's business-necessity defense. It ordered the City to hire 132 randomly selected members of the class (reflecting the number of African-Americans the court found would have been hired but for the City's practices) and awarded backpay to be divided among the remaining class members.

The Seventh Circuit reversed. 528 F. 3d 488 (2008). It held that petitioners' suit was untimely because the earliest EEOC charge was filed more than 300 days after the only discriminatory act: sorting the scores into the "well-qualified," "qualified," and "not-qualified" categories. The hiring decisions down the line were immaterial, it reasoned, because "[t]he hiring only of applicants classified 'well qualified' was the automatic consequence of the test scores rather than the product of a fresh act of discrimination." *Id.*, at 491. We granted certiorari. 557 U. S. 965 (2009).

II

A

Before beginning a Title VII suit, a plaintiff must first file a timely EEOC charge. In this case, petitioners' charges were due within 300 days "after the alleged unlawful employment practice occurred." § 2000e–5(e)(1).[3] Determin-

[3] All agree that a 300-day deadline applies to petitioners' charges pursuant to 29 CFR §§ 1601.13(a)(4), (b)(1), 1601.80 (2009). Cf. *EEOC* v. *Commercial Office Products Co.*, 486 U. S. 107, 112, 114–122 (1988).

ing whether a plaintiff's charge is timely thus requires "identify[ing] precisely the 'unlawful employment practice' of which he complains." *Delaware State College* v. *Ricks*, 449 U. S. 250, 257 (1980). Petitioners here challenge the City's practice of picking only those who had scored 89 or above on the 1995 examination when it later chose applicants to advance. Setting aside the first round of selection in May 1996, which all agree is beyond the cutoff, no one disputes that the conduct petitioners challenge occurred within the charging period.[4] The real question, then, is not whether a claim predicated on that conduct is *timely*, but whether the practice thus defined can be the basis for a disparate-impact claim *at all*.

We conclude that it can. As originally enacted, Title VII did not expressly prohibit employment practices that cause a disparate impact. That enactment made it an "unlawful employment practice" for an employer "to fail or refuse to hire or to discharge any individual, or otherwise 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," § 2000e–2(a)(1), or "to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of" any of the same reasons, § 2000e–2(a)(2). In *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 431 (1971), we interpreted the latter provision to "proscrib[e] not only overt discrimination but also practices that are fair in form, but discriminatory in operation."

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[4] Because the District Court certified petitioners as a class, and because a court may award classwide relief even to unnamed class members who have not filed EEOC charges, see *Franks* v. *Bowman Transp. Co.*, 424 U. S. 747, 771 (1976), petitioners assert and the City does not dispute that the date of the earliest EEOC charge filed by a named plaintiff—that filed by Smith on March 31, 1997—controls the timeliness of the class's claims. We assume without deciding that this is correct.

Two decades later, Congress codified the requirements of the "disparate impact" claims *Griggs* had recognized. Pub. L. 102–166, § 105, 105 Stat. 1074, 42 U. S. C. § 2000e–2(k). That provision states:

> "(1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if—
>
> "(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity . . . ."

Thus, a plaintiff establishes a prima facie disparate-impact claim by showing that the employer "*uses* a particular employment practice that causes a disparate impact" on one of the prohibited bases. *Ibid.* (emphasis added). See *Ricci* v. *DeStefano,* 557 U. S. 557, 578 (2009).

Petitioners' claim satisfies that requirement. Title VII does not define "employment practice," but we think it clear that the term encompasses the conduct of which petitioners complain: the exclusion of passing applicants who scored below 89 (until the supply of scores 89 or above was exhausted) when selecting those who would advance. The City "use[d]" that practice in each round of selection. Although the City had adopted the eligibility list (embodying the score cutoffs) earlier and announced its intention to draw from that list, it made use of the practice of excluding those who scored 88 or below each time it filled a new class of firefighters. Petitioners alleged that this exclusion caused a disparate impact. Whether they adequately proved that is not before us. What matters is that their allegations, based on the City's actual implementation of its policy, stated a cognizable claim.

The City argues that subsection (k) is inapposite because it does not address "accrual" of disparate-impact claims. Section 2000e–5(e)(1), it says, specifies when the time to file a charge starts running. That is true but irrelevant. Aside from the first round of selection in May 1996 (which all agree is beyond the 300-day charging period), the acts petitioners challenge—the City's use of its cutoff score in selecting candidates—occurred within the charging period. Accordingly, no one disputes that if petitioners could bring new claims based on those acts, their claims were timely. The issue, in other words, is not *when* petitioners' claims accrued, but *whether* they could accrue at all.

The City responds that subsection (k) does not answer *that* question either; that it speaks, as its title indicates, only to the plaintiff's "[b]urden of proof in disparate impact cases," not to the elements of disparate-impact claims, which the City says are be found in § 2000e–2(a)(2). That is incorrect. Subsection (k) does indeed address the burden of proof—not just who bears it, however, but also what it consists of. It *does* set forth the essential ingredients of a disparate-impact claim: It says that a claim "is established" if an employer "uses" an "employment practice" that "causes a disparate impact" on one of the enumerated bases. § 2000e–2(k)(1)(A)(i). That it also sets forth a business-necessity defense employers may raise, *ibid.*, and explains how plaintiffs may prevail despite that defense, § 2000e–2(k)(1)(A)(ii), is irrelevant. Unless and until the defendant pleads and proves a business-necessity defense, the plaintiff wins simply by showing the stated elements.

B

Notwithstanding the text of § 2000e–2(k)(1)(A)(i) and petitioners' description of the practice they claim was unlawful, the City argues that the unlawful employment practice here was something else entirely. The only actionable discrimination, it argues, occurred in 1996 when it "used the exami-

nation results to create the hiring eligibility list, limited hiring to the 'well qualified' classification, and notified petitioners." Brief for Respondent 23. That initial decision, it concedes, was unlawful. But because no timely charge challenged the decision, that cannot now be the basis for liability. And because, the City claims, the exclusion of petitioners when selecting classes of firefighters followed inevitably from the earlier decision to adopt the cutoff score, no new violations could have occurred. The Seventh Circuit adopted the same analysis. See 528 F. 3d, at 490–491.

The City's premise is sound, but its conclusion does not follow. It may be true that the City's January 1996 decision to adopt the cutoff score (and to create a list of the applicants above it) gave rise to a freestanding disparate-impact claim. Cf. *Connecticut* v. *Teal*, 457 U. S. 440, 445–451 (1982). If that is so, the City is correct that since no timely charge was filed attacking it, the City is now "entitled to treat that past act as lawful." *United Air Lines, Inc.* v. *Evans*, 431 U. S. 553, 558 (1977). But it does not follow that no new violation occurred—and no new claims could arise—when the City implemented that decision down the road. If petitioners could prove that the City "use[d]" the "practice" that "causes a disparate impact," they could prevail.

The City, like the Seventh Circuit, see 528 F. 3d, at 490–491, insists that *Evans* and a line of cases following it require a different result. See also *Ledbetter* v. *Goodyear Tire & Rubber Co.*, 550 U. S. 618 (2007); *Lorance* v. *AT&T Technologies, Inc.*, 490 U. S. 900 (1989); *Ricks*, 449 U. S. 250. Those cases, we are told, stand for the proposition that present effects of prior actions cannot lead to Title VII liability.

We disagree. As relevant here, those cases establish only that a Title VII plaintiff must show a "present violation" within the limitations period. *Evans*, *supra*, at 558 (emphasis deleted). What that requires depends on the claim asserted. For disparate-treatment claims—and others for which discriminatory intent is required—that means the

plaintiff must demonstrate deliberate discrimination within the limitations period. See *Ledbetter*, *supra*, at 624–629; *Lorance*, *supra*, at 904–905; *Ricks*, *supra*, at 256–258; *Evans*, *supra*, at 557–560; see also *Chardon* v. *Fernandez*, 454 U. S. 6, 8 (1981) *(per curiam)*. But for claims that do not require discriminatory intent, no such demonstration is needed. Cf. *Ledbetter*, *supra*, at 640; *Lorance*, *supra*, at 904, 908–909. Our opinions, it is true, described the harms of which the unsuccessful plaintiffs in those cases complained as "present effect[s]" of past discrimination. *Ledbetter*, *supra*, at 628; see also *Lorance*, *supra*, at 907; *Chardon*, *supra*, at 8; *Ricks*, *supra*, at 258; *Evans*, *supra*, at 558. But the reason they could not be the present effects of present discrimination was that the charged discrimination required proof of discriminatory intent, which had not even been alleged. That reasoning has no application when, as here, the charge is disparate impact, which does not require discriminatory intent.

The Seventh Circuit resisted this conclusion, reasoning that the difference between disparate-treatment and disparate-impact claims is only superficial. Both take aim at the same evil—discrimination on a prohibited basis—but simply seek to establish it by different means. 528 F. 3d, at 491–492. Disparate-impact liability, the Court of Appeals explained, "'is primarily intended to lighten the plaintiff's heavy burden of proving intentional discrimination after employers learned to cover their tracks.'" *Id.*, at 492 (quoting *Finnegan* v. *Trans World Airlines, Inc.*, 967 F. 2d 1161, 1164 (CA7 1992)). But even if the two theories were directed at the same evil, it would not follow that their reach is therefore coextensive. If the effect of applying Title VII's text is that some claims that would be doomed under one theory will survive under the other, that is the product of the law Congress has written. It is not for us to rewrite the statute so that it covers only what we think is necessary to achieve what we think Congress really intended. See *Oncale*

v. *Sundowner Offshore Services, Inc.*, 523 U. S. 75, 79–80 (1998).

The City also argues that, even if petitioners could have proved a present disparate-impact violation, they never did so under the proper test. The parties litigated the merits—and the City stipulated that the cutoff score caused disparate impact—after the District Court adopted petitioners' "continuing violation" theory. App. to Pet. for Cert. 45a. That theory, which petitioners have since abandoned, treated the adoption and application of the cutoff score as a single, ongoing wrong. As a result, the City says, "petitioners never proved, or even attempted to prove, that *use* of the [eligibility] list had disparate impact," Brief for Respondent 32 (emphasis added), since the theory they advanced did not require them to do so. If the Court of Appeals determines that the argument has been preserved it may be available on remand. But it has no bearing here. The only question presented to us is whether the claim petitioners brought is cognizable. Because we conclude that it is, our inquiry is at an end.

C

The City and its *amici* warn that our reading will result in a host of practical problems for employers and employees alike. Employers may face new disparate-impact suits for practices they have used regularly for years. Evidence essential to their business-necessity defenses might be unavailable (or in the case of witnesses' memories, unreliable) by the time the later suits are brought. And affected employees and prospective employees may not even know they have claims if they are unaware the employer is still applying the disputed practice.

Truth to tell, however, both readings of the statute produce puzzling results. Under the City's reading, if an employer adopts an unlawful practice and no timely charge is brought, it can continue using the practice indefinitely, with impunity, despite ongoing disparate impact. Equitable toll-

ing or estoppel may allow some affected employees or applicants to sue, but many others will be left out in the cold. Moreover, the City's reading may induce plaintiffs aware of the danger of delay to file charges upon the announcement of a hiring practice, before they have any basis for believing it will produce a disparate impact.

In all events, it is not our task to assess the consequences of each approach and adopt the one that produces the least mischief. Our charge is to give effect to the law Congress enacted. By enacting § 2000e–2(k)(1)(A)(i), Congress allowed claims to be brought against an employer who uses a practice that causes disparate impact, whatever the employer's motives and whether or not he has employed the same practice in the past. If that effect was unintended, it is a problem for Congress, not one that federal courts can fix.

III

The City asserts that one aspect of the District Court's judgment still must be changed. The first round of hiring firefighters occurred outside the charging period even for the earliest EEOC charge. Yet the District Court, applying the continuing-violation theory, awarded relief based on those acts. Petitioners do not disagree, and they do not oppose the City's request for a remand to resolve this issue. We therefore leave it to the Seventh Circuit to determine, to the extent that point was properly preserved, whether the judgment must be modified in light of our decision.

* * *

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

It is so ordered.

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UNITED STATES *v.* O'BRIEN ET AL.

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

No. 08–1569. Argued February 23, 2010—Decided May 24, 2010

Respondents O'Brien and Burgess each carried a firearm during an attempted robbery. Count three of their indictment charged them with using a firearm in furtherance of a crime of violence, which carries a mandatory minimum 5-year prison term. 18 U. S. C. § 924(c)(1)(A)(i). Count four alleged use of a machinegun (here, a pistol that authorities believed operated as a fully automatic firearm) in furtherance of that crime, which carries a 30-year mandatory minimum term. § 924(c)(1)(B)(ii). The Government moved to dismiss the fourth count on the basis that it could not establish the count beyond a reasonable doubt, but it maintained that § 924(c)(1)(B)(ii)'s machinegun provision was a sentencing enhancement to be determined by the District Court upon a conviction on count three. The court dismissed count four and rejected the Government's sentencing-enhancement position. Respondents then pleaded guilty to the remaining counts. The court sentenced O'Brien to a 102-month term and Burgess to an 84-month term for their § 924(c) convictions. In affirming the District Court's § 924(c)(1)(B)(ii) ruling, the First Circuit looked primarily to *Castillo* v. *United States*, 530 U. S. 120, which held that the machinegun provision in an earlier version of § 924(c) constituted an element of an offense, not a sentencing factor. The court found that *Castillo* was "close to binding," absent clearer or more dramatic changes than those made by Congress' 1998 amendment of § 924(c) or a clearer legislative history.

Held: The fact that a firearm was a machinegun is an element to be proved to the jury beyond a reasonable doubt, not a sentencing factor to be proved to the judge at sentencing. Pp. 224–235.

(a) Generally, a fact that "increase[s] the prescribed range of penalties to which a criminal defendant is exposed" is an element of a crime, *Apprendi* v. *New Jersey*, 530 U. S. 466, 490, to be charged in an indictment and proved to a jury beyond a reasonable doubt, *Hamling* v. *United States*, 418 U. S. 87, 117, rather than proved to a judge at sentencing by a preponderance of the evidence, *McMillan* v. *Pennsylvania*, 477 U. S. 79, 91–92. Subject to this constitutional constraint, Congress determines whether a factor is an element or a sentencing factor. When Congress is not explicit, courts look to a statute's provisions and framework for guidance. Analysis of the current machinegun provision

begins with *Castillo*, where the Court found the bare language of § 924's prior version "neutral," 530 U. S., at 124, but ruled that four factors—(1) language and structure, (2) tradition, (3) risk of unfairness, and (4) severity of the sentence—favored treating the machinegun provision as an element of an offense, *id.*, at 124–131; while a fifth factor—legislative history—did not favor either side, *ibid.* Pp. 224–226.

(b) As relevant here, the 1998 amendment divided what was once a lengthy principal sentence into separate subparagraphs. Thus, with regard to the first *Castillo* factor, the Court's observation that "Congress placed the element 'uses or carries a firearm' and the word 'machinegun' in a single sentence, not broken up with dashes or separated into subsections," 530 U. S., at 124–125, no longer holds true. However, the amendment did not affect the second through fifth *Castillo* factors. Each of them, except for legislative history (which remains relatively silent), continues to favor treating the machinegun provision as an element. The amendment's effect on the language and structure factor requires closer examination. Pp. 226–231.

(c) Given the Court's determination in *Castillo* that the machinegun provision in § 924's prior version is an element, a substantive change in the statute should not be inferred "[a]bsent a clear indication from Congress of a change in policy," *Grogan* v. *Garner*, 498 U. S. 279, 290. Nothing in the 1998 amendment indicates such a change. There are three principal differences between the previous and current § 924(c). The first, a substantive change, shifts what were once mandatory 5-year and 30-year sentences to mandatory minimum sentences. The second, also substantive—made in direct response to the holding in *Bailey* v. *United States*, 516 U. S. 137, that "uses or carries" in § 924's preamendment version connotes "more than mere possession," *id.*, at 143—adds "possesses" to the "uses or carries" language in § 924(c)'s principal paragraph and provides sentencing enhancements for brandishing or discharging the firearm, §§ 924(c)(1)(A)(ii) and (iii), which do state sentencing factors, *Harris* v. *United States*, 536 U. S. 545, 552–556. Neither of these substantive changes suggests that Congress meant to transform the machinegun provision from an element into a sentencing factor. The third difference is the machinegun provision's relocation from the principal paragraph that unmistakably lists offense elements to a separate subparagraph, § 924(c)(1)(B), but this structural or stylistic change provides no "clear indication" that Congress meant to alter its treatment of machineguns as an offense element. A more logical explanation is that the restructuring was intended to break up a lengthy principal paragraph, which exceeded 250 words, into a more readable statute, which is in step with current legislative drafting guidelines. While this Court

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has recognized that placing factors in separate subsections is one way Congress might signal that it is treating them as sentencing factors rather than elements, *Castillo*, *supra*, at 124–125, it has rejected the view that such a structural consideration predominates even when other factors point in the other direction, *Harris*, *supra*, at 553. The current structure of § 924(c) is more favorable to treating the machinegun provision as a sentencing factor than was true in *Castillo*, particularly because the machinegun provision is now positioned between the sentencing factors provided in (A)(ii) and (iii) and those in (C)(i) and (ii). This structural point is overcome by the substantial weight of the other *Castillo* factors and the principle that Congress would not enact so significant a change without a clear indication of its purpose to do so. Pp. 231–235.

542 F. 3d 921, affirmed.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C. J., and STEVENS, SCALIA, GINSBURG, BREYER, ALITO, and SOTOMAYOR, JJ., joined. STEVENS, J., filed a concurring opinion, *post*, p. 235. THOMAS, J., filed an opinion concurring in the judgment, *post*, p. 240.

Benjamin J. Horwich argued the cause for the United States. With him on the briefs were *Solicitor General Kagan*, *Assistant Attorney General Breuer*, *Deputy Solicitor General Dreeben*, and *Sangita K. Rao*.

Jeffrey L. Fisher argued the cause for respondents. With him on the brief for respondent O'Brien were *Timothy P. O'Connell*, by appointment of the Court, 558 U. S. 1022, *Patricia A. Millett*, *Thomas C. Goldstein*, *Pamela S. Karlan*, *Amy Howe*, and *Kevin K. Russell*. *Leslie Feldman-Rumpler*, by appointment of the Court, 558 U. S. 1022, *Sarah O'Rourke Schrup*, *Jeffrey T. Green*, *Quin M. Sorenson*, and *Judith H. Mizner* filed a brief for respondent Burgess.*

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*Briefs of *amici curiae* urging affirmance were filed for the Center on the Administration of Criminal Law by *Samuel L. Feder*, *Anthony S. Barkow*, and *Douglas A. Berman;* for Families Against Mandatory Minimums et al. by *Samuel J. Buffone*, *Mary Price*, and *Peter Goldberger;* and for the National Association of Federal Defenders by *Mark Osler*, *Paul M. Rashkind*, *Frances H. Pratt*, and *Brett G. Sweitzer*.

JUSTICE KENNEDY delivered the opinion of the Court.

The Court must interpret, once again, § 924(c) of Title 18 of the United States Code. This provision prohibits the use or carrying of a firearm in relation to a crime of violence or drug trafficking crime, or the possession of a firearm in furtherance of such crimes. § 924(c)(1)(A). A violation of the statute carries a mandatory minimum term of five years' imprisonment, § 924(c)(1)(A)(i); but if the firearm is a machinegun, the statute requires a 30-year mandatory minimum sentence, § 924(c)(1)(B)(ii). Whether a firearm was used, carried, or possessed is, as all concede, an element of the offense. At issue here is whether the fact that the firearm was a machinegun is an element to be proved to the jury beyond a reasonable doubt or a sentencing factor to be proved to the judge at sentencing.

In an earlier case the Court determined that an analogous machinegun provision in a previous version of § 924 constituted an element of an offense to be proved to the jury. *Castillo* v. *United States*, 530 U. S. 120 (2000). The *Castillo* decision, however, addressed the statute as it existed before congressional amendments made in 1998. And in a case after *Castillo*, the brandishing provision in the post-1998 version of § 924 was held to provide a sentencing factor, not an element of the offense. *Harris* v. *United States*, 536 U. S. 545 (2002). In light of the 1998 amendments and the *Harris* decision, the question of how to interpret § 924's machinegun provision is considered once more in the instant case.

I

On June 16, 2005, respondents Martin O'Brien and Arthur Burgess attempted to rob an armored car making a scheduled delivery of cash to a bank. Along with a third collaborator, respondents hid in a minivan and waited for the armored car to make its stop. Each of the men carried a firearm. Containing nearly $2 million and attended by two guards, the armored car arrived. A guard began to unload

boxes of coins. The three men came out of the van and, while one of them brandished his weapon, they ordered the guards to get on the ground. One guard did so, but the other ran to a nearby restaurant. Respondents abandoned the robbery and fled without taking any money. No shots were fired, and no one was injured.

Authorities apprehended respondents and recovered the three firearms used during the attempted robbery. The firearms were a semiautomatic Sig-Sauer pistol, an AK–47 semiautomatic rifle, and a Cobray pistol. The Cobray pistol had been manufactured as, and had the external appearance of, a semiautomatic firearm. According to the Federal Bureau of Investigation, though, it operated as a fully automatic weapon, apparently due to some alteration of its original firing mechanism. Respondents dispute whether the Cobray in fact did operate as a fully automatic weapon.

Respondents were indicted on multiple counts. Relevant here are counts three and four, both of which charged offenses under § 924(c). Count three charged respondents with using a firearm in furtherance of a crime of violence, which carries a statutory minimum of five years' imprisonment. Count four charged respondents in more specific terms, alleging use of a machinegun (the Cobray) in furtherance of a crime of violence, as proscribed by §§ 924(c)(1)(A) and (B)(ii). The latter provision mandates a minimum sentence of 30 years' imprisonment.

The Government moved to dismiss count four on the basis that it would be unable to establish the count beyond a reasonable doubt. (The issues in the present case do not require the Court to consider any contention that a defendant who uses, carries, or possesses a firearm must be aware of the weapon's characteristics. This opinion expresses no views on the point.)

The Government then maintained that the machinegun provision in § 924(c)(1)(B)(ii) was a sentencing factor, so that, if respondents were convicted of carrying a firearm under

count three, the court could determine at sentencing that the particular firearm was a machinegun, thus activating the 30-year mandatory minimum. The District Court dismissed count four, as the Government requested, but rejected the Government's position that the machinegun provision was a sentencing enhancement to be determined by the court at sentencing once there was a conviction on count three. It ruled that the machinegun provision states an element of a crime. Thus, to invoke the 30-year minimum sentence, the Government was required to charge in the indictment, and then prove to the jury, that the Cobray was a machinegun.

At this point, after the District Court foreclosed the possibility of respondents' facing a 30-year minimum, respondents pleaded guilty to the remaining counts, including count three. The District Court sentenced O'Brien to a 102-month term for his § 924(c) conviction, to run consecutively with his sentence on two other counts. It sentenced Burgess to an 84-month term for his § 924(c) conviction, also to run consecutively to his sentence on the other charges. The Government appealed the District Court's ruling that the § 924 machinegun provision constitutes an element of an offense instead of a sentencing factor.

The United States Court of Appeals for the First Circuit affirmed. It looked primarily to *Castillo*, 530 U. S. 120, which held that the machinegun provision in an earlier version of § 924(c) constituted an element of an offense, not a sentencing factor. The court noted that the statute under consideration in *Castillo* had been revised by Congress, "break[ing] what was a single run-on sentence into subparagraphs," and it acknowledged that the earlier repealed version of the statute was "slightly more favorable to the [respondents] than the current version[,] but not markedly so." 542 F. 3d 921, 925 (2008). It found "no evidence that the breaking up of the sentence into the present subdivisions or recasting of language was anything more than a current trend—probably for ease of reading—to convert lengthy sen-

tences in criminal statutes into subsections in the fashion of the tax code." *Id.*, at 926. The court concluded: "Absent a clearer or more dramatic change in language or legislative history expressing a specific intent to assign judge or jury functions, we think that *Castillo* is close to binding," and any reconsideration of the issue should be left to this Court. *Ibid.;* see also *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U. S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions").

We granted certiorari. 557 U. S. 966 (2009).

II

Elements of a crime must be charged in an indictment and proved to a jury beyond a reasonable doubt. *Hamling* v. *United States*, 418 U. S. 87, 117 (1974); *Jones* v. *United States*, 526 U. S. 227, 232 (1999). Sentencing factors, on the other hand, can be proved to a judge at sentencing by a preponderance of the evidence. See *McMillan* v. *Pennsylvania*, 477 U. S. 79, 91–92 (1986). Though one exception has been established, see *Almendarez-Torres* v. *United States*, 523 U. S. 224, 228 (1998), "'[i]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed.'" *Apprendi* v. *New Jersey*, 530 U. S. 466, 490 (2000) (quoting *Jones*, *supra*, at 252–253 (STEVENS, J., concurring)). In other words, while sentencing factors may guide or confine a judge's discretion in sentencing an offender "*within the range* prescribed by statute," *Apprendi*, *supra*, at 481, judge-found sentencing factors cannot increase the maximum sentence a defendant might otherwise receive based purely on the facts found by the jury.

Subject to this constitutional constraint, whether a given fact is an element of the crime itself or a sentencing factor is a question for Congress. When Congress is not explicit, as is often the case because it seldom directly addresses the distinction between sentencing factors and elements, courts look to the provisions and the framework of the statute to determine whether a fact is an element or a sentencing factor. *Almendarez-Torres*, *supra*, at 228. In examining whether the machinegun provision in § 924 is an element or a sentencing factor, the analysis must begin with this Court's previous examination of the question in *Castillo*.

In *Castillo*, the Court considered a prior version of § 924, which provided:

> "(c)(1) Whoever, during and in relation to any crime of violence or drug trafficking crime . . . , uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, and if the firearm is a short-barreled rifle [or a] short-barreled shotgun to imprisonment for ten years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years. . . . " 18 U. S. C. § 924(c)(1) (1988 ed., Supp. V).

In determining whether the machinegun provision in the just-quoted version of § 924 constituted an element or a sentencing factor, the Court in *Castillo* observed that the bare statutory language was "neutral." 530 U. S., at 124. It examined five factors directed at determining congressional intent: (1) language and structure, (2) tradition, (3) risk of unfairness, (4) severity of the sentence, and (5) legislative history. *Id.*, at 124–131. The Court unanimously concluded that the machinegun provision provided an element of an offense, noting that the first four factors favored treating it

as such while legislative history did not significantly favor either side. *Ibid.*

III

A

Section 924(c) was amended to its current form in 1998. The amendment had been enacted when the Court considered *Castillo*, *supra*, at 125, but the pre-1998 version of the statute was at issue there. The instant case concerns the post-1998 (and current) version of the statute, which provides:

> "(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—
>
> "(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.
>
> "(B) If the firearm possessed by a person convicted of a violation of this subsection—
>
> "(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or
>
> "(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years." 18 U. S. C. § 924(c)(1).

The 1998 amendment did make substantive changes to the statute, to be discussed below; but for purposes of the present case the most apparent effect of the amendment was to divide what was once a lengthy principal sentence into separate subparagraphs. This Court's observation in considering the first *Castillo* factor, that "Congress placed the element 'uses or carries a firearm' and the word 'machinegun' in a single sentence, not broken up with dashes or separated into subsections," 530 U. S., at 124–125, no longer holds true. Aside from this new structure, however, the 1998 amendment of § 924 did nothing to affect the second through fifth *Castillo* factors. Each of the factors, except for legislative history (which, assuming its relevance, remains relatively silent), continues to favor the conclusion that the machinegun provision is an element of an offense.

Legal tradition and past congressional practice are the second *Castillo* factor. The factor is to be consulted when, as here, a statute's text is unclear as to whether certain facts constitute elements or sentencing factors. Sentencing factors traditionally involve characteristics of the offender—such as recidivism, cooperation with law enforcement, or acceptance of responsibility. *Id.*, at 126. Characteristics of the offense itself are traditionally treated as elements, and the use of a machinegun under § 924(c) lies "closest to the heart of the crime at issue." *Id.*, at 127. This is no less true today than it was 10 years ago in *Castillo*. Unsurprisingly, firearm type is treated as an element in a number of statutes, as "numerous gun crimes make substantive distinctions between weapons such as pistols and machineguns." *Ibid.;* see, *e. g.,* 18 U. S. C. §§ 922(a)(4), 922(b)(4), and 922(*o*)(1).

The Government counters that this tradition or pattern has evolved since the version of § 924(c) under review in *Castillo* was enacted. The Government contends that the Federal Sentencing Guidelines altered the tradition by treating the possession of a firearm as a sentencing factor. Brief for

United States 23 (citing United States Sentencing Commission, Guidelines Manual §2K2.1(a)(5) (Nov. 1998) (raising base offense level "if the offense involved a firearm")).

The argument is not persuasive. The Sentencing Reform Act of 1984, 98 Stat. 1987, establishing the Federal Sentencing Guidelines, was enacted four years before the version of §924 under review in *Castillo,* see Anti-Drug Abuse Act of 1988, §6460, 102 Stat. 4373. While the resulting Guidelines were not effective until 1987, this was still before the 1988 enactment of the statute at issue in *Castillo,* and 13 years before this Court's conclusion in *Castillo* that firearm type is traditionally treated as an offense element. The Government cannot claim the benefit of any shift in how the law traditionally treats firearm type from the Guidelines, for that supposed shift would have occurred before the 1988 version of §924 was enacted. The Guidelines were explicitly taken into account when this Court analyzed the traditions in *Castillo.* 530 U. S., at 126 (discussing Federal Sentencing Guidelines in determining what traditionally qualifies as a sentencing factor).

The third *Castillo* factor, potential unfairness, was unchanged by the restructuring of §924. The Court explained in *Castillo* that treating the machinegun provision as a sentencing factor "might unnecessarily produce a conflict between the judge and the jury" because "a jury may well have to decide which of several weapons" a defendant used. *Id.,* at 128. The concern was that the judge may not know which weapon the jurors determined a defendant used, and "a judge's later, sentencing-related decision that the defendant used the machinegun, rather than, say, the pistol, might conflict with the jury's belief that he actively used the pistol." *Ibid.* This same concern arises under the current version of §924, where jurors might have to determine which among several weapons a defendant used, carried, or possessed in furtherance of a crime.

The Government's response, that permitting a judge to make this finding would "streamlin[e] guilt-stage proceedings, without interfering with the accuracy of fact-finding," Brief for United States 33, is unconvincing. It does not address the particular unfairness concern expressed in *Castillo*, which was not alleviated by the restructuring of § 924. And the Government does not suggest that it would be subjected to any unfairness if the machinegun provision continues to be treated as an element.

The fourth *Castillo* factor, the severity of the sentence accompanying a finding that a defendant carried a machinegun under § 924, was also unaffected by the statute's restructuring. A finding that a defendant carried a machinegun under § 924, in contrast to some less dangerous firearm, vaults a defendant's mandatory minimum sentence from 5 to 30 years, 530 U. S., at 131, or from 7 to 30 years if, as in this case, the firearm was brandished, § 924(c)(1)(A)(ii). This is not akin to the "incremental changes in the minimum" that one would "expect to see in provisions meant to identify matters for the sentencing judge's consideration," *Harris*, 536 U. S., at 554 (from 5 years to 7 years); it is a drastic, sixfold increase that strongly suggests a separate substantive crime.

There is one substantive difference between the old and new versions of § 924 that might bear on this fourth factor. The previous version of § 924 provided mandatory sentences: 5 years for using or carrying a firearm and 30 years if the firearm is a machinegun, for example. See § 924(c)(1) (1988 ed., Supp. V). The current statute provides only mandatory minimums: not less than 5 years for using or possessing a firearm; not less than 7 for brandishing it; and not less than 30 if the firearm is a machinegun. §§ 924(c)(1)(A)(i), (ii), (B)(ii). The Government argues that this difference is critical because a 30-year sentence is conceivable under the statute even without a finding that the particular weapon is a machinegun. Brief for United States 25.

This is a distinction in theory, perhaps, but not in practice. Neither the Government nor any party or *amicus* has identified a single defendant whose conviction under § 924 for possessing or brandishing a nonspecific firearm led to a sentence approaching the 30-year sentence that is required when the firearm is a machinegun. Respondents advise, without refutation, that most courts impose the mandatory minimum of 7 years' imprisonment for brandishing a nonspecific weapon and the longest sentence that has come to the litigants' or the Court's attention is 14 years. Brief for Respondent O'Brien 46, 48 (citing *United States* v. *Batts*, 317 Fed. Appx. 329 (CA4 2009) *(per curiam)*); see also *Harris*, *supra*, at 578 (THOMAS, J., dissenting). Indeed, in the instant case, Burgess received the statutory minimum 7-year sentence, and O'Brien received only 18 months more than that. Once the machinegun enhancement was off the table, the Government itself did not seek anything approaching 30-year terms, instead requesting 12-year terms for each respondent.

The immense danger posed by machineguns, the moral depravity in choosing the weapon, and the substantial increase in the minimum sentence provided by the statute support the conclusion that this prohibition is an element of the crime, not a sentencing factor. It is not likely that Congress intended to remove the indictment and jury trial protections when it provided for such an extreme sentencing increase. See *Jones*, 526 U. S., at 233 ("It is at best questionable whether the specification of facts sufficient to increase a penalty range by two-thirds, let alone from 15 years to life, was meant to carry none of the process safeguards that elements of an offense bring with them for a defendant's benefit"). Perhaps Congress was not concerned with parsing the distinction between elements and sentencing factors, a matter more often discussed by the courts when discussing the proper allocation of functions between judge and jury. Instead, it likely was more focused on deterring the crime by creating the mandatory minimum sentences. But the sever-

ity of the increase in this case counsels in favor of finding that the prohibition is an element, at least absent some clear congressional indication to the contrary.

The fifth factor considered in *Castillo* was legislative history, and the Court there found it to be of little help. 530 U. S., at 130 ("Insofar as this history may be relevant, however, it does not significantly help the Government"). The 1998 amendment has its own legislative record, discussed below, but the parties accurately observe that it is silent as to congressional consideration of the distinction between elements and sentencing factors. Brief for United States 29; Brief for Respondent O'Brien 28–29. This silence is not neutral, however, because as explained below, it tends to counsel against finding that Congress made a substantive change to this statutory provision.

Four of the five factors the Court relied upon in *Castillo* point in the same direction they did 10 years ago. How the 1998 amendment affects the remaining factor—the provision's language and structure—requires closer examination.

B

In *Castillo*, the Court interpreted § 924(c) in its original version, though Congress had at that point already amended the provision. Here, the applicable principle is that Congress does not enact substantive changes *sub silentio*. See *Director of Revenue of Mo.* v. *CoBank ACB*, 531 U. S. 316, 323 (2001). In light of *Castillo*'s determination that the machinegun provision in the previous version of § 924 is an element, a change should not be inferred "[a]bsent a clear indication from Congress of a change in policy." *Grogan* v. *Garner*, 498 U. S. 279, 290 (1991); see also *Rivers* v. *Roadway Express, Inc.*, 511 U. S. 298, 313, n. 12 (1994) ("[W]hen this Court construes a statute, it is explaining its understanding of what the statute has meant continuously since the date when it became law").

The Government argues that the 1998 amendment restructuring § 924(c) demonstrates the congressional judgment to reclassify the machinegun provision as a sentencing factor, rather than as an offense element. But the better understanding, as the Government acknowledged in its submission in *Castillo*, is that "there is nothing to suggest that the 1998 amendments were intended to change, rather than simply reorganize and clarify, [§ 924]'s treatment of firearm type." Brief for United States, O. T. 1999, No. 99–658, p. 41. A closer review of the 1998 amendment confirms this.

There are three principal differences between the previous and current versions of § 924(c): two substantive changes and a third regarding the stylistic structure of the statute. The first difference, as discussed above, *supra*, at 229, is that the amendment changed what were once mandatory sentences into mandatory minimum sentences. A person convicted of the primary offense of using or carrying a firearm during a crime of violence was once to "be sentenced to imprisonment for five years," but under the current version he or she is to "be sentenced to a term of imprisonment of not less than 5 years."

The second difference is that the amended version includes the word "possesses" in addition to "uses or carries" in its principal paragraph, and then adds the substantive provisions in §§ 924(c)(1)(A)(ii) and (iii), which provide mandatory minimums for brandishing (7 years) and discharging (10 years) the firearm. These provisions are new substantive additions to the text of the previous version, which provided a bare 5-year mandatory minimum for any offender who "use[d] or carrie[d] a firearm," without concern for how the firearm was used.

The changes were a direct response to this Court's decision in *Bailey* v. *United States,* 516 U. S. 137 (1995), which held that the word "use" in the preamendment version of § 924 "must connote more than mere possession of a firearm by a person who commits a drug offense." *Id.*, at 143.

The Court in *Bailey* went on to observe that, "[h]ad Congress intended possession alone to trigger liability under § 924(c)(1), it easily could have so provided" by using the word "possess," as it had so frequently done in other statutory provisions. *Ibid.* Three years later, Congress made the change and added the word "possesses" to the principal paragraph. Congress additionally provided mandatory sentences above the 5-year minimum depending on whether and how the firearm was used. Sections 924(c)(1)(A)(ii) and (iii) provide sentencing enhancements for brandishing or discharging the firearm, and the Court has held that these enhancements are sentencing factors to be found by a judge. See *Harris*, 536 U. S., at 552–556; see also *Dean* v. *United States*, 556 U. S. 568, 573–574 (2009) (referring to the brandishing and discharge provisions as "sentencing factors"). The 1998 amendment was colloquially known as the "Bailey Fix Act." 144 Cong. Rec. 26608 (1998) (remarks of Sen. DeWine); see also *Dean*, *supra*, at 579 (STEVENS, J., dissenting).

Aside from shifting the mandatory sentences to mandatory minimums, and this so-called *Bailey* fix, Congress left the substance of the statute unchanged. Neither of these substantive changes suggests that Congress meant to transform the machinegun provision from an element into a sentencing factor.

The Government stresses a third, structural, difference in the statute, pointing out that the machinegun provision now resides in a separate subparagraph, § 924(c)(1)(B), whereas it once resided in the principal paragraph that unmistakably lists offense elements. This structural or stylistic change, though, does not provide a "clear indication" that Congress meant to alter its treatment of machineguns as an offense element. See *Grogan*, 498 U. S., at 290. A more logical explanation for the restructuring is that it broke up a lengthy principal paragraph, which exceeded 250 words even before adding more to it for the *Bailey* fix, into a more readable statute. This is in step with current legislative drafting

guidelines, which advise drafters to break lengthy statutory provisions into separate subsections that can be read more easily. See House Legislative Counsel's Manual on Drafting Style, HLC No. 104.1, § 312, pp. 23–25 (1995); Senate Office of the Legislative Counsel, Legislative Drafting Manual § 112, pp. 10–11 (1997).

While the Court has indicated that placing factors in separate subsections is one way Congress might signal that it is treating them as sentencing factors as opposed to elements, *Castillo*, 530 U. S., at 124–125, *Harris*, 536 U. S., at 552–553, it has rejected the view that this structural consideration predominates even when other factors point in the other direction, *id.*, at 553 ("[E]ven if a statute 'has a look to it suggesting that the numbered subsections are only sentencing provisions,'" the Court will not ignore "compelling evidence to the contrary" (quoting *Jones*, 526 U. S., at 232)). For instance, in *Jones* the Court found that the federal carjacking statute set forth elements of multiple offenses despite a structure similar to the statute at issue here. *Id.*, at 232–239. And in *Harris*, the Court was careful to point out that, unlike the case at bar, the other *Castillo* factors "reinforce[d] the single-offense interpretation implied by the statute's structure." 536 U. S., at 553.

In examining the amended version of § 924(c)'s structure, there is an additional consideration that supports interpreting the machinegun provision to be an offense element. As explained above, the brandishing and discharge provisions codified in §§ 924(c)(1)(A)(ii) and (iii) do state sentencing factors. See *Harris*, *supra*, at 552–556; *Dean*, *supra*, at 573–574. Had Congress intended to treat firearm type as a sentencing factor, it likely would have listed firearm types as clauses (iv) and (v) of subparagraph (A), instead of as clauses (i) and (ii) of subparagraph (B). By listing firearm type in stand-alone subparagraph (B), Congress set it apart from the sentencing factors in (A)(ii) and (iii); this is consistent with preserving firearm type as an element of a separate offense.

To be sure, there are some arguments in favor of treating the machinegun provision as a sentencing factor. The current structure of § 924(c) is more favorable to that interpretation than was true in *Castillo*, particularly because the machinegun provision is now positioned between the sentencing factors provided in (A)(ii) and (iii), see *Harris*, *supra*, at 552–556, and the recidivist provisions in (C)(i) and (ii), which are typically sentencing factors as well. See *Almendarez-Torres*, 523 U. S., at 230. These points are overcome, however, by the substantial weight of the other *Castillo* factors and the principle that Congress would not enact so significant a change without a clear indication of its purpose to do so. The evident congressional purpose was to amend the statute to counteract *Bailey* and to make the statute more readable but not otherwise to alter the substance of the statute. The analysis and holding of *Castillo* control this case. The machinegun provision in § 924(c)(1)(B)(ii) is an element of an offense.

* * *

The judgment of the Court of Appeals is affirmed.

It is so ordered.

JUSTICE STEVENS, concurring.

A "sentencing factor" may serve two very different functions. As a historical matter, the term has described a fact that a trial judge might rely upon when choosing a specific sentence within the range authorized by the legislature. In that setting, the judge has broad discretion in determining both the significance of the factor and whether it has been established by reliable evidence.

In the 1970's and 1980's, as part of a national effort to enact tougher sentences,[1] a new type of "sentencing factor"

[1] "By 1990, forty-six states had enacted mandatory sentence enhancement laws, and most states had a wide variety of these provisions." Lowenthal, Mandatory Sentencing Laws: Undermining the Effectiveness of

emerged. Since then the term has been used to describe facts, found by the judge by a preponderance of the evidence, that have the effect of imposing mandatory limits on a sentencing judge's discretion. When used as an element of a mandatory sentencing scheme, a sentencing factor is the functional equivalent of an element of the criminal offense itself. In these circumstances, I continue to believe the Constitution requires proof beyond a reasonable doubt of this "factor."

I

We first encountered the use of a "sentencing factor" in the mandatory minimum context in *McMillan* v. *Pennsylvania,* 477 U. S. 79 (1986), when we examined the constitutionality of Pennsylvania's 1982 Mandatory Minimum Sentencing Act (Act).[2] The Pennsylvania statute subjected anyone convicted of a specified felony to a mandatory minimum 5-year sentence if the trial judge found, by a preponderance of the evidence, that the defendant "visibly possessed a firearm" during the commission of the offense. See *id.*, at 81–82. In four prosecutions under the Act, the trial judges had each held that the statute was unconstitutional and imposed sentences lower than the 5-year mandatory minimum, presumably because they recognized that the statute treated the visible possession of a firearm as the functional equivalent of an offense element. *Id.*, at 82. On appeal, the Pennsylvania Supreme Court consolidated the four cases and reversed.[3]

Determinate Sentencing Reform, 81 Cal. L. Rev. 61, 64–65 (1993) (footnote omitted); see also *id.*, at 69 ("[M]ost of the current mandatory enhancement laws did not appear until the 1970s"); Schulhofer, Rethinking Mandatory Minimums, 28 Wake Forest L. Rev. 199, 200–201 (1993) (discussing history of federal mandatory minimum sentencing regime).

[2] See *Apprendi* v. *New Jersey,* 530 U. S. 466, 485 (2000) ("It was in *McMillan* . . . that this Court, for the first time, coined the term 'sentencing factor' to refer to a fact that was not found by a jury but that could affect the sentence imposed by the judge").

[3] *Commonwealth* v. *Wright,* 508 Pa. 25, 494 A. 2d 354 (1985).

Id., at 83. It reasoned that because visible possession of a firearm was a mere "sentencing factor," rather than an element of any of the specified offenses defined by the legislature, the protections afforded by cases like *In re Winship*, 397 U. S. 358 (1970),[4] did not apply.

A bare majority of the *McMillan* Court endorsed this novel use of the sentencing factor concept. Five Justices concluded that the prerequisite for a mandatory sentence is just a "sentencing factor," rather than an "element of the offense," because the factor does not "alte[r] the maximum penalty for the crime" and merely "limit[s] the sentencing court's discretion in selecting a penalty within the range already available to it." 477 U. S., at 87–88. Yet, although the Pennsylvania Act's 5-year mandatory sentence for visible possession of a firearm during the commission of an offense did not exceed the statutory maximum that otherwise applied for the crimes of conviction, a positive finding on the so-called sentencing factor mandated the imposition of a sentence that exceeded the punishment the defendant would have otherwise received. See *id.*, at 103–104 (STEVENS, J., dissenting).

The majority opinion in *McMillan* can fairly be described as pathmarking, but unlike one of its predecessors, *Winship*, it pointed in the wrong direction. For reasons set forth in the opinions joined by the four dissenting Justices in *McMillan*, I continue to believe that *McMillan* was incorrectly decided. See *id.*, at 93–94 (Marshall, J., dissenting); *id.*, at 95–104 (STEVENS, J., dissenting).

II

Not only was *McMillan* wrong the day it was decided, but its reasoning has been substantially undermined—if not

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[4] In *Winship*, the Court "explicitly" held that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." 397 U. S., at 364.

eviscerated—by the development of our Sixth Amendment jurisprudence in more recent years. We now understand that "'[i]t is unconstitutional [under the Sixth Amendment] for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed.'" *Apprendi* v. *New Jersey*, 530 U. S. 466, 490 (2000) (quoting *Jones* v. *United States*, 526 U. S. 227, 252–253 (1999) (STEVENS, J., concurring)). Harmonizing *Apprendi* with our existing Sixth Amendment jurisprudence, we explained that "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 (emphasis added). In other words, we narrowed our holding to those facts that effectively raised the ceiling on the offense, but did not then consider whether the logic of our holding applied also to those facts necessary to set the floor of a particular sentence.

As JUSTICE THOMAS eloquently explained in his dissent in *Harris* v. *United States*, 536 U. S. 545, 572 (2002), the reasoning in our decision in *Apprendi* applies with equal force in the context of mandatory minimums. There is, quite simply, no reason to distinguish between facts that trigger punishment in excess of the statutory maximum and facts that trigger a mandatory minimum. This case vividly illustrates the point. It is quite plain that there is a world of difference between the 8½-year sentence and the 7-year sentence the judge imposed on the defendants in this case and the 30-year sentence mandated by the machinegun finding under 18 U. S. C. § 924(c)(1)(B).

Mandatory minimums may have a particularly acute practical effect in this type of statutory scheme which contains an *implied* statutory maximum of life, see *ante*, at 229. There is, in this type of case, no ceiling; there is only a floor below which a sentence cannot fall. Furthermore, absent a positive finding on one of § 924(c)(1)'s enumerated factors, it is quite clear that no judge would impose a sentence as great

as the sentences commanded by the provision at issue in this case. Indeed, it appears that, but for those subject to the 30-year mandatory minimum, no defendant has *ever* been sentenced to a sentence anywhere near 30 years for a § 924(c) offense. See Brief for Respondent O'Brien 46–47, and n. 15.

Apprendi should have signaled the end of *McMillan*, just as it signaled the unconstitutionality of state and federal determinate sentencing schemes in *Blakely* v. *Washington*, 542 U. S. 296 (2004), and *United States* v. *Booker*, 543 U. S. 220 (2005). But thanks to an unpersuasive attempt to distinguish *Apprendi*,[5] and a reluctant *Apprendi* dissenter, *McMillan* survived over the protest of four Members of the Court. See *Harris*, 536 U. S., at 569–570 (BREYER, J., concurring in part and concurring in judgment) ("I cannot easily distinguish *Apprendi* . . . from this case in terms of logic. For that reason, I cannot agree with the plurality's opinion insofar as it finds such a distinction. At the same time . . . I cannot yet accept [*Apprendi*'s] rule"). It appears, however, that the reluctant *Apprendi* dissenter may no longer be reluctant.[6]

I am therefore in full agreement with JUSTICE THOMAS' separate writing today, *post*, p. 240, as I was with his *Harris* dissent. *McMillan* and *Harris* should be overruled, at least

[5] Consistent with the attempt in *Harris* v. *United States*, 536 U. S. 545 (2002), to distinguish *Apprendi*, JUSTICE KENNEDY's fine opinion for the Court today employs some of the same acrobatics to distinguish *Harris* from the present case. *Harris* also involved § 924(c)(1), though a different subparagraph; its reading of the mandatory minimum for "brandishing" a firearm contained in 18 U. S. C. § 924(c)(1)(A) as a sentencing factor is not so easily distinguished from the nearly identical mandatory minimum for possessing a "machinegun" under § 924(c)(1)(B).

[6] "But in *Harris*, I said that I thought *Apprendi* does cover mandatory minimums, but I don't accept *Apprendi*. Well, at some point I guess I have to accept *Apprendi*, because it's the law and has been for some time. So if . . . if that should become an issue about whether mandatory minimums are treated like the maximums for *Apprendi* purposes, should we reset the case for argument?" Tr. of Oral Arg. 20 (question by BREYER, J.).

to the extent that they authorize judicial factfinding on a preponderance of the evidence standard of facts that "expos[e] a defendant to [a] greater punishment than what is otherwise legally prescribed . . . ." *Harris*, 536 U. S., at 579 (THOMAS, J., dissenting). Any such fact is the functional equivalent of an element of the offense.

III

In my view, the simplest, and most correct, solution to the case before us would be to recognize that any fact mandating the imposition of a sentence more severe than a judge would otherwise have discretion to impose should be treated as an element of the offense. The unanimity of our decision today does not imply that *McMillan* is safe from a direct challenge to its foundation.

JUSTICE THOMAS, concurring in the judgment.

In *Harris* v. *United States*, 536 U. S. 545 (2002), this Court 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,' whether the statute calls it an element or a sentencing factor, 'must be submitted to a jury, and proved beyond a reasonable doubt,' " *id.*, at 550 (quoting *Apprendi* v. *New Jersey*, 530 U. S. 466, 490 (2000)). I continue to believe that this constitutional requirement applies to sentencing facts that, like the machinegun enhancement at issue here, 18 U. S. C. § 924(c)(1)(B)(ii), "alte[r] the [defendant's] statutorily mandated sentencing range, by increasing the mandatory minimum sentence," regardless of whether they alter the statutory maximum penalty, *Harris*, 536 U. S., at 577 (THOMAS, J., dissenting); see *id.*, at 577–578 ("As a matter of common sense, an increased mandatory minimum heightens the loss of liberty and represents the increased stigma society attaches to the offense. Consequently, facts that trigger an increased mandatory minimum sentence warrant constitutional safeguards").

In my view, it makes no difference whether the sentencing fact "vaults a defendant's mandatory minimum sentence" by many years, *ante*, at 229, or only "'incremental[ly] changes'" it by a few, *ibid.* (quoting *Harris*, *supra*, at 554). Nor does it make a difference whether the sentencing fact "involve[s] characteristics of the offender" or "[c]haracteristics of the offense," *ante*, at 227, or which direction the other factors in the Court's five-factor test may tilt. One question decides the matter: If a sentencing fact either "raises the floor or raises the ceiling" of the range of punishments to which a defendant is exposed, it is, "'by definition [an] "elemen[t]."'" *Harris*, *supra*, at 579 (THOMAS, J., dissenting) (quoting *Apprendi*, *supra*, at 483, n. 10).

Without a finding that a defendant used a machinegun, the penalty range for a conviction under § 924(c)(1)(A)(i) is five years to life imprisonment. But once that finding is added, the penalty range becomes harsher—30 years to life imprisonment, § 924(c)(1)(B)(ii)—thus "expos[ing] a defendant to greater punishment than what is otherwise legally prescribed," *Harris*, 536 U. S., at 579 (THOMAS, J., dissenting). As a consequence, "it is ultimately beside the point whether as a matter of statutory interpretation [the machinegun enhancement] is a sentencing factor." *Id.*, at 576. "[A]s a constitutional matter," because it establishes a harsher range of punishments, it must be treated as an element of a separate, aggravated offense that is submitted to a jury and proved beyond a reasonable doubt. *Ibid.*

Because the Court reaches this same conclusion based on its analysis of a five-factor test, see *ante*, at 225–235, I concur in the judgment.

Syllabus

HARDT *v.* RELIANCE STANDARD LIFE INSURANCE CO.

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

No. 09–448. Argued April 26, 2010—Decided May 24, 2010

After medical problems forced petitioner Hardt to stop working, she filed for long-term disability benefits under her employer's long-term disability plan. Upon exhausting her administrative remedies, Hardt sued respondent Reliance, her employer's disability insurance carrier, alleging that it had violated the Employee Retirement Income Security Act of 1974 (ERISA) by wrongfully denying her benefits claim. The District Court denied Reliance summary judgment, finding that because the carrier had acted on incomplete medical information, the benefits denial was not based on substantial evidence. Though also denying Hardt summary judgment, the court stated that it found "compelling evidence" in the record that she was totally disabled and that it was inclined to rule in her favor, but concluded that it would be unwise to do so without giving Reliance the chance to address the deficiencies in its approach. The court therefore remanded to Reliance, giving it 30 days to consider all the evidence and to act on Hardt's application, or else the court would enter judgment in Hardt's favor. Reliance did as instructed and awarded Hardt benefits. Hardt then filed a motion under 29 U. S. C. § 1132(g)(1), a fee-shifting statute that applies in most ERISA lawsuits and provides that "the court in its discretion may allow a reasonable attorney's fee and costs . . . to either party." Granting the motion, the District Court applied the Circuit's framework governing attorney's fee requests in ERISA cases, concluding, *inter alia*, that Hardt had attained the requisite "prevailing party" status. The Fourth Circuit vacated the fees award, holding that Hardt had failed to establish that she qualified as a "prevailing party" under the rule set forth in *Buckhannon Board & Care Home, Inc.* v. *West Virginia Dept. of Health and Human Resources*, 532 U. S. 598, 604, that a fee claimant is a "prevailing party" only if he has obtained an "enforceable judgmen[t] on the merits" or a "court-ordered consent decre[e]." The court reasoned that because the remand order did not require Reliance to award Hardt benefits, it did not constitute an enforceable judgment on the merits.

Held:

1. A fee claimant need not be a "prevailing party" to be eligible for an attorney's fees award under § 1132(g)(1). Interpreting the section

to require a party to attain that status is contrary to § 1132(g)(1)'s plain text. The words "prevailing party" do not appear in the provision. Nor does anything else in § 1132(g)(1)'s text purport to limit the availability of attorney's fees to a "prevailing party." Instead, § 1132(g)(1) expressly grants district courts "discretion" to award attorney's fees "to *either* party." (Emphasis added.) That language contrasts sharply with § 1132(g)(2), which governs the availability of attorney's fees in ERISA actions to recover delinquent employer contributions to a multiemployer plan. In such cases, only plaintiffs who obtain "a judgment in favor of the plan" may seek attorney's fees. § 1132(g)(2)(D). The contrast between these two paragraphs makes clear that Congress knows how to impose express limits on the availability of attorney's fees in ERISA cases. Because Congress failed to include in § 1132(g)(1) an express "prevailing party" requirement, the Fourth Circuit's decision adding that term of art to the statute more closely resembles "invent-[ing] a statute rather than interpret[ing] one." *Pasquantino* v. *United States*, 544 U. S. 349, 359. Pp. 251–252.

2. A court may award fees and costs under § 1132(g)(1), as long as the fee claimant has achieved "some degree of success on the merits." *Ruckelshaus* v. *Sierra Club*, 463 U. S. 680, 694. The bedrock principle known as the American Rule provides the relevant point of reference: Each litigant pays his own attorney's fees, win or lose, unless a statute or contract provides otherwise. *E. g., id.*, at 683–686. This Court's "prevailing party" precedents do not govern here because that term of art does not appear in § 1132(g)(1). Instead, the Court interprets § 1132(g)(1) in light of its precedents addressing statutes that deviate from the American Rule by authorizing attorney's fees based on other criteria. *Ruckelshaus*, which considered a statute authorizing a fees award if the court "determines that such an award is appropriate," 42 U. S. C. § 7607(f), is the principal case in that category. Applying that decision's interpretive approach to 29 U. S. C. § 1132(g)(1), the Court first looks to "the language of the section," 463 U. S., at 682, which unambiguously allows a court to award attorney's fees "in its discretion . . . to either party." *Ruckelshaus* also lays down the proper markers to guide a court in exercising that discretion. Because here, as in the statute in *Ruckelshaus*, Congress failed to indicate clearly that it "meant to abandon historic fee-shifting principles and intuitive notions of fairness," 463 U. S., at 686, a fees claimant must show "some degree of success on the merits" before a court may award attorney's fees under § 1132(g)(1), see *id.*, at 694. Hardt has satisfied that standard. Though she failed to win summary judgment on her benefits claim, the District Court nevertheless found compelling evidence that she is totally disabled and stated that it was inclined to rule in her favor. She also

obtained the remand order, after which Reliance conducted the court-ordered review, reversed its decision, and awarded the benefits she sought. Accordingly, the District Court properly exercised its discretion to award Hardt attorney's fees. Pp. 252–256.

336 Fed. Appx. 332, reversed and remanded.

THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, GINSBURG, BREYER, ALITO, and SOTOMAYOR, JJ., joined, and in which STEVENS, J., joined as to Parts I and II. STEVENS, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 257.

John R. Ates argued the cause for petitioner. With him on the briefs were *Ann K. Sullivan* and *Elaine Inman Hogan*.

Pratik A. Shah argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Kagan*, *Deputy Solicitor General Kneedler*, *M. Patricia Smith*, and *Elizabeth Hopkins*.

Nicholas Quinn Rosenkranz argued the cause for respondent. With him on the brief were *R. Ted Cruz* and *Howard M. Radzely*.*

JUSTICE THOMAS delivered the opinion of the Court.

In most lawsuits seeking relief under the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 829, as amended, 29 U. S. C. § 1001 *et seq.*, "a reasonable attorney's fee and costs" are available "to either party" at the court's "discretion." § 1132(g)(1). The Court of Appeals for the Fourth Circuit has interpreted § 1132(g)(1) to require that a fee claimant be a "prevailing party" before he may seek a fees award. We reject this interpretation as con-

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*Briefs of *amici curiae* urging reversal were filed for AARP et al. by *Mary Ellen Signorille*, *Jay E. Sushelsky*, *Melvin R. Radowitz*, and *Terisa E. Chaw;* and for United Policyholders by *Mark D. DeBofsky* and *Donald Bogan*.

Mark E. Schmidtke and *John R. Kouris* filed a brief for DRI—The Voice of the Defense Bar as *amicus curiae* urging affirmance.

trary to § 1132(g)(1)'s plain text. We hold instead that a court "in its discretion" may award fees and costs "to either party," *ibid.*, as long as the fee claimant has achieved "some degree of success on the merits," *Ruckelshaus* v. *Sierra Club*, 463 U. S. 680, 694 (1983).

I

In 2000, while working as an executive assistant to the president of textile manufacturer Dan River, Inc., petitioner Bridget Hardt began experiencing neck and shoulder pain. Her doctors eventually diagnosed her with carpal tunnel syndrome. Because surgeries on both her wrists failed to alleviate her pain, Hardt stopped working in January 2003.

In August 2003, Hardt sought long-term disability benefits from Dan River's Group Long-Term Disability Insurance Program Plan (Plan). Dan River administers the Plan, which is subject to ERISA, but respondent Reliance Standard Life Insurance Company decides whether a claimant qualifies for benefits under the Plan and underwrites any benefits awarded. Reliance provisionally approved Hardt's claim, telling her that final approval hinged on her performance in a functional capacities evaluation intended to assess the impact of her carpal tunnel syndrome and neck pain on her ability to work.

Hardt completed the functional capacities evaluation in October 2003. The evaluator summarized Hardt's medical history, observed her resulting physical limitations, and ultimately found that Hardt could perform some amount of sedentary work. Based on this finding, Reliance concluded that Hardt was not totally disabled within the meaning of the Plan and denied her claim for disability benefits. Hardt filed an administrative appeal. Reliance reversed itself in part, finding that Hardt was totally disabled from her regular occupation, and was therefore entitled to temporary disability benefits for 24 months.

While her administrative appeal was pending, Hardt began experiencing new symptoms in her feet and calves, including tingling, pain, and numbness. One of her physicians diagnosed her with small-fiber neuropathy, a condition that increased her pain and decreased her physical capabilities over the ensuing months.

Hardt eventually applied to the Social Security Administration for disability benefits under the Social Security Act. Her application included questionnaires completed by two of her treating physicians, which described Hardt's symptoms and stated the doctors' conclusion that Hardt could not return to full gainful employment because of her neuropathy and other ailments. In February 2005, the Social Security Administration granted Hardt's application and awarded her disability benefits.

About two months later, Reliance told Hardt that her Plan benefits would expire at the end of the 24-month period. Reliance explained that under the Plan's terms, only individuals who are "totally disabled from all occupations" were eligible for benefits beyond that period, App. to Pet. for Cert. 36a, and adhered to its conclusion that, based on its review of Hardt's records, Hardt was not "totally disabled" as defined by the Plan. Reliance also demanded that Hardt pay Reliance $14,913.23 to offset the disability benefits she had received from the Social Security Administration. (The Plan contains a provision coordinating benefits with Social Security payments.) Hardt paid Reliance the offset.

Hardt then filed another administrative appeal. She gave Reliance all of her medical records, the questionnaires she had submitted to the Social Security Administration, and an updated questionnaire from one of her physicians. Reliance asked Hardt to supplement this material with another functional capacities evaluation. When Reliance referred Hardt for the updated evaluation, it did not ask the evaluator to review Hardt for neuropathic pain, even though it knew

that Hardt had been diagnosed with neuropathy after her first evaluation.

Hardt appeared for the updated evaluation in December 2005, and appeared for another evaluation in January 2006. The evaluators deemed both evaluations invalid because Hardt's efforts were "submaximal." *Id.*, at 37a. One evaluator recorded that Hardt "refused multiple tests . . . for fear of nausea/illness/further pain complaints." *Ibid.* (internal quotation marks omitted).

Lacking an updated functional capacities evaluation, Reliance hired a physician and a vocation rehabilitation counselor to help it resolve Hardt's administrative appeal. The physician did not examine Hardt; instead, he reviewed some, but not all, of Hardt's medical records. Based on that review, the physician produced a report in which he opined that Hardt's health was expected to improve. His report, however, did not mention Hardt's pain medications or the questionnaires that Hardt's attending physicians had completed as part of her application for Social Security benefits. The vocational rehabilitation counselor, in turn, performed a labor market study (based on Hardt's health in 2003) that identified eight employment opportunities suitable for Hardt. After reviewing the physician's report, the labor market study, and the results of the 2003 functional capacities evaluation, Reliance concluded that its decision to terminate Hardt's benefits was correct. It advised Hardt of this decision in March 2006.

After exhausting her administrative remedies, Hardt sued Reliance in the United States District Court for the Eastern District of Virginia. She alleged that Reliance violated ERISA by wrongfully denying her claim for long-term disability benefits. See § 1132(a)(1)(B). The parties filed cross-motions for summary judgment, both of which the District Court denied.

The court first rejected Reliance's request for summary judgment affirming the denial of benefits, finding that "Re-

liance's decision to deny benefits was based on incomplete information." App. to Pet. for Cert. 42a. Most prominently, none of the functional capacities evaluations to which Hardt had submitted had "assessed the impact of neuropathy and neuropathic pain on Ms. Hardt." *Ibid.* In addition, the reviewing physician's report "was itself incomplete"; the basis for the physician's "medical conclusions [wa]s extremely vague and conclusory," *ibid.*, and the physician had "failed to cite any medical evidence to support his conclusions," *id.*, at 43a, or "to address the treating physicians' contradictory medical findings," *id.*, at 44a. The court also found that Reliance had "improperly rejected much of the evidence that Ms. Hardt submitted," *id.*, at 45a, and had "further ignored the substantial amount of pain medication Ms. Hardt's treating physicians had prescribed to her," *id.*, at 46a. Accordingly, the court thought it "clear that Reliance's decision to deny Ms. Hardt long-term disability benefits was not based on substantial evidence." *Id.*, at 47a.

The District Court then denied Hardt's motion for summary judgment, which contended that Reliance's decision to deny benefits was unreasonable as a matter of law. In so doing, however, the court found "compelling evidence" in the record that "Ms. Hardt [wa]s totally disabled due to her neuropathy." *Id.*, at 48a. Although it was "inclined to rule in Ms. Hardt's favor," the court concluded that "it would be unwise to take this step without first giving Reliance the chance to address the deficiencies in its approach." *Ibid.* In the District Court's view, a remand to Reliance was warranted because "[t]his case presents one of those scenarios where the plan administrator has failed to comply with the ERISA guidelines," meaning "Ms. Hardt did not get the kind of review to which she was entitled under applicable law." *Ibid.* Accordingly, the court instructed "Reliance to act on Ms. Hardt's application by adequately considering all the evidence" within 30 days; "[o]therwise," it warned, "judgment will be issued in favor of Ms. Hardt." *Id.*, at 49a.

Reliance did as instructed. After conducting that review, Reliance found Hardt eligible for long-term disability benefits and paid her $55,250 in accrued, past-due benefits.

Hardt then moved for attorney's fees and costs under § 1132(g)(1). The District Court assessed her motion under the three-step framework that governed fee requests in ERISA cases under Circuit precedent. At step one of that framework, a district court asks whether the fee claimant is a "'prevailing party.'" *Id.*, at 15a–16a (quoting *Martin* v. *Blue Cross & Blue Shield of Virginia, Inc.*, 115 F. 3d 1201, 1210 (CA4 1997), and citing *Buckhannon Board & Care Home, Inc.* v. *West Virginia Dept. of Health and Human Resources*, 532 U. S. 598, 603 (2001)). If the fee claimant qualifies as a prevailing party, the court proceeds to step two and "determin[es] whether an award of attorneys' fees is appropriate" by examining "five factors."[1] App. to Pet. for Cert. 16a. Finally, if those five factors suggest that a fees award is appropriate, the court "must review the attorneys' fees and costs requested and limit them to a reasonable amount." *Id.*, at 17a (citing *Hensley* v. *Eckerhart*, 461 U. S. 424, 433 (1983)).

Applying that framework, the District Court granted Hardt's motion. It first concluded that Hardt was a prevailing party because the court's remand order "sanctioned a material change in the legal relationship of the parties by ordering [Reliance] to conduct the type of review to which [Hardt] was entitled." App. to Pet. for Cert. 22a. The court recognized that the order did not "sanctio[n] a certain

[1] These factors are: "'(1) the degree of opposing parties' culpability or bad faith; (2) ability of opposing parties to satisfy an award of attorneys' fees; (3) whether an award of attorneys' fees against the opposing parties would deter other persons acting under similar circumstances; (4) whether the parties requesting attorneys' fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA itself; and (5) the relative merits of the parties' positions.'" App. to Pet. for Cert. 16a (quoting *Quesinberry* v. *Life Ins. Co. of North Am.*, 987 F. 2d 1017, 1029 (CA4 1993)).

result on remand," but found that it "quite clearly expressed the consequences to [Reliance] were it to fail to complete its reconsideration in an expeditious manner." *Id.*, at 19a. Accordingly, the remand order "signif[ied] that the court was displeased with the cursory review that [Reliance] had initially given to [Hardt's] claim, but was inclined to reserve judgment and permit [Reliance] to conduct a proper review of all of the medical evidence." *Ibid.* The court next concluded that a fees award was appropriate under the five-factor test, see *id.*, at 22a–25a, and awarded $39,149 in fees and costs, *id.*, at 25a–30a.

Reliance appealed the fees award, and the Court of Appeals vacated the District Court's order. According to the Court of Appeals, Hardt failed to satisfy the step-one inquiry—*i. e.*, she failed to establish that she was a "prevailing party." In reaching that conclusion, the Court of Appeals relied on this Court's decision in *Buckhannon*, under which a fee claimant qualifies as a "prevailing party" only if he has obtained an "'enforceable judgmen[t] on the merits'" or a "'court-ordered consent decre[e].'" 336 Fed. Appx. 332, 335 (CA4 2009) *(per curiam)* (quoting 532 U. S., at 604). The Court of Appeals reasoned that because the remand order "did not require Reliance to award benefits to Hardt," it did "not constitute an 'enforceable judgment on the merits' as *Buckhannon* requires," thus precluding Hardt from establishing prevailing party status. 336 Fed. Appx., at 336 (brackets omitted).

Hardt filed a petition for a writ of certiorari seeking review of two aspects of the Court of Appeals' judgment. First, did the Court of Appeals correctly conclude that § 1132(g)(1) permits courts to award attorney's fees only to a "prevailing party"?[2] Second, did the Court of Appeals cor-

[2] The Courts of Appeals are divided on this issue. Some (a few only tentatively) agree with the Court of Appeals' conclusion here that only prevailing parties are entitled to fees under § 1132(g)(1). See, *e. g.*, *Cottrill* v. *Sparrow, Johnson & Ursillo, Inc.*, 100 F. 3d 220, 225 (CA1 1996)

rectly identify the circumstances under which a fee claimant is entitled to attorney's fees under § 1132(g)(1)? We granted certiorari. 558 U. S. 1142 (2010).

II

Whether § 1132(g)(1) limits the availability of attorney's fees to a "prevailing party" is a question of statutory construction. As in all such cases, we begin by analyzing the statutory language, "assum[ing] that the ordinary meaning of that language accurately expresses the legislative purpose." *Gross* v. *FBL Financial Services, Inc.*, 557 U. S. 167, 175 (2009) (internal quotation marks omitted). We must enforce plain and unambiguous statutory language according to its terms. *Carcieri* v. *Salazar*, 555 U. S. 379, 387 (2009); *Jimenez* v. *Quarterman*, 555 U. S. 113, 118 (2009).

Section 1132(g)(1) provides:

> "In any action under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may allow

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("Congress declared that, in any ERISA claim advanced by a 'participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee' *to the prevailing party*" (emphasis added)); *Tate* v. *Long Term Disability Plan for Salaried Employees of Champion Int'l Corp. #506*, 545 F. 3d 555, 564 (CA7 2008) ("In analyzing whether attorney's fees should be awarded to a 'prevailing party' in an ERISA case, a court should consider whether the losing party's position was justified and taken in good faith. However, we have held that a claimant who is awarded a remand in an ERISA case generally is not a prevailing party in the truest sense of the term" (some internal quotation marks and citation omitted)); *Graham* v. *Hartford Life & Accident Ins. Co.*, 501 F. 3d 1153, 1162 (CA10 2007) ("We also afford certain weight to prevailing party status, even though we acknowledge that the ERISA attorney's fees provision is not expressly directed at prevailing parties"). Other Courts of Appeals have rejected or disavowed that position. See, *e. g.*, *Miller* v. *United Welfare Fund*, 72 F. 3d 1066, 1074 (CA2 1995); *Gibbs* v. *Gibbs*, 210 F. 3d 491, 503 (CA5 2000); *Freeman* v. *Continental Ins. Co.*, 996 F. 2d 1116, 1119 (CA11 1993).

> a reasonable attorney's fee and costs of action to either party."

The words "prevailing party" do not appear in this provision. Nor does anything else in § 1132(g)(1)'s text purport to limit the availability of attorney's fees to a "prevailing party." Instead, § 1132(g)(1) expressly grants district courts "discretion" to award attorney's fees "to *either* party." (Emphasis added.)

That language contrasts sharply with § 1132(g)(2), which governs the availability of attorney's fees in ERISA actions under § 1145 (actions to recover delinquent employer contributions to a multiemployer plan). In such cases, only plaintiffs who obtain "a judgment in favor of the plan" may seek attorney's fees. § 1132(g)(2)(D). The contrast between these two paragraphs makes clear that Congress knows how to impose express limits on the availability of attorney's fees in ERISA cases. Because Congress failed to include in § 1132(g)(1) an express "prevailing party" limit on the availability of attorney's fees, the Court of Appeals' decision adding that term of art to a fee-shifting statute from which it is conspicuously absent more closely resembles "invent[ing] a statute rather than interpret[ing] one." *Pasquantino* v. *United States*, 544 U. S. 349, 359 (2005) (internal quotation marks omitted).

We see no reason to dwell any longer on this question, particularly given Reliance's concessions. See Brief for Respondent 9–10 ("On its face," § 1132(g)(1) "does not expressly demand, like so many statutes, that a claimant be a 'prevailing party' before receiving attorney's fees"). We therefore hold that a fee claimant need not be a "prevailing party" to be eligible for an attorney's fees award under § 1132(g)(1).

III

We next consider the circumstances under which a court may award attorney's fees pursuant to § 1132(g)(1). "Our basic point of reference" when considering the award of at-

torney's fees is the bedrock principle known as the "'American Rule'": Each litigant pays his own attorney's fees, win or lose, unless a statute or contract provides otherwise. *Ruckelshaus*, 463 U. S., at 683; see *id.*, at 683–686; *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U. S. 240, 247 (1975); *Buckhannon*, 532 U. S., at 602–603; see also *Perdue* v. *Kenny A.*, 559 U. S. 542, 550 (2010). Statutory changes to this rule take various forms. Most fee-shifting provisions permit a court to award attorney's fees only to a "prevailing party."[3] Others permit a "substantially prevailing" party[4] or a "successful" litigant[5] to obtain fees. Still others authorize district courts to award attorney's fees where "appropriate,"[6] or simply vest district courts with "discretion" to award fees.[7]

Of those statutory deviations from the American Rule, we have most often considered statutes containing an express "prevailing party" requirement. See, *e. g.*, *Texas State Teachers Assn.* v. *Garland Independent School Dist.*, 489 U. S. 782, 792–793 (1989); *Farrar* v. *Hobby*, 506 U. S. 103, 109–114 (1992); *Buckhannon*, *supra*, at 602–606; *Sole* v. *Wyner*, 551 U. S. 74, 82–86 (2007). Our "prevailing party" precedents, however, do not govern the availability of fees awards under § 1132(g)(1), because this provision does not limit the availability of attorney's fees to the "prevailing party." *Supra*, at 252; see also *Gross*, *supra*, at 174 (cautioning courts "conducting statutory interpretation . . . 'not to apply rules applicable under one statute to a different statute with-

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[3] See, *e. g.*, *Buckhannon Board & Care Home, Inc.* v. *West Virginia Dept. of Health and Human Resources*, 532 U. S. 598, 601–603 (2001) (citing examples); *Ruckelshaus* v. *Sierra Club*, 463 U. S. 680, 684, n. 3 (1983) (same).

[4] See *ibid.*, n. 4 (citing examples).

[5] See, *e. g.*, 18 U. S. C. § 2707(c); *Ruckelshaus*, *supra*, at 684, n. 5 (citing examples).

[6] See *Ruckelshaus*, *supra*, at 682, n. 1 (citing examples).

[7] See, *e. g.*, 15 U. S. C. §§ 77k(e), 77www(a), 78i(e), 78r(a), 7706(g)(4); 20 U. S. C. § 1415(i)(3)(B)(i); 42 U. S. C. § 2000aa–6(f).

out careful and critical examination'" (quoting *Federal Express Corp.* v. *Holowecki*, 552 U. S. 389, 393 (2008))).

Instead, we interpret § 1132(g)(1) in light of our precedents addressing statutory deviations from the American Rule that do not limit attorney's fees awards to the "prevailing party." In that line of precedents, *Ruckelshaus* is the principal case. There, the Court interpreted § 307(f) of the Clean Air Act, which authorizes a court to award fees "whenever it determines that such an award is appropriate." 42 U. S. C. § 7607(f). We began by noting that because nothing in § 307(f)'s text "clear[ly] show[ed]" that Congress meant to abandon the American Rule, 463 U. S., at 685, fee claimants must have achieved some litigating success to be eligible for a fees award under that section, *id.*, at 686. We then concluded that by using the less stringent "whenever . . . appropriate" standard instead of the traditional "prevailing party" standard, Congress had "expand[ed] the class of parties eligible for fees awards from prevailing parties to *partially prevailing* parties—parties achieving *some success*, even if not major success." *Id.*, at 688. We thus held "that, absent some degree of success on the merits by the claimant, it is not 'appropriate' for a federal court to award attorney's fees under § 307(f)." *Id.*, at 694.

Applying the interpretive approach we employed in *Ruckelshaus* to § 1132(g)(1), we first look to "the language of the section," *id.*, at 682, which unambiguously allows a court to award attorney's fees "in its discretion . . . to either party," § 1132(g)(1). Statutes vesting judges with such broad discretion are well known in the law, particularly in the attorney's fees context. See, *e. g.*, n. 7, *supra;* see also *Perdue*, 559 U. S., at 558.

Equally well known, however, is the fact that a "judge's discretion is not unlimited." *Ibid.* Consistent with Circuit precedent, the District Court applied five factors to guide its discretion in deciding whether to award attorney's fees under § 1132(g)(1). See *supra*, at 249, and n. 1. Because

these five factors bear no obvious relation to § 1132(g)(1)'s text or to our fee-shifting jurisprudence, they are not required for channeling a court's discretion when awarding fees under this section.

Instead, *Ruckelshaus* lays down the proper markers to guide a court in exercising the discretion that § 1132(g)(1) grants. As in the statute at issue in *Ruckelshaus*, Congress failed to indicate clearly in § 1132(g)(1) that it "meant to abandon historic fee-shifting principles and intuitive notions of fairness." 463 U. S., at 686. Accordingly, a fees claimant must show "some degree of success on the merits" before a court may award attorney's fees under § 1132(g)(1), *id.*, at 694. A claimant does not satisfy that requirement by achieving "trivial success on the merits" or a "purely procedural victor[y]," but does satisfy it if the court can fairly call the outcome of the litigation some success on the merits without conducting a "lengthy inquir[y] into the question whether a particular party's success was 'substantial' or occurred on a 'central issue.'" *Id.*, at 688, n. 9.[8]

Reliance essentially agrees that this standard should govern fee requests under § 1132(g)(1), see Brief for Respondent 13–31, but argues that Hardt has not satisfied it. Specifically, Reliance contends that a court order remanding an ERISA claim for further consideration can never constitute "some success on the merits," even if such a remand results in an award of benefits. See *id.*, at 34–50.

Reliance's argument misses the point, given the facts of this case. Hardt persuaded the District Court to find that "the plan administrator has failed to comply with the ERISA guidelines" and "that Ms. Hardt did not get the kind of review to which she was entitled under applicable law." App. to Pet. for Cert. 48a; see 29 U. S. C. § 1133(2), 29 CFR

[8] We do not foreclose the possibility that once a claimant has satisfied this requirement, and thus becomes eligible for a fees award under § 1132(g)(1), a court may consider the five factors adopted by the Court of Appeals, see n. 1, *supra*, in deciding whether to award attorney's fees.

§ 2560.503–1(h) (2009). Although Hardt failed to win summary judgment on her benefits claim, the District Court nevertheless found "compelling evidence that Ms. Hardt is totally disabled due to her neuropathy," and stated that it was "inclined to rule in Ms. Hardt's favor" on her benefits claim, but declined to do so before "first giving Reliance the chance to address the deficiencies in its" statutorily mandated "full and fair review" of that claim. App. to Pet. for Cert. 48a; 29 U. S. C. § 1133(2). Hardt thus obtained a judicial order instructing Reliance "to act on Ms. Hardt's application by adequately considering all the evidence" within 30 days; "[o]therwise, judgment will be issued in favor of Ms. Hardt." App. to Pet. for Cert. 49a. After Reliance conducted that court-ordered review, and consistent with the District Court's appraisal, Reliance reversed its decision and awarded Hardt the benefits she sought. App. 120a–123a.

These facts establish that Hardt has achieved far more than "trivial success on the merits" or a "purely procedural victory." Accordingly, she has achieved "some success on the merits," and the District Court properly exercised its discretion to award Hardt attorney's fees in this case. Because these conclusions resolve this case, we need not decide today whether a remand order, without more, constitutes "some success on the merits" sufficient to make a party eligible for attorney's fees under § 1132(g)(1).[9]

* * *

We reverse the judgment of the Court of Appeals for the Fourth Circuit and remand this case for proceedings consistent with this opinion.

It is so ordered.

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[9] Reliance has not preserved any separate objection to the reasonableness of the amount of fees awarded. See *Perdue* v. *Kenny A.*, 559 U. S. 542, 552–553, 558–559 (2010).

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

While I join the Court's judgment and Parts I and II of its opinion, I do not believe that our mistaken interpretation of § 307(f) of the Clean Air Act in *Ruckelshaus* v. *Sierra Club*, 463 U. S. 680 (1983), should be given any special weight in the interpretation of this—or any other—different statutory provision. The outcome in that closely divided case turned, to a significant extent, on a judgment about how to read the legislative history of the provision in question. Compare *id.*, at 686–693, with *id.*, at 703–706 (STEVENS, J., dissenting). I agree with the Court in this case that 29 U. S. C. § 1132(g)(1) does not impose a "prevailing party" requirement; I agree, further, that the District Court acted well within its discretion in awarding attorney's fees to this petitioner. But I would examine the text, structure, and history of any other federal statute authorizing an award of fees before concluding that Congress intended the same approach under that statute as under this one.

Syllabus

UNITED STATES *v.* MARCUS

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

No. 08–1341. Argued February 24, 2010—Decided May 24, 2010

Respondent Marcus was convicted of engaging in forced labor and sex trafficking between January 1999 and October 2001. On appeal, he pointed out for the first time that the federal statutes he violated did not become law until October 2000. Thus, he claimed, the indictment and evidence permitted at trial allowed a jury to convict him exclusively on the basis of preenactment conduct in violation of the *Ex Post Facto* Clause. He conceded that he had not raised this objection in the District Court, but argued that because the constitutional error was plain, his conviction must be set aside. The Second Circuit agreed and vacated the conviction. In doing so, the court held that, even in the case of a continuing offense, retrial is necessary if there is "any possibility, no matter how unlikely, that the jury could have convicted based exclusively on pre-enactment conduct." The court noted that this was "true even under plain error review."

Held: The Second Circuit's plain-error standard conflicts with this Court's interpretation of the plain-error rule. An appellate court may recognize a "plain error that affects substantial rights," even if that error was "not brought" to the district court's "attention." Fed. Rule Crim. Proc. 52(b). This Court's cases interpret this rule such that an appellate court may, in its discretion, correct an error not raised at trial only when the appellant demonstrates that (1) there is an error; (2) the error is clear or obvious; (3) the error affected the appellant's substantial rights; and (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings.

The standard the Second Circuit applied in this case is inconsistent with the third and fourth of these criteria. To begin, it is irreconcilable with the criterion that the error "affec[t] the appellant's substantial rights," *Puckett* v. *United States*, 556 U. S. 129, 135. This condition requires the error to be prejudicial, meaning that there is a reasonable probability that the error affected the trial's outcome, not that there is "*any possibility,*" however remote, that the jury could have convicted based exclusively on preenactment conduct.

Nor does this error fall within the category of "structural errors" that may "affect substantial rights" regardless of their actual impact on an

appellant's trial. *Id.*, at 140–141. Here, a jury instruction might have minimized or eliminated the risk that Marcus would have been convicted based solely on preenactment conduct. A reviewing court should find it no more difficult to assess the failure to give such an instruction than to assess numerous other instructional errors previously found nonstructural, see, *e. g.*, *Hedgpeth* v. *Pulido*, 555 U. S. 57 *(per curiam)*. The Court further rejects Marcus' argument that the error at issue should be labeled an *Ex Post Facto* Clause violation, and that all such violations should be treated as special, structural errors warranting reversal without a showing of prejudice. As an initial matter, the Government never argued that the statute that criminalized Marcus' conduct applied retroactively, and Marcus' claim is thus properly brought under the Due Process, and not the *Ex Post Facto*, Clause. Moreover, we see no reason why errors similar to the one at issue in this case, taken as a class, would automatically affect substantial rights without a showing of prejudice.

In any event, the Second Circuit's "any possibility," however remote, standard also cannot be reconciled with the criterion that "the error seriously affec[t] the fairness, integrity or public reputation of judicial proceedings." *Puckett*, *supra*, at 135 (internal quotation marks omitted). Under the Second Circuit's approach, a retrial would be required even where the evidence supporting conviction consists of a few days of preenactment conduct along with several continuous years of identical postenactment conduct. Given the tiny risk that a jury would base its conviction in these circumstances on the few preenactment days alone, such an error is most unlikely to cast serious doubt on the fairness, integrity, or public reputation of the judicial system. Pp. 262–267.

538 F. 3d 97, reversed and remanded.

BREYER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, THOMAS, GINSBURG, and ALITO, JJ., joined. STEVENS, J., filed a dissenting opinion, *post*, p. 267. SOTOMAYOR, J., took no part in the consideration or decision of the case.

Eric D. Miller argued the cause for the United States. With him on the brief were *Solicitor General Kagan*, *Assistant Attorney General Perez*, *Deputy Solicitor General Dreeben*, *Jessica Dunsay Silver*, and *Tovah R. Calderon*.

Herald Price Fahringer argued the cause for respondent. With him on the brief was *Erica T. Dubno*.

JUSTICE BREYER delivered the opinion of the Court.

The question before us concerns an appellate court's "plain error" review of a claim not raised at trial. See Fed. Rule Crim. Proc. 52(b). The Second Circuit has said that it must recognize a "plain error" if there is "*any possibility*," however remote, that a jury convicted a defendant exclusively on the basis of actions taken before enactment of the statute that made those actions criminal. 538 F. 3d 97, 102 (2008) *(per curiam)* (emphasis added). In our view, the Second Circuit's standard is inconsistent with this Court's "plain error" cases. We therefore reverse.

I

A federal grand jury indicted respondent Glenn Marcus on charges that he engaged in unlawful forced labor and sex trafficking between " 'January 1999 and October 2001.' " *Id.*, at 100; see also 18 U. S. C. §§ 1589, 1591(a)(1). At trial, the Government presented evidence of his conduct during that entire period. 538 F. 3d, at 100. And a jury found him guilty of both charges. *Ibid.*

On appeal, Marcus pointed out for the first time that the statutes he violated were enacted as part of the Trafficking Victims Protection Act of 2000 (TVPA), which did not become law until October 28, 2000. § 112(a)(2), 114 Stat. 1486. Marcus noted that the indictment and the evidence presented at trial permitted a jury to convict him exclusively upon the basis of actions that he took before October 28, 2000. And for that reason, Marcus argued that his conviction violated the Constitution—in Marcus' view, the *Ex Post Facto* Clause, Art. I, § 9, cl. 3. Marcus conceded that he had not objected on these grounds in the District Court. Letter Brief for Appellant in No. 07–4005–cr (CA2), p. 12. But, he said, the constitutional error is "plain," and his conviction therefore must be set aside. *Id.*, at 13.

The Government replied by arguing that Marcus' conviction was for a single course of conduct, some of which took

place before, and some of which took place after, the statute's enactment date. 538 F. 3d, at 101. The Constitution, it said, does not forbid the application of a new statute to such a course of conduct so long as the course of conduct continued *after* the enactment of the statute. See, *e. g.*, *United States* v. *Harris*, 79 F. 3d 223, 229 (CA2 1996); *United States* v. *Duncan*, 42 F. 3d 97, 104 (CA2 1994). The Government conceded that the conviction could not rest exclusively upon conduct which took place before the TVPA's enactment, but it argued that the possibility that the jury here had convicted on that basis was "'remote.'" 538 F. 3d, at 102. Hence, the Government claimed, it was highly unlikely that the judge's failure to make this aspect of the law clear (say, by explaining to the jury that it could not convict based on preenactment conduct alone) affected Marcus' "substantial rights." Letter Brief for United States in No. 07–4005–cr (CA2), p. 9. And the Government thus argued that the court should not recognize a "plain error." *Ibid.*

The Second Circuit noted that Marcus had not raised his *ex post facto* argument in the District Court. 538 F. 3d, at 102. The court also recognized that, under Circuit precedent, the Constitution did not prohibit conviction for a "'continuing offense'" so long as the conviction rested, at least in part, upon postenactment conduct. *Id.*, at 101 (quoting *Harris*, *supra*, at 229). But, the court held, "even in the case of a continuing offense, if it was *possible* for the jury—wh[ich] had not been given instructions regarding the date of enactment—to convict *exclusively* on [the basis of] pre-enactment conduct, then the conviction constitutes a violation" of the *Ex Post Facto* Clause. 538 F. 3d, at 101. The court noted that this was "true even under plain error review." *Ibid.* In short, under the Second Circuit's approach, "a retrial is necessary whenever there is any possibility, *no matter how unlikely*, that the jury could have convicted based exclusively on pre-enactment conduct." *Id.*, at 102 (emphasis added).

The Government sought certiorari. And we granted the writ, agreeing to decide whether the Second Circuit's approach to "plain error" review, as we have set it forth, conflicts with this Court's interpretation of the "plain error" rule. See Fed. Rule Crim. Proc. 52(b).

II

Rule 52(b) permits an appellate court to recognize a "plain error that affects substantial rights," even if the claim of error was "not brought" to the district court's "attention." Lower courts, of course, must apply the Rule as this Court has interpreted it. And the cases that set forth our interpretation hold that an appellate court may, in its discretion, correct an error not raised at trial only where the appellant demonstrates that (1) there is an "error"; (2) the error is "clear or obvious, rather than subject to reasonable dispute"; (3) the error "affected the appellant's substantial rights, which in the ordinary case means" it "affected the outcome of the district court proceedings"; and (4) "the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Puckett* v. *United States*, 556 U. S. 129, 135 (2009) (internal quotation marks omitted); see also *United States* v. *Olano*, 507 U. S. 725, 731–737 (1993); *Johnson* v. *United States*, 520 U. S. 461, 466–467 (1997); *United States* v. *Cotton*, 535 U. S. 625, 631–632 (2002).

In our view, the Second Circuit's standard is inconsistent with the third and the fourth criteria set forth in these cases. The third criterion specifies that a "plain error" must "affec[t]" the appellant's "substantial rights." In the ordinary case, to meet this standard an error must be "prejudicial," which means that there must be a reasonable probability that the error affected the outcome of the trial. *Olano*, *supra*, at 734–735 (stating that, to satisfy the third criterion of Rule 52(b), a defendant must "normally" demonstrate that the alleged error was not "harmless"); see also *United States* v. *Dominguez Benitez*, 542 U. S. 74, 83 (2004).

The Court of Appeals, however, would notice a "plain error" and set aside a conviction whenever there exists "any possibility, no matter how unlikely, that the jury could have convicted based exclusively on pre-enactment conduct." 538 F. 3d, at 102. This standard is irreconcilable with our "plain error" precedent. See, *e. g.*, *Olano*, *supra*, at 734–735.

We recognize that our cases speak of a need for a showing that the error affected the "outcome of the district court proceedings" in the "ordinary case." *Puckett*, 556 U. S., at 135 (internal quotation marks omitted). And we have noted the possibility that certain errors, termed "structural errors," might "affec[t] substantial rights" regardless of their actual impact on an appellant's trial. See *id.*, at 140–141 (reserving the question whether "structural errors" automatically satisfy the third "plain error" criterion); *Cotton*, *supra*, at 632 (same); *Johnson*, *supra*, at 469 (same); *Olano*, *supra*, at 735 (same). But "structural errors" are "a very limited class" of errors that affect the "'framework within which the trial proceeds,'" *Johnson*, *supra*, at 468 (quoting *Arizona* v. *Fulminante*, 499 U. S. 279, 310 (1991)), such that it is often "difficul[t]" to "asses[s] the effect of the error," *United States* v. *Gonzalez-Lopez*, 548 U. S. 140, 149, n. 4 (2006). See *Johnson*, *supra*, at 468–469 (citing cases in which this Court has found "structural error," including *Gideon* v. *Wainwright*, 372 U. S. 335 (1963) (total deprivation of counsel); *Tumey* v. *Ohio*, 273 U. S. 510 (1927) (lack of an impartial trial judge); *McKaskle* v. *Wiggins*, 465 U. S. 168 (1984) (right to self-representation at trial); *Waller* v. *Georgia*, 467 U. S. 39 (1984) (violation of the right to a public trial); and *Sullivan* v. *Louisiana*, 508 U. S. 275 (1993) (erroneous reasonable-doubt instruction)). We cannot conclude that the error here falls within that category.

The error at issue in this case created a risk that the jury would convict respondent solely on the basis of conduct that was not criminal when the defendant engaged in that conduct. A judge might have minimized, if not eliminated, this

risk by giving the jury a proper instruction. We see no reason why, when a judge fails to give such an instruction, a reviewing court would find it any more difficult to assess the likely consequences of that failure than with numerous other kinds of instructional errors that we have previously held to be non-"structural"—for example, instructing a jury as to an invalid alternative theory of guilt, *Hedgpeth* v. *Pulido*, 555 U. S. 57 (2008) *(per curiam)*, omitting mention of an element of an offense, *Neder* v. *United States*, 527 U. S. 1 (1999), or erroneously instructing the jury on an element, *Yates* v. *Evatt*, 500 U. S. 391 (1991); *Carella* v. *California*, 491 U. S. 263 (1989) *(per curiam)*; *Pope* v. *Illinois*, 481 U. S. 497 (1987); *Rose* v. *Clark*, 478 U. S. 570 (1986).

Marcus argues that, like the Second Circuit, we should apply the label "*Ex Post Facto* Clause violation" to the error in this case, and that we should then treat all errors so labeled as special, "structural," errors that warrant reversal without a showing of prejudice. See Brief for Respondent 27–29. But we cannot accept this argument. As an initial matter, we note that the Government has never claimed that the TVPA retroactively criminalizes preenactment conduct, see Brief for United States 16, and that Marcus and the Second Circuit were thus incorrect to classify the error at issue here as an *Ex Post Facto* Clause violation, see *Marks* v. *United States*, 430 U. S. 188, 191 (1977) ("The *Ex Post Facto* Clause is a limitation upon the powers of the Legislature, and does not of its own force apply to the Judicial Branch of government" (citation omitted)). Rather, if the jury, which was not instructed about the TVPA's enactment date, erroneously convicted Marcus based exclusively on noncriminal, preenactment conduct, Marcus would have a valid due process claim. Cf. *Bouie* v. *City of Columbia*, 378 U. S. 347, 353–354 (1964) (applying Due Process Clause to *ex post facto* judicial decisions). In any event, however Marcus' claim is labeled, we see no reason why this kind of error would auto-

matically "affec[t] substantial rights" without a showing of individual prejudice.

That is because errors similar to the one at issue in this case—*i. e.*, errors that create a risk that a defendant will be convicted based exclusively on noncriminal conduct—come in various shapes and sizes. The kind and degree of harm that such errors create can consequently vary. Sometimes a proper jury instruction might well avoid harm; other times, preventing the harm might only require striking or limiting the testimony of a particular witness. And sometimes the error might infect an entire trial, such that a jury instruction would mean little. There is thus no reason to believe that *all or almost all* such errors *always* "affec[t] the framework within which the trial proceeds," *Fulminante*, *supra*, at 310, or "necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence," *Neder*, *supra*, at 9 (emphasis deleted).

Moreover, while the rights at issue in this case are important, they do not differ significantly in importance from the constitutional rights at issue in other cases where we have insisted upon a showing of individual prejudice. See *Fulminante*, *supra*, at 306–307 (collecting cases). Indeed, we have said that "if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred" are not "structural errors." *Rose*, *supra*, at 579. No one here denies that defendant had counsel and was tried by an impartial adjudicator.

In any event, the Second Circuit's approach also cannot be reconciled with this Court's fourth "plain error" criterion, which permits an appeals court to recognize "plain error" only if the error "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Johnson*, 520 U. S., at 467 (internal quotation marks omitted). In cases applying this fourth criterion, we have suggested that, in most circumstances, an error that does not affect the jury's

verdict does not significantly impugn the "fairness," "integrity," or "public reputation" of the judicial process. *Ibid.* (internal quotation marks omitted); *Cotton*, 535 U. S., at 633. The Second Circuit's "any possibility, no matter how unlikely" standard, however, would require finding a "plain error" in a case where the evidence supporting a conviction consisted of, say, a few days of preenactment conduct along with several continuous years of identical postenactment conduct. Given the tiny risk that the jury would have based its conviction upon those few preenactment days alone, a refusal to recognize such an error as a "plain error" (and to set aside the verdict) is most unlikely to cast serious doubt on the "fairness," "integrity," or "public reputation" of the judicial system.

We do not intend to trivialize the claim that respondent here raises. Nor do we imply that the kind of error at issue here is unimportant. But the rule that permits courts to recognize a "plain error" does not "remove" "seriou[s]" errors "from the ambit of the Federal Rules of Criminal Procedure." *Johnson*, *supra*, at 466. Rather, the "plain error" rule, as interpreted by this Court, sets forth criteria that a claim of error not raised at trial must satisfy. The Second Circuit's rule would require reversal under the "plain error" standard for errors that do not meet those criteria. We can find no good reason to treat respondent's claim of error differently from others. See *Puckett*, 556 U. S., at 143 (reviewing the Government's violation of a plea agreement for "plain error"); *Cotton*, *supra*, at 631–632 (reviewing an indictment's failure to charge a fact that increased defendant's statutory maximum sentence for "plain error"); *Johnson*, *supra*, at 464 (reviewing the failure to submit an element of the crime to the jury for "plain error"). Hence we must reject the Second Circuit's rule.

For these reasons, the judgment of the Court of Appeals is reversed. As the Court of Appeals has not yet considered whether the error at issue in this case satisfies this Court's

"plain error" standard—*i. e.*, whether the error affects "substantial rights" and "the fairness, integrity, or public reputation of judicial proceedings"—we remand the case to that court so that it may do so.

It is so ordered.

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

JUSTICE STEVENS, dissenting.

The Court's opinion fairly summarizes our "plain error" cases and shows how the Court of Appeals applied a novel standard of review. Yet while it may have taken an unusual route to get there, I find nothing wrong with the Court of Appeals' judgment. I am more concerned with this Court's approach to, and policing of, Federal Rule of Criminal Procedure 52(b).

I

On October 28, 2000, Congress enacted the Trafficking Victims Protection Act (TVPA), 114 Stat. 1466. Respondent Glenn Marcus was convicted on two counts under the TVPA: one for sex trafficking, in violation of 18 U. S. C. § 1591(a)(1), and one for forced labor, in violation of § 1589. The indictment charged conduct that spanned from January 1999 to October 2001. See 538 F. 3d 97, 100 (CA2 2008) *(per curiam)*. The evidence introduced by the Government at trial spanned from 1998 to 2003. See 487 F. Supp. 2d 289, 292–297 (EDNY 2007). Most of the evidence supporting the sex trafficking charge, and some of the evidence supporting the forced labor charge, related to discrete events that occurred before October 28, 2000.

At trial, Marcus failed to ask the judge to inform the jury that his preenactment conduct was not unlawful, and the judge failed to give an instruction to that effect. If a request had been made, it is clear that an appropriate instruction would have been given. Indeed, it is equally clear that

the judge would have given such an instruction *sua sponte* if she had been aware of the effective date of the statute. No one disputes that error was committed in the way Marcus was charged and tried, and the error was sufficiently plain to be considered on appeal.

The record demonstrates that Marcus' sex trafficking conviction likely violated the *ex post facto* rule, as applied to trial proceedings through the Due Process Clause, see *ante,* at 264, because the postenactment evidence appears to have been insufficient to prove guilt beyond a reasonable doubt. See 538 F. 3d, at 105–106 (Sotomayor, J., concurring). Whether his forced labor conviction is invalid for the same reason is not clear. What is clear, however, is that neither the Second Circuit nor this Court has to determine that an error of constitutional magnitude occurred for Marcus to be eligible for relief. The question under Federal Rule of Criminal Procedure 52(b) is whether the trial error was sufficiently weighty to affect "substantial rights," and in my view this error surely was.

The Court notes that the error "created a risk that the jury would convict respondent solely on the basis of conduct that was not criminal when the defendant engaged in that conduct." *Ante,* at 263. That is true, and it is of fundamental concern because imposing criminal sanctions for nonproscribed conduct has always been considered a hallmark of tyranny—no matter how morally reprehensible the prosecuted party.

But in addition to the very real possibility that the jury convicted Marcus of sex trafficking *solely* on the basis of preenactment conduct, the error created another risk: namely, that both verdicts, returned after seven days of deliberation, rested in part on the jury's incorrect belief that the conduct before October 28, 2000, was unlawful. The error committed at trial not only prevented the jury from focusing on the relevant time period, but it also distorted the jury's perception of Marcus' actions. By arguing that

its preenactment evidence showed a violation of the TVPA, the Government effectively mischaracterized all of that evidence as descriptions of illegal behavior. And by giving the jury the impression that Marcus committed a much larger amount of criminal conduct than he really did, the error may have tipped the scales in favor of the prosecution, when the actual evidence of guilt would not have persuaded the jury to convict.

There is no need to decide whether the Government's arguments or the trial court's failure to give a curative instruction reached a level of unfairness sufficient to violate the Due Process Clause. For the foregoing reasons, I am convinced that the error prejudiced Marcus and seriously undermined the integrity of the proceedings. While I do not endorse the reasoning in the Court of Appeals' opinion,* I would therefore affirm its judgment.

II

The Court does not engage the merits of that judgment, but instead remands to the Court of Appeals to apply the test we have devised for evaluating claims of "plain error." That test requires lower courts to conduct four separate in-

*The *per curiam* opinion contained a curious wrinkle, apart from misclassifying the trial error. See *ante*, at 264. The *per curiam* applied a standard from earlier Second Circuit cases that asked whether there was any possibility the jury convicted the defendant exclusively on the basis of preenactment conduct. 538 F. 3d 97, 101 (CA2 2008) (citing *United States* v. *Torres*, 901 F. 2d 205, 229 (1990), *United States* v. *Monaco*, 194 F. 3d 381, 386 (1999), and *United States* v. *Harris*, 79 F. 3d 223, 229 (1996)). As I read the Second Circuit precedents, however, they used that standard to determine whether an *ex post facto* violation occurred, not to determine whether that violation warranted vacatur of the conviction pursuant to Federal Rule of Criminal Procedure 52(b). *Torres* is the only one of the cited cases that even considered Rule 52(b), and its holding rested on a combination of factors, including that "the defendants brought the general ex post facto question to the attention of the district court," albeit imprecisely, and that a mandatory life sentence was imposed. 901 F. 2d, at 229. It is thus unclear why the Court of Appeals believed itself foreclosed from conducting a regular "plain error" review.

quiries, each of which requires a distinct form of judgment and several of which have generated significant appellate-court dissensus; the test may also contain an exception for "structural errors," a category we have never defined clearly. With great concision, the Court manages to summarize all of these moving parts in about five pages. *Ante*, at 262–267.

Yet the language of Rule 52(b) is straightforward. It states simply: "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention." This is the mirror image of Rule 52(a), which instructs courts to disregard any error "that does not affect substantial rights." The Federal Rules thus set forth a unitary standard, which turns on whether the error in question affected substantial rights (either in a particular defendant's case or in the mine run of comparable cases), and they leave it to judges to figure out how best to apply that standard.

In our attempt to clarify Rule 52(b), we have, I fear, both muddied the waters and lost sight of the wisdom embodied in the Rule's spare text. Errors come in an endless variety of "shapes and sizes." *Ante*, at 265. Because error-free trials are so rare, appellate courts must repeatedly confront the question whether a trial judge's mistake was harmless or warrants reversal. They become familiar with particular judges and with the vast panoply of trial procedures, they acquire special expertise in dealing with recurring issues, and their doctrine evolves over time to help clarify and classify various types of mistakes. These are just a few of the reasons why federal appellate courts are "allowed a wide measure of discretion in the supervision of litigation in their respective circuits." *United States* v. *Olano*, 507 U. S. 725, 745 (1993) (STEVENS, J., dissenting). This Court's ever more intensive efforts to rationalize plain-error review may have been born of a worthy instinct. But they have trapped the appellate courts in an analytic maze that, I have increasingly

come to believe, is more liable to frustrate than to facilitate sound decisionmaking.

The trial error at issue in this case undermined the defendant's substantial rights by allowing the jury to convict him on the basis of an incorrect belief that lawful conduct was unlawful, and it does not take an elaborate formula to see that. Because, in my view, the Court of Appeals properly exercised its discretion to remedy the error and to order a retrial, I respectfully dissent.

Per Curiam

ROBERTSON *v.* UNITED STATES EX REL. WATSON

CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

No. 08–6261. Argued March 31, 2010—Decided May 24, 2010

Certiorari dismissed. Reported below: 940 A. 2d 1050.

Jaclyn S. Frankfurt argued the cause for petitioner. With her on the briefs were *James W. Klein* and *Lee R. Goebes.*

Robert A. Long, Jr., argued the cause for respondent. With him on the brief were *Theodore P. Metzler, Jr.*, and *Mark W. Mosier.*

Solicitor General Kagan argued the cause for the United States as *amicus curiae* in support of respondent. With her on the brief were *Assistant Attorney General Breuer, Deputy Solicitor General Dreeben,* and *Joseph R. Palmore.**

PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

It is so ordered.

**Jonathan D. Hacker, Blair G. Brown,* and *Cory T. Way* filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the District of Columbia by *Peter J. Nickles,* Attorney General of the District of Columbia, *Todd S. Kim,* Solicitor General, *Rosalyn Calbert Groce,* Deputy Solicitor General, *Janice Sheppard,* Assistant Attorney General, and *Janese Bechtol;* and for the Domestic Violence Legal Empowerment and Appeals Project et al. by *Joan S. Meier, Deanne E. Maynard,* and *Brian R. Matsui.*

Briefs of *amici curiae* were filed for the National Crime Victim Law Institute by *Douglas E. Beloof;* and for Betty Weinberg Ellerin et al. by *Evan A. Davis* and *Christina Brandt-Young.*

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

This is a complicated case, but it raises a straightforward and important threshold issue. When we granted certiorari, we rephrased the question presented to focus on that issue: "Whether an action for criminal contempt in a congressionally created court may constitutionally be brought in the name and pursuant to the power of a private person, rather than in the name and pursuant to the power of the United States." 558 U. S. 1090–1091 (2009). The answer to that question is no. The terrifying force of the criminal justice system may only be brought to bear against an individual by society as a whole, through a prosecution brought on behalf of the government. The court below held otherwise, relying on a *dissenting* opinion in one of our cases, and on the litigating position of the United States, which the Solicitor General has properly abandoned in this Court. See Brief for United States as *Amicus Curiae* 12–13, n. 3. We should correct the lower court's error and return the case to that court to resolve the remaining questions.

I

In March 1999, Wykenna Watson was assaulted by her then-boyfriend, John Robertson. App. 40. Watson sought and secured a civil protective order against Robertson, prohibiting him from approaching within 100 feet of her and from assaulting, threatening, harassing, physically abusing, or contacting her. *Id.*, at 20. At the same time, the United States Attorney's Office (USAO) was independently pursuing criminal charges against Robertson arising from the assault.

On June 26, Robertson violated the protective order by again violently assaulting Watson. On July 8, he was indicted for the previous March incident; shortly thereafter, the USAO offered, and Robertson accepted, a plea agreement resolving those charges. *Id.*, at 26–30. At the top of

the boilerplate plea form, the assistant U. S. attorney added in longhand: "In exchange for Mr. Robertson's plea of guilty to attempt[ed] aggravated assault, the gov't agrees to: DISMISS the [remaining] charges[,] [and] [n]ot pursue any charges concerning an incident on 6-26-99." *Id.*, at 28. The Superior Court accepted Robertson's plea and sentenced him to one to three years' imprisonment. *Id.*, at 30, 46, 53.

A few months later, Watson filed a motion to initiate criminal contempt proceedings against Robertson for violating the civil protective order, based on the June 26 assault. See D. C. Code § 16–1005(f) (2009 Supp.); D. C. Super. Ct. Domestic Violence Rule 12(d) (Lexis 2010); *In re Robertson*, 940 A. 2d 1050, 1053 (D. C. 2008). After a 2-day bench trial, the court found Robertson guilty on three counts of criminal contempt and sentenced him to three consecutive 180-day terms of imprisonment, suspending execution of the last in favor of five years' probation. The court also ordered Robertson to pay Watson roughly $10,000 in restitution. App. 2, 63–64. Robertson filed a motion to vacate the judgment, which the court denied.

Robertson appealed. Criminal contempt prosecutions, he argued, "are between the public and the defendant," and thus could "only be brought in the name of the relevant sovereign, . . . the United States." Brief for Petitioner 8, 10 (quoting Brief for Appellant in No. 00–FM–925 etc. (D. C.), pp. 20–21, and 940 A. 2d, at 1057; internal quotation marks omitted). So viewed, the prosecution based on the June 26 incident could not be brought, because the plea agreement barred the "gov[ernmen]t" from pursuing any charges arising from that incident.

The Court of Appeals rejected Robertson's arguments, in a two-step holding. Step one: "the criminal contempt prosecution in this case was conducted as a private action brought in the name and interest of Ms. Watson, not as a public action brought in the name and interest of the United States or any other governmental entity." 940 A. 2d, at 1057–1058 (inter-

nal quotation marks and brackets omitted). Step two: because the criminal contempt prosecution was brought as an exercise of private power, that prosecution did not implicate a plea agreement that bound only the Government. *Id.*, at 1059–1060.

We granted certiorari to review the first step of that holding. 558 U. S. 1090 (2009).

II

A

Our decision in *United States* v. *Dixon*, 509 U. S. 688 (1993), provides the answer to the question presented here. The question in *Dixon* was one of double jeopardy—whether a private party's prosecution for criminal contempt barred the Government's subsequent prosecution for the "same criminal offense." *Id.*, at 696. The private prosecution in that case was brought under the same D. C. contempt law at issue here. *Id.*, at 692 (citing D. C. Code § 16–1005 (1989)).

We thought it "obvious" in *Dixon* that double jeopardy protections barred the Government's subsequent prosecution. 509 U. S., at 696. The Double Jeopardy Clause, of course, bars the second prosecution for the same offense only if that prosecution is brought by the same sovereign as the first. See *Heath* v. *Alabama*, 474 U. S. 82, 88–89 (1985). Thus, the only possible way the Government's *second* prosecution could have offended the Double Jeopardy Clause is if the Court understood the criminal contempt prosecution to be the Government's *first* prosecution—*i. e.*, one brought *on behalf of the Government.* See *United States* v. *Halper*, 490 U. S. 435, 451 (1989) ("The protections of the Double Jeopardy Clause are not triggered by litigation between private parties"), overruled on other grounds by *Hudson* v. *United States*, 522 U. S. 93 (1997).

That we treated the criminal contempt prosecution in *Dixon* as an exercise of government power should not be surprising. More than two centuries ago, Blackstone wrote

that the king is "the proper person to prosecute for all public offences and breaches of the peace, being the person injured in the eye of the law." 1 W. Blackstone, Commentaries *268. Blackstone repeated that principle throughout his fourth book. See, *e. g.*, 4 *id.*, at *2, *8, *177. Not long after Blackstone, then-Representative John Marshall agreed, stating on the House floor that "administer[ing] criminal judgment . . . is a duty to be performed at the demand of the nation, and with which the nation has a right to dispense. If judgment . . . is to be pronounced, it must be at the prosecution of the nation." 10 Annals of Cong. 615 (1800).

This principle has deep historical roots. See, *e. g.*, 1 F. Wharton, Criminal Law § 10, p. 11 (9th ed. 1885) ("Penal justice . . . is a distinctive prerogative of the State, to be exercised in the service [of] the State"); see also J. Locke, Second Treatise of Civil Government § 88, pp. 43–44 (J. Gough ed. 1947) ("[E]very man who has entered into civil society, and is become a member of any commonwealth, has thereby quitted his power to punish offences against the law of nature in prosecution of his own private judgment[.] . . . [H]e has given a right to the commonwealth to employ his force for the execution of the judgments of the commonwealth" (footnote omitted)). As this Court has said before, "[c]rimes and offences against the laws of any State can only be defined, prosecuted and pardoned by the sovereign authority of that State." *Huntington* v. *Attrill*, 146 U. S. 657, 669 (1892); see also *Heath*, *supra*, at 88 ("The dual sovereignty doctrine [of the Double Jeopardy Clause] is founded on the common-law conception of crime as an offense against the sovereignty of the government").

These core principles are embodied in the Constitution. The protections our Bill of Rights affords those facing criminal prosecution apply to "*any* person," "*any* criminal case," and "*all* criminal prosecutions." Amdts. 5, 6 (emphasis added). But those protections apply only against *the government*; "[i]ndividual invasion of individual rights" is not

covered. *Civil Rights Cases*, 109 U. S. 3, 11 (1883) (Fourteenth Amendment). If the safeguards of the Bill of Rights are to be available in "all criminal prosecutions," then any such prosecution must be considered to be one on behalf of the government—otherwise the constitutional limits do not apply. "The Constitution constrains governmental action 'by whatever instruments or in whatever modes that action may be taken,'" *Lebron* v. *National Railroad Passenger Corporation*, 513 U. S. 374, 392 (1995) (quoting *Ex parte Virginia*, 100 U. S. 339, 346–347 (1880)), but the action still must be *governmental* action.

The court below, however, rejected this understanding, concluding that Watson's "criminal contempt prosecution" was not "a public action" but "a private action," such that it was not covered by an agreement binding the Government. 940 A. 2d, at 1057–1058 (internal quotation marks omitted). But as we have explained, "[t]he purpose of a criminal court is not to provide a forum for the ascertainment of private rights. Rather it is to vindicate the public interest in the enforcement of the criminal law while at the same time safeguarding the rights of the individual defendant." *Standefer* v. *United States*, 447 U. S. 10, 25 (1980) (internal quotation marks omitted).

The holding below gives rise to a broad array of unsettling questions. Take the Due Process Clause. It guarantees particular rights in criminal prosecutions because the prosecutor is a state actor, carrying out a "duty *on the part of the Government*." *Kyles* v. *Whitley*, 514 U. S. 419, 433 (1995) (emphasis added). But if the criminal prosecution is instead viewed as "a private action," not an exercise of sovereign power, how would those rights attach? Cf. *DeShaney* v. *Winnebago County Dept. of Social Servs.*, 489 U. S. 189, 195–196 (1989). What about *Brady* v. *Maryland*, 373 U. S. 83 (1963)? The private prosecutor is likely to have evidence pertinent to the proceeding—particularly if, as here, the private prosecutor is also the victim of the crime.

But if the prosecutor is not exercising governmental authority, what would be the constitutional basis for any *Brady* obligations? May the private prosecutor interview the defendant without *Miranda* warnings, since she is not acting on behalf of any sovereign but only in a private capacity? See *Miranda* v. *Arizona*, 384 U. S. 436 (1966).

Our entire criminal justice system is premised on the notion that a criminal prosecution pits the government against the governed, not one private citizen against another. The ruling below is a startling repudiation of that basic understanding.

B

Despite the foregoing, the Court of Appeals determined that Watson brought this criminal prosecution under her authority as a private citizen. 940 A. 2d, at 1058. To reach that conclusion, the court relied on Justice Blackmun's separate opinion in *Dixon*. See 940 A. 2d, at 1057 ("As Justice Blackmun said in *United States v. Dixon*, criminal contempt is 'a special situation.' [*Dixon*, 509 U. S., at 742 (opinion concurring in judgment in part and dissenting in part)]. . . . '[T]he purpose of contempt is not to punish an offense against the community at large but rather to punish the specific offense of disobeying a court order.' [*Ibid.*]" (citation omitted)). In fact, the court quoted from Justice Blackmun's separate opinion no fewer than four times. *Id.*, at 1057.

Justice Blackmun's opinion, however, was a partial concurrence in the judgment and partial dissent, and it garnered only one vote. Moreover, the portion of the opinion relied upon by the court below was the *dissenting* part. A majority of the Court squarely rejected Justice Blackmun's view, and did so in plain terms. See *Dixon*, 509 U. S., at 699–701 (opinion of SCALIA, J., joined by KENNEDY, J.); see *id.*, at 720 (White, J., joined by STEVENS and Souter, JJ., concurring in judgment in part and dissenting in part).

Before this Court, Watson understandably retreats from Justice Blackmun's dissenting opinion. Instead, she argues

that "[i]n England and in America at the time of the Founding, prosecutions by victims of crime and their families were the rule, not the exception." Brief for Respondent 38–39. But such prosecutions, though brought by a private party, were commonly understood as an exercise of sovereign power—the private party acting on behalf of the sovereign, seeking to vindicate a public wrong.

In England, for example, private parties could initiate criminal prosecutions, but the Crown—entrusted with the constitutional responsibility for law enforcement—could enter a *nolle prosequi* to halt the prosecution. See, *e. g.*, *King* v. *Guerchy*, 1 Black W. 545, 96 Eng. Rep. 315 (K. B. 1765); *King* v. *Fielding*, 2 Burr. 719, 720, 97 Eng. Rep. 531 (K. B. 1759); see also *King* v. *State*, 43 Fla. 211, 223, 31 So. 254, 257 (1901) (Private prosecutions in England were understood to be "conducted on behalf of the crown by the privately retained counsel of private prosecutors"); P. Devlin, The Criminal Prosecution in England 21 (1958).

Watson's arguments based on American precedent fail largely for the same reason: To say that private parties could (and still can, in some places) exercise some control over criminal prosecutions says nothing to rebut the widely accepted principle that those private parties necessarily acted (and now act) on behalf of the sovereign. See, *e. g.*, *Cronan ex rel. State* v. *Cronan*, 774 A. 2d 866, 877 (R. I. 2001) ("[A]ttorneys conducting private prosecutions stand in the shoes of the state"); *State* v. *Westbrook*, 279 N. C. 18, 36, 181 S. E. 2d 572, 583 (1971) ("The prosecuting attorney, whether the solicitor or privately employed counsel, represents the State"); Sidman, The Outmoded Concept of Private Prosecution, 25 Am. U. L. Rev. 754, 774 (1976) ("[T]he privately retained attorney becomes, in effect, a temporary public prosecutor"). Indeed, many of the state court authorities Watson herself cites expressly recognize this fundamental point. See, *e. g.*, *Katz* v. *Commonwealth*, 379 Mass. 305, 312, 399 N. E. 2d 1055, 1060 (1979) ("[I]t is clear with respect to the

criminal aspects of the present case that the Commonwealth . . . is the adverse party").

We have no need to take issue with that proposition, but this case is different. The whole point of the ruling below was that this was not a "public action" that happened to be litigated by a private party, but "a private action brought in the name and interest of [Ms.] Watson." 940 A. 2d, at 1057–1058 (internal quotation marks omitted). That holding was critical in explaining why Watson's criminal action was not barred by a plea agreement that bound the Government.

Moving beyond criminal prosecutions generally, Watson next contends that contempt prosecutions are unique, and thus should be exempt from the general rule. See Brief for Respondent 24. If Watson means to argue that modern criminal contempts are not "crimes," that view was squarely rejected by this Court in *Bloom* v. *Illinois*, 391 U. S. 194 (1968). See *id.*, at 199–200 (holding that a criminal contempt prosecution is a criminal prosecution for the purposes of the Sixth Amendment); see also *id.*, at 201 ("Criminal contempt is a crime in the ordinary sense"); *United States* v. *Providence Journal Co.*, 485 U. S. 693, 700 (1988) ("The fact that the allegedly criminal conduct concerns the violation of a court order instead of common law or a statutory prohibition does not render the prosecution any less an exercise of the sovereign power of the United States").

In any event, even if contempt prosecutions might not always count as "crimes," this one undoubtedly does, as Watson herself concedes. Brief for Respondent 34 ("[T]his case was clearly a criminal contempt proceeding from beginning to end"). That concession is well taken, given that whether a particular punishment is criminal or civil is "a matter of statutory construction," *Hudson*, 522 U. S., at 99, and that the relevant provisions here make clear that contempt proceedings like this one are criminal, see D. C. Code § 16–1005(f) (2009 Supp.) ("[C]riminal contempt shall be punished by a fine not exceeding $1,000 or imprisonment for not more

than 180 days, or both"); see also D. C. Super. Ct. Domestic Violence Rule 12(d) (labeled "Motion to adjudicate criminal contempt," and describing the violation as "criminal contempt"). As Justice Holmes put it for the Court: "These contempts are infractions of the law, visited with punishment as such. If such acts are not criminal, we are in error as to the most fundamental characteristic of crimes as that word has been understood in English speech." *Gompers* v. *United States*, 233 U. S. 604, 610 (1914).

The United States bears some responsibility for leading the court below astray. In that court, the Government argued that the criminal contempt prosecution was "'a private action brought in the name and interest of [Ms.] Watson, not . . . a public action brought in the name and interest of the United States or any other governmental entity.'" 940 A. 2d, at 1056 (quoting Brief for United States in No. 00–FM–925 etc. (D. C.), p. 6). The court below quoted that precise language in stating its conclusion. See 940 A. 2d, at 1057–1058.

Before this Court, the Solicitor General has properly abandoned that position, and does not defend the lower court's decision on this issue. See Brief for United States as *Amicus Curiae* 12–13, n. 3 ("[T]he United States no longer believes the contempt prosecution at issue can be understood as a purely 'private action'"). We should do our part and correct the ruling of the court below.

III

The ultimate issue in this case, of course, is whether the criminal contempt prosecution Watson initiated in January 2000 violated the plea agreement Robertson signed with the USAO in July 1999. The Court of Appeals said "no," based solely on its determination that Watson was exercising private—not sovereign—power. With that determination in hand, the ultimate plea agreement question was straightforward: If Watson was wielding purely private power, a plea

agreement that by its terms bound only the "gov[ernmen]t" would not bind her.

With a proper view of Watson's role in this case, however, the plea agreement question becomes significantly more difficult. The Solicitor General argues that the agreement does not bar the contempt prosecution, even if that prosecution is correctly viewed as on behalf of the sovereign. *Id.*, at 29–32. The difficult aspects of that legal issue, however, should not cause us to shy away from answering the fundamental threshold question whether a criminal prosecution may be brought on behalf and in the interest of a private party. Having decided that threshold question in favor of Robertson, I would remand to the court below to consider the plea agreement from the proper starting point.

In light of all the foregoing, it is worth stressing that the majority's determination not to decide that question "carries with it no implication whatever regarding the Court's views on the merits." *Maryland* v. *Baltimore Radio Show, Inc.*, 338 U. S. 912, 919 (1950) (Frankfurter, J., respecting denial of certiorari).

* * *

Allegorical depictions of the law frequently show a figure wielding a sword—the sword of justice, to be used to smite those who violate the criminal laws. Indeed, outside our own courthouse you will find a statue of more than 30 tons, Authority of Law, which portrays a male figure with such a sword. According to the sculptor, James Earle Fraser (who also designed the buffalo nickel), the figure sits "'wait[ing] with concentrated attention, holding in his left hand the tablet of laws, backed by the sheathed sword, symbolic of enforcement through law.'" Supreme Court of the United States, Office of the Curator, Contemplation of Justice and Authority of Law Information Sheet 2 (2009) (available in Clerk of Court's case file). A basic step in organizing a civilized society is to take that sword out of private hands and turn it over to an organized government, acting on behalf of

all the people. Indeed, "[t]he . . . power a man has in the state of nature is the power to punish the crimes committed against that law. [But this] he gives up when he joins [a] . . . political society, and incorporates into [a] commonwealth." Locke, Second Treatise § 128, at 64.

The ruling below contravenes that fundamental proposition, and should not be allowed to stand. At the very least, we should do what we decided to do when we granted certiorari, and took the unusual step of rephrasing the question presented: answer it.

I respectfully dissent from the Court's belated determination not to answer that question.

JUSTICE SOTOMAYOR, with whom JUSTICE KENNEDY joins, dissenting.

THE CHIEF JUSTICE would hold that criminal prosecutions, including criminal contempt proceedings, must be brought on behalf of the government. I join his opinion with the understanding that the narrow holding it proposes does not address civil contempt proceedings or consider more generally the legitimacy of existing regimes for the enforcement of restraining orders.

Per Curiam

JEFFERSON *v.* UPTON

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

No. 09–8852. Decided May 24, 2010

After petitioner Jefferson was convicted of murder and sentenced to death in Georgia state court, he sought state habeas relief. The court rejected his claim that his trial attorneys rendered ineffective assistance by failing to have him tested for brain damage; but its opinion was allegedly authored by the State's attorneys at the court's request and without notice to Jefferson or his counsel, and it included statements purportedly made on Jefferson's behalf by a witness who never testified. The State Supreme Court affirmed. Jefferson subsequently sought federal habeas relief. Under then-applicable federal law, state-court factual findings are presumed correct unless any one of the eight exceptions applies. 28 U. S. C. §§2254(d)(1)–(8) (1994 ed.). The District Court granted Jefferson relief without disturbing the state court's factual findings because it believed he should prevail even if those findings were true. In reversing, the Eleventh Circuit considered only one of §2254(d)'s exceptions—§2254(d)(8)—and determined that it did not apply.

Held: The Eleventh Circuit erred in failing to consider whether any of §2254(d)'s other exceptions apply in this case. Even though Jefferson essentially argued that the state court's factual findings were not entitled to a presumption of correctness because the "factfinding procedure," "hearing," and "proceeding" were not "full, fair, and adequate," §§2254(d)(2), (6), (7), the Eleventh Circuit treated §2254(d)(8)—which lifts the presumption of correctness for findings that are not fairly supported by the record—as the exclusive statutory exception, and failed to address Jefferson's argument that the state court's procedures deprived its findings of deference. The court thus applied the statute and this Court's precedents incorrectly. The lower courts must determine in the first instance whether the state court's factual findings warrant a presumption of correctness.

Certiorari granted; 570 F. 3d 1283, vacated and remanded.

PER CURIAM.

Petitioner Lawrence Jefferson, who has been sentenced to death, claimed in both state and federal courts that his law-

yers were constitutionally inadequate because they failed to investigate a traumatic head injury that he suffered as a child. The state court rejected that claim after making a finding that the attorneys were advised by an expert that such investigation was unnecessary. Under the governing federal statute, that factual finding is presumed correct unless any one of eight exceptions applies. See 28 U. S. C. §§ 2254(d)(1)–(8) (1994 ed.). But the Court of Appeals considered only one of those exceptions (specifically § 2254(d)(8)). And on that basis, it considered itself "duty-bound" to accept the state court's finding, and rejected Jefferson's claim. Because the Court of Appeals did not fully consider several remaining potentially applicable exceptions, we vacate its judgment and remand.

I

When Jefferson was a child, he "suffered a serious injury to his head." *Jefferson* v. *Terry*, 490 F. Supp. 2d 1261, 1326 (ND Ga. 2007); see *id.*, at 1320 (quoting Jefferson's mother's testimony that "a car ran over the top of his head" when he was two years old). The accident left his skull swollen and misshapen and his forehead visibly scarred. *Jefferson* v. *Hall*, 570 F. 3d 1283, 1311, 1315, n. 4 (CA11 2009) (Carnes, J., dissenting). During the District Court proceedings below, uncontroverted experts testified that, as a result of his head injury, Jefferson has "permanent brain damage" that "causes abnormal behavior" over which he "has no or substantially limited control." 490 F. Supp. 2d, at 1321–1322. According to these experts, Jefferson's condition causes "'emotional dullness,'" "'restless or aggressive characteristics,'" "'impulsiveness,'" "'temper outbursts,'" "'markedly diminished impulse control,'" "'impaired social judgment,'" and "'transient outbursts of rage which are totally inconsistent with his normal behavioral pattern.'" *Id.*, at 1322, 1327.

The experts further testified that Jefferson's "'severe cognitive disabilities'" "'profoundly alter'" his "'ability to plan and coordinate his actions, to be aware of the consequences

of his behavior, and to engage in premeditated or intentional acts.'" *Id.*, at 1327. But they testified he is neither psychotic nor retarded. *Id.*, at 1319. Thus, they said, to a lay observer or even to a professional psychologist, Jefferson does not outwardly appear mentally impaired. Indeed, according to the experts, "'the behavior that may result from'" his condition "'could, without the administration of proper testing, be mistaken for volitional.'" *Id.*, at 1322.

Jefferson faced a death sentence for killing his co-worker while the two men were fishing. *Id.*, at 1271–1272. Prior to trial, he was examined by a psychologist named Dr. Gary Dudley, who prepared a formal report in which he concluded that Jefferson's mental deficiencies do not impair "'his judgment or decision-making capacity.'" 570 F. 3d, at 1294 (quoting report). But Dr. Dudley's report included a caveat: "'One possibility that could not be explored because of [Jefferson's] incarceration has to do with the sequelae,'" *i. e.*, pathologies, related to a "'head injury experienced during childhood.'" *Ibid.* "'In my opinion,'" he wrote, "'it would be worthwhile to conduct neuropsychological evaluation of this individual to rule out an organic etiology,'" *i. e.*, to rule out brain damage. *Ibid.*

Although "it is undisputed that the testing" Dr. Dudley recommended "could have easily been performed," 490 F. Supp. 2d, at 1322, and that Jefferson's attorneys possessed police reports and hospital records recounting his head injury, *id.*, at 1323, the attorneys did not have Jefferson tested. At sentencing, they presented only testimony from two prison guards, who stated that Jefferson was an unproblematic inmate, and from three members of Jefferson's family, who testified that he is a "responsible, generous, gentle, and kind" person and "a good father." 570 F. 3d, at 1290–1291. And while Jefferson's mother briefly mentioned the car accident, "she was not questioned and did not offer any testimony regarding the impact, if any, that the accident had on him." *Id.*, at 1291. Thus, "[a]s far as the jury knew, Jeffer-

son did not suffer from brain damage or neurological impairment; he had no organic disorders"; and "his emotional stability, impulse control, and judgment were perfectly normal." *Id.*, at 1311 (Carnes, J., dissenting).

Jefferson sought habeas relief in state court, arguing that his two trial attorneys unreasonably failed to pursue brain-damage testing. In response, the trial attorneys testified that they did not pursue such testing because, after delivering his formal written report, Dr. Dudley later told them that further investigation "'may be a waste of time because the rest of [his] report'" had "'said that [Jefferson] was non psychotic.'" *Id.*, at 1295 (quoting testimony). Dr. Dudley did not testify in person at the hearing, but he submitted a sworn affidavit denying that he had ever made such statements. He said "it had always been his expert opinion 'that neuropsychological testing was necessary'" and that when he wrote as much in his formal report "he 'meant it.'" *Id.*, at 1312 (Carnes, J., dissenting) (quoting affidavit). He added, "'I never, before or after that report, suggested to [Jefferson's attorneys] that such an evaluation was not necessary or that it would not be worthwhile.'" *Ibid.;* cf. Pet. for Cert. 17, n. 12.

Jefferson contends, and the State has not disputed, that after the hearing concluded the state-court judge contacted the attorneys for the State *ex parte.* And in a private conversation that included neither Jefferson nor his attorneys, the judge asked the State's attorneys to draft the opinion of the court. See *id.*, at 3, 12. According to Jefferson, no such request was made of him, nor was he informed of the request made to opposing counsel. *Id.*, at 12, n. 8, 13; see also *Jefferson* v. *Zant,* 263 Ga. 316, 431 S. E. 2d 110, 111 (1993) ("Jefferson contends [the order] amounts to no more and no less than a reply brief to which [he] has not had a chance to respond").

The attorneys for the State prepared an opinion finding that "Dr. Dudley led [Jefferson's trial attorneys] to believe that further investigation would simply be a waste of time

because Petitioner [i]s not psychotic." *Jefferson* v. *Zant*, Civ. Action No. 87–V–1241 (Super. Ct. Butts Cty., Ga., Oct. 7, 1992), p. 16, App. 4 to Pet. for Cert. 16 (hereinafter State Order); see also *id.*, at 37. The opinion "specifically credits the testimony of [the trial attorneys] with regard to their efforts to investigate Petitioner's mental condition." *Id.*, at 18; see also *id.*, at 36. And relying on these findings, it concludes that Jefferson's attorneys "made a reasonable investigation into [his] mental health" and were thus not ineffective. *Id.*, at 37.

Notably, as the Georgia Supreme Court acknowledged, the State's opinion discusses statements purportedly made on Jefferson's behalf by a witness "who did not testify" or participate in the proceedings. 263 Ga., at 318, 431 S. E. 2d, at 112; see State Order 24–25. Nonetheless, the opinion "was adopted verbatim by the [state] court." 263 Ga., at 317, 431 S. E. 2d, at 111. And while the State Supreme Court recognized that we have "'criticized'" such a practice, it affirmed the judgment. *Id.*, at 317, 320, 431 S. E. 2d, at 112, 114 (quoting *Anderson* v. *Bessemer City*, 470 U. S. 564, 572 (1985)).

II

Jefferson next sought federal habeas relief in the District Court. In his opening brief, he argued that "there is no reason under principles of comity or otherwise to give any deference to the findings of the State Habeas Corpus Court." Brief for Petitioner in No. 1:96–CV–989–CC (ND Ga.), Doc. 105, p. 4, and n. 1 (hereinafter District Court Brief). In support of that argument, he claimed that the state court "merely signed an order drafted by the State without revision of a single word," even though the order "described witnesses who never testified." *Ibid.* And he said that such a process "rais[es] serious doubts as to whether [the judge] even read, much less carefully considered, the proposed order submitted by the State." *Ibid.*

The District Court ruled in Jefferson's favor. It noted that under the relevant statute "factual findings of state courts are presumed to be correct unless one of . . . eight enumerated exceptions . . . applies." 490 F. Supp. 2d, at 1280; see also *ibid.*, n. 5 (listing the exceptions). And it acknowledged "the state habeas corpus court's failure to explain the basis" for its credibility findings. *Id.*, at 1324, n. 17. But it accepted Jefferson's claim of ineffective assistance of counsel without disturbing the state court's factual findings because it believed he should prevail even accepting those findings as true. *Id.*, at 1324–1325.

On appeal, Jefferson defended the District Court's judgment primarily on its own terms. But he also argued that the state court's factfinding was "dubious at best" in light of the process that court employed, and that the Court of Appeals therefore "should harbor serious doubts about the findings of fact and credibility determinations in the state court record." Brief for Petitioner/Appellee in No. 07–12502 (CA11), pp. 31–32, n. 10 (hereinafter Appeals Brief).

A divided Court of Appeals panel reversed, and Jefferson filed this petition for certiorari asking us to review his claim of ineffective assistance of counsel. And, in so doing, he challenges—as he did in the State Supreme Court, the District Court, and the Court of Appeals—"the fact findings of the state court," given what he describes as the deficient procedure employed by that court while reviewing his claim. Pet. for Cert. 11–13, 17, n. 12, 18, n. 13 (recounting " 'reason[s] to doubt' " the state court's findings). Cf. *Lebron* v. *National Railroad Passenger Corporation*, 513 U. S. 374, 379 (1995) (stating standard for preserving an issue for review in this Court).

III

This habeas application was filed prior to the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 and is therefore governed by federal habeas law as it existed prior to that point. *Lindh* v. *Murphy*, 521 U. S. 320, 326–336

(1997). In 1963, we set forth the "appropriate standard" to be applied by a "federal court in habeas corpus" when "the facts" pertinent to a habeas application "are in dispute." *Townsend* v. *Sain*, 372 U. S. 293, 312. We held that when "the habeas applicant was afforded a full and fair hearing by the state court resulting in reliable findings" the district court "ordinarily should . . . accept the facts as found" by the state-court judge. *Id.*, at 318. However, "if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of the trial or in a collateral proceeding," we held that the federal court "must hold an evidentiary hearing" to resolve any facts that "are in dispute." *Id.*, at 312. We further "explain[ed] the controlling criteria" by enumerating six circumstances in which such an evidentiary hearing would be required:

> "(1) [T]he merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) *the fact-finding procedure* employed by the state court *was not adequate to afford a full and fair hearing;* (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) *for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.*" *Id.*, at 313 (emphasis added).

Three years later, in 1966, Congress enacted an amendment to the federal habeas statute that "was an almost verbatim codification of the standards delineated in *Townsend* v. *Sain.*" *Miller* v. *Fenton*, 474 U. S. 104, 111 (1985). That codification read in relevant part as follows:

> "In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination . . . of a factual issue, made by a State

court of competent jurisdiction . . . , shall be presumed to be correct, *unless* the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

"(1) that the merits of the factual dispute were not resolved in the State court hearing;

"(2) *that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;*

"(3) that the material facts were not adequately developed at the State court hearing;

"(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

"(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

"(6) *that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or*

"(7) *that the applicant was otherwise denied due process of law in the State court proceeding;*

"(8) or unless . . . the Federal court on a consideration of [the relevant] part of the record as a whole concludes that such factual determination *is not fairly supported by the record.*" § 2254(d) (emphasis added).

As is clear from the statutory text quoted above, and as the District Court correctly stated, if any "one of the eight enumerated exceptions . . . applies" then "the state court's factfinding is not presumed correct." 490 F. Supp. 2d, at 1280; accord, *Miller, supra,* at 105 ("Under 28 U. S. C. § 2254(d), state-court findings of fact 'shall be presumed to be correct' in a federal habeas corpus proceeding unless one of eight enumerated exceptions applies"); see also 1 R. Hertz & J. Liebman, Federal Habeas Corpus Practice and Procedure § 20.2c, pp. 915–918 (5th ed. 2005).

Jefferson has consistently argued that the federal courts "should harbor serious doubts about" and should not "give any deference to" the "findings of fact and credibility determinations" made by the state habeas court because those findings were drafted exclusively by the attorneys for the State pursuant to an *ex parte* request from the state-court judge, who made no such request of Jefferson, failed to notify Jefferson of the request made to opposing counsel, and adopted the State's proposed opinion verbatim even though it recounted evidence from a nonexistent witness. See, *e. g.*, Appeals Brief 32, n. 10; District Court Brief 4, n. 1; Pet. for Cert. 12. These are arguments that the state court's *process* was deficient. In other words, they are arguments that Jefferson "did not receive a full and fair evidentiary hearing in . . . state court." *Townsend, supra,* at 312. Or, to use the statutory language, they are arguments that the state court's "factfinding procedure," "hearing," and "proceeding" were not "full, fair, and adequate." §§ 2254(d)(2), (6), (7).

But the Court of Appeals did not consider the state court's process when it applied the statutory presumption of correctness. Instead, it invoked Circuit precedent that applied only paragraph (8) of § 2254(d), which, codifying the second *Townsend* exception, 372 U. S., at 313, lifts the presumption of correctness for findings that are "not fairly supported by the record." See 570 F. 3d, at 1300 (quoting *Jackson* v. *Herring,* 42 F. 3d 1350, 1366 (CA11 1995), in turn quoting 28 U. S. C. § 2254(d)(8)). And even though the Court of Appeals "recognize[d]" that Jefferson had argued that the state court's *process* had produced factual findings that were "'dubious at best,'" and that federal courts should therefore "'harbor serious doubts about'" the state court's "'findings of fact and credibility,'" the Court of Appeals nonetheless held that the state court's findings are "'entitled to a presumption of correctness'" that it was "duty-bound" to apply. 570 F. 3d, at 1304, n. 8 (quoting Appeals Brief 32, n. 10). The Court of Appeals explicitly stated that it considered itself

"duty-bound" to defer to the state court's findings because "Jefferson has not argued that any of the state courts' factual findings were '*not fairly supported by the record*,'" a direct reference to § 2254(d)(8) and to the second *Townsend* exception. 570 F. 3d, at 1304, n. 8 (emphasis added). And it then concluded: "Based on these factual findings of the state habeas courts—all of which are *fairly supported by the record*—we believe that Jefferson's counsel were reasonable in deciding not to pursue neuropsychological testing." *Id.*, at 1304 (emphasis added).

In our view, the Court of Appeals did not properly consider the legal status of the state court's factual findings. Under *Townsend*, as codified by the governing statute, a federal court is not "duty-bound" to accept any and all state-court findings that are "fairly supported by the record." Those words come from § 2254(d)(8), which is only one of eight enumerated exceptions to the presumption of correctness. But there are seven others, see §§ 2254(d)(1)–(7), none of which the Court of Appeals considered when addressing Jefferson's claim. To be sure, we have previously stated in cases *applying* § 2254(d)(8) that "a federal court" may not overturn a state court's factual conclusion "unless the conclusion is not 'fairly supported by the record.'" *Parker* v. *Dugger*, 498 U. S. 308, 320 (1991) (granting federal habeas relief after rejecting state court's finding under § 2254(d)(8)); see also *Demosthenes* v. *Baal*, 495 U. S. 731 (1990) *(per curiam)* (applying § 2254(d)(8)); cf. *post*, at 303 (SCALIA, J., dissenting). But in those cases there was no suggestion that any *other* provisions enumerated in § 2254(d) were at issue. That is not the case here. In treating § 2254(d)(8) as the *exclusive* statutory exception, and by failing to address Jefferson's argument that the state court's *procedures* deprived its findings of deference, the Court of Appeals applied the statute and our precedents incorrectly.

Although we have stated that a court's "verbatim adoption of findings of fact prepared by prevailing parties" should be

treated as findings of the court, we have also criticized that practice. *Anderson*, 470 U. S., at 572. And we have not considered the lawfulness of, nor the application of the habeas statute to, the use of such a practice where (1) a judge solicits the proposed findings *ex parte*, (2) does not provide the opposing party an opportunity to criticize the findings or to submit his own, or (3) adopts findings that contain internal evidence suggesting that the judge may not have read them. Cf. *id.*, at 568; Ga. Code of Judicial Conduct, Canon 3(A)(4) (1993) (prohibiting *ex parte* judicial communications).

We decline to determine in the first instance whether any of the exceptions enumerated in §§ 2254(d)(1)–(8) apply in this case, see, *e. g.*, *Cutter* v. *Wilkinson*, 544 U. S. 709, 718, n. 7 (2005), especially given that the facts surrounding the state habeas court's process are undeveloped. Respondent has conceded that the State drafted the state court's final order at that court's request and that the order was adopted verbatim, 263 Ga., at 317, 431 S. E. 2d, at 111, and has not disputed in this Court that the state court solicited the order "*ex parte* and without prior notice" and "did not seek a proposed order from Petitioner," Pet. for Cert. 12, and n. 8. But the precise nature of what transpired during the state-court proceedings is not fully known. See 263 Ga., at 316–317, 431 S. E. 2d, at 111 (noting dispute as to whether Jefferson "had a chance to respond" to the final order); see also Pet. for Cert. 13.

Accordingly, we believe it necessary for the lower courts to determine on remand whether the state court's factual findings warrant a presumption of correctness, and to conduct any further proceedings as may be appropriate in light of their resolution of that issue. See *Townsend*, 372 U. S., at 313–319; *Keeney* v. *Tamayo-Reyes*, 504 U. S. 1 (1992). In so holding, we express no opinion as to whether Jefferson's Sixth Amendment rights were violated assuming the state court's factual findings to be true.

* * *

The petition for a writ of certiorari and motion to proceed *in forma pauperis* are granted. 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 SCALIA, with whom JUSTICE THOMAS joins, dissenting.

The question presented by Jefferson's petition for writ of certiorari is whether his trial attorneys rendered ineffective assistance of counsel when they declined to pursue further investigation of Jefferson's childhood head injury. In my view the Court should either answer that question or (as I would prefer) deny the petition. Instead, it summarily vacates the judgment of the Court of Appeals on an altogether different ground that was neither raised nor passed upon below and that is not fairly included within the sole question presented. To make matters worse, the Court conjures up an "error" with respect to that ground by misquoting and mischaracterizing the Court of Appeals' opinion, *ante*, at 293, and by overlooking relevant authority from this Court. I respectfully dissent.

I

A

The prior version of 28 U. S. C. § 2254(d) (1994 ed.) applicable in this case provided that in federal habeas proceedings the factual determinations of a state court "shall be presumed to be correct," unless the applicant proves, the respondent admits, or a federal court determines that one of eight exceptions set forth in § 2254(d)(1)–(8) applies. The Court concludes that the Eleventh Circuit misapplied that provision and our precedents by treating one of those exceptions, § 2254(d)(8), "as the *exclusive* statutory exception" to the presumption of correctness, and by failing to address

whether § 2254(d)(2), (6), or (7) might also bar application of that presumption.[1] *Ante*, at 293.

The Court's opinion, however, is the first anyone (including Jefferson) has heard of this argument. Jefferson's briefs below contain no discussion or even citation of subsection (d)—let alone of paragraphs (2), (6), or (7)—and the courts below understandably never passed upon the application of those provisions. Under our longstanding practice, that should be the end of the matter. See, *e. g.*, *Pennsylvania Dept. of Corrections* v. *Yeskey*, 524 U. S. 206, 212–213 (1998).

But the Court insists, *ante*, at 289, 292, that if we squint at them long enough we can see in Jefferson's briefs below a challenge to the state court's factfinding process cognizable under § 2254(d)(2), (6), and (7). But the handful of isolated, vague statements it musters (buried in hundreds of pages of briefs) show no such thing. The Court's only evidence that Jefferson presented the point to the District Court, *ante*, at 288, 292, consists of a single sentence of text (and an accompanying two-sentence footnote) in the "Prior Proceedings" section of his 180-page brief. Brief for Petitioner in No. 1:96–CV–989–CC (ND Ga.), Doc. 105 (hereinafter District Court Brief). The sentence is: "In entering the State Habeas Corpus Order Judge Newton merely signed an order drafted by the State without revision of a single word." *Id.*, at 4. The footnote adds:

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[1] These four exceptions in 28 U. S. C. § 2254(d) (1994 ed.) were:

"(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

. . . . . .

"(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

"(7) that the applicant was otherwise denied due process of law in the State court proceeding;

"(8) or unless . . . the Federal court on a consideration of [the relevant] part of the record as a whole concludes that such factual determination is not fairly supported by the record . . . ."

> "[T]he order signed by Judge Newton described witnesses who never testified, raising serious doubts as to whether he even read, much less carefully considered, the proposed order submitted by the State. In this circumstance, there is no reason under principles of comity or otherwise to give any deference to the findings of the State Habeas Corpus Court, because there was apparently no serious consideration or deliberation of the factual and legal issues raised." *Ibid.*, n. 1.

This passing suggestion that deference would be unwarranted is, to put it mildly, an elliptical way to argue that the state factfinding procedure was inadequate, § 2254(d)(2), that Jefferson was denied a full, fair, and adequate hearing, § 2254(d)(6), or that Jefferson was denied due process of law, § 2254(d)(7). And it only appeared, I emphasize again, in the "Prior Proceedings" section of the brief. The *argument* section of Jefferson's District Court Brief, consisting of 164 pages and containing separate assignments of error from III to XLIV (44), makes no mention of the ground upon which the Court today relies. And the assignment of error that is the basis for the question presented in Jefferson's petition, VI, *id.*, at 48–80, did not dispute the state courts' factual findings under § 2254(d), but only challenged the state courts' legal conclusion that his attorneys' failure to conduct a fuller investigation into the head injury he suffered as a child was not deficient performance under *Strickland* v. *Washington*, 466 U. S. 668 (1984).

Jefferson also did not raise the point in the Eleventh Circuit. His brief to that court acknowledged that the state courts' "[f]indings of fact and credibility determinations are reviewed for clear error." Brief for Petitioner/Appellee in No. 07–12502, pp. 16–17 (hereinafter Appeals Brief). It declared that "The District Court Correctly Deferred to the Fact Findings of the State Court" in adjudicating his ineffective-assistance-of-counsel claim. *Id.*, at 21 (some capitalization and boldface type deleted); see also *id.*, at 29,

and n. 7, 31. And it conceded that with respect to the ineffective-assistance claim, "[t]he relevant facts are not in dispute." *Id.*, at 24. Jefferson did characterize the state habeas court's factual findings as generally "dubious" and suggested there were "serious doubts" about them, *id.*, at 31–32, n. 10. But not once did he argue that the dubiousness of the findings was the consequence of a failure to meet the requirements of § 2254(d)(2), (6), or (7)—or even more generally that the findings should not be presumed correct under § 2254(d). Instead, he pressed the same argument he made in the District Court: Even if the state courts' factual findings were correct, his trial attorneys rendered ineffective assistance in deciding to forgo further investigation of his childhood head injury. *Id.*, at 31–33, 50–51.

Nor did the courts below pass upon the argument the Court now addresses. The District Court did not dispute the state courts' factual findings. *Jefferson* v. *Terry*, 490 F. Supp. 2d 1261, 1319–1320 (ND Ga. 2007). It accepted those findings as true, including the state habeas court's credibility findings, *id.*, at 1323–1324, and n. 17, but held "as a matter of law" that it was objectively unreasonable for Jefferson's attorneys "not to investigate" further into the effect, if any, of the accident on Jefferson's mental capacity and health, *id.*, at 1324. Concluding that Jefferson was thereby prejudiced, the court ordered a new sentencing hearing. *Id.*, at 1328.

The Court of Appeals disagreed with that determination and reversed, holding that his trial attorneys' performance was not objectively unreasonable under *Strickland*. *Jefferson* v. *Hall*, 570 F. 3d 1283, 1301–1309 (CA11 2009). That court correctly stated the applicable framework under § 2254(d):

> "Pre-AEDPA, questions of law and mixed questions of law and fact resolved by state habeas courts are reviewed *de novo*, while the state courts' factual findings are 'subject to the presumption of correctness.'

> *Freund v. Butterworth*, 165 F. 3d 839, 861 (11th Cir. 1999). Although these findings may be disregarded *if, for example,* they are 'not fairly supported by the record,' *Jackson v. Herring*, 42 F. 3d 1350, 1366 (11th Cir. 1995) (quoting 28 U. S. C. § 2254(d)(8)), this Court has construed the 'presumption of correctness' standard to be the same as the 'clear error' standard of review." *Id.*, at 1300 (emphasis added; footnote omitted).

Confronted with no argument that § 2254(d)(1)–(7) applied or that it must disregard the state courts' factual findings, the Court of Appeals understandably did not pass upon those questions.

The Court of Appeals did consider the record on its own, as required by § 2254(d)(8), to determine whether the state courts' factual determinations were fairly supported by the record. *Id.*, at 1303–1304, and n. 8. In doing so, the court "specifically note[d] that neither Jefferson nor the district court questioned the state court's factual finding that [the defense's psychiatric expert] led [one of Jefferson's attorneys] to believe that further investigation *would* simply be a waste of time, . . . despite [his attorney's] testimony that [the expert] told him it 'may' be a waste of time." *Id.*, at 1303, n. 8 (some internal quotation marks omitted). It added that Jefferson did not "point to any particular factual finding that was clearly erroneous," *id.*, at 1304, n. 8—applying the same standard Jefferson had proposed in his brief, see *supra*, at 297. Even the dissent agreed that the court was "obliged to accept" the state courts' credibility determination, despite the "reasons to doubt it." 570 F. 3d, at 1312 (opinion of Carnes, J.). The dissent did not cite § 2254(d)(2), (6), or (7), but instead focused on the same question of constitutional law that occupied Jefferson's briefs, the District Court's opinion, and the majority's opinion: whether, accepting the factual findings and credibility determination of the state courts as true, Jefferson's attorneys rendered ineffec-

tive assistance of counsel. *That* is the only question that occupied the courts and the parties below.

B

It is bad enough that the Court decides an issue not raised or resolved in the lower courts. It is much worse that it decides an issue Jefferson has not even asked *us* to address. Under this Court's Rule 14.1(a), "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court." We apply that rule in all but "the most exceptional cases, where reasons of urgency or of economy suggest the need to address the unpresented question in the case under consideration." *Yee* v. *Escondido*, 503 U. S. 519, 535 (1992) (citation and internal quotation marks omitted).

Jefferson's petition for writ of certiorari presents a single question:

> "[W]hether the majority opinion, in affording trial counsel's decision to limit the scope of investigation in a death penalty case 'higher-than-strong presumption of reasonableness' *[sic]* conflicts with this Court's precedent as announced in *Williams v. Taylor*, 529 U. S. 362 (2000), *Wiggins v. Smith*, 539 U. S. 510 (2003), *Rompilla v. Beard*, 545 U. S. 374 [(2005),] and *Porter v. McCollum*, [558 U. S. 30] (2009) *[(per curiam)]*." Pet. for Cert. i.

This is a straightforward request for error correction on a constitutional claim in light of those four decisions, and neither the request nor those cases have anything to do with the pre-AEDPA version of § 2254(d). Nor does that question necessarily encompass whether the Court of Appeals misapplied that version of § 2254(d) in determining the deference due to the state courts' factual findings. The statutory question may be "*related* to," and "perhaps *complementary* to the one petitione[r] presented," but it is not "fairly included therein." *Yee*, *supra*, at 537 (internal quotation marks omitted).

As for the body of Jefferson's petition: Far from invoking § 2254(d)'s exceptions to the presumption of correctness to support the Sixth Amendment claim, the petition does not even mention subsection (d), let alone paragraphs (2), (6), or (7). There is *no* argument, anywhere in the section entitled "Reasons for Granting the Writ," that the state courts' factual findings are not entitled to a presumption of correctness. Pet. for Cert. 31.

The Court claims, *ante,* at 289, that Jefferson sufficiently presented the statutory issue by his characterizations of the state courts' factual findings in the "Statement of the Case" section of his petition, see Pet. for Cert. 2, 11–13, 17, n. 12, 18, n. 13. Even if that were so, "'the fact that [petitioner] discussed this issue in the text of [his] petition for certiorari does not bring it before us. Rule 14.1(a) requires that a subsidiary question be fairly included in the *question presented* for our review.'" *Wood* v. *Allen,* 558 U. S. 290, 304 (2010) (quoting *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U. S. Philips Corp.,* 510 U. S. 27, 31, n. 5 (1993) *(per curiam)*). But in any event, the cited passages do not remotely present the statutory issue. They contain no argument that § 2254(d)'s presumption is inapplicable because of § 2254(d)(2), (6), or (7), but merely describe the proceedings below, see Pet. for Cert. 11–13, and assert that there might be reasons to doubt the state-court findings (but for the § 2254(d) presumption), see *id.,* at 17, n. 12, 18, n. 13.

"The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them." *Carducci* v. *Regan,* 714 F. 2d 171, 177 (CADC 1983) (opinion for the court by Scalia, J.). Our refusal to abide by standard rules of appellate practice is unfair to the Eleventh Circuit, whose judgment the Court vacates, and especially to the respondent here, who suffers a loss in this Court without *ever* having an opportunity to address the merits of the statutory question the Court decides.

II

The Court's approach would be objectionable even if it were correct that the Court of Appeals went astray. But it is not. The Court of Appeals did *not* treat § 2254(d)(8) as "the *exclusive* statutory exception" to the presumption of correctness. *Ante*, at 293. It is true that the majority's opinion—as well as the dissent's—discussed only § 2254(d)(8). But that is because only § 2254(d)(8), and not § 2254(d)(2), (6), or (7), was ever brought to the court's attention. On the fair reading we owe the Eleventh Circuit's opinion, there simply was no error in its application of § 2254(d).

The Court asserts, however, that the Eleventh Circuit ignored the other seven paragraphs in § 2254(d) when it "invoked Circuit precedent that applied only paragraph (8) of § 2254(d)." *Ante*, at 292. It did nothing of the sort. The Court of Appeals said that a state court's factual findings "may be disregarded *if, for example,* they are 'not fairly supported by the record,' *Jackson v. Herring*, 42 F. 3d 1350, 1366 (11th Cir. 1995) (quoting 28 U. S. C. § 2254(d)(8))." 570 F. 3d, at 1300 (emphasis added). The Court of Appeals thus expressly acknowledged that § 2254(d)(8) was *but one example* of the grounds for disregarding a state court's factual findings. And the Circuit precedent it cited, *Jackson* v. *Herring*, 42 F. 3d 1350 (CA11 1995), similarly did not imply, much less hold, that § 2254(d)(8) provided the only grounds for setting aside a state court's factual findings under § 2254(d). See *id.*, at 1366.

Next, the Court states:

> "And even though the Court of Appeals 'recognize[d]' that Jefferson had argued that the state court's *process* had produced factual findings that were '"dubious at best,"' and that federal courts should therefore '"harbor serious doubts about"' the state court's '"findings of fact and credibility,"' the Court of Appeals nonetheless held that the state court's findings are '"entitled to a presumption of correctness"' that it was 'duty-bound' to

> apply. 570 F. 3d, at 1304, n. 8 (quoting Appeals Brief 32, n. 10)." *Ante*, at 292.

Again, the Court has plucked isolated language from here and there in the Court of Appeals' opinion, to produce a reading which suggests that the Court of Appeals agreed with, or at least did not contest, Jefferson's claim of "serious doubts." That is not so. In the *first* paragraph of footnote eight of its opinion, the panel reasoned that it was "duty-bound to accept" the state courts' factual findings because it concluded they "are clear, unambiguous, and fairly supported by the record." 570 F. 3d, at 1303–1304, n. 8. That language precedes the panel's analysis—in the *second* paragraph of footnote eight—regarding Jefferson's statements that the findings were "dubious" and raised "serious doubts." The Court omits the panel's *actual* explanation for declining to credit Jefferson's general characterization of the quality of the record, which is: "Jefferson does not point to any particular factual finding that was clearly erroneous, and Jefferson even says in the argument section of his brief that '[t]he relevant facts are not in dispute.'" *Id.*, at 1304, n. 8.

By the way, even if the Court of Appeals had carelessly described application of the pre-AEDPA version of § 2254(d) in the manner which the Court suggests, that would have been no worse than what we have done. For example, in *Demosthenes* v. *Baal*, 495 U. S. 731, 735 (1990) *(per curiam)*, we stated that a federal court may not overturn a state habeas court's factual determinations "unless it concludes that they are not 'fairly supported by the record.' See 28 U. S. C. § 2254(d)(8)." And in *Parker* v. *Dugger*, 498 U. S. 308, 320 (1991), we explained that a federal habeas court "is not to overturn a factual conclusion of a state court, including a state appellate court, unless the conclusion is not 'fairly supported by the record.'"[2]

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[2] The Court attempts to distinguish these two cases on the ground that they contained "no suggestion that any *other* provisions enumerated in

* * *

Generally speaking, we have no power to set aside the duly entered judgment of a lower federal court unless we find it to have been in error. More specifically, except where there has been an intervening legal development (such as a subsequently announced opinion of ours) that might alter the judgment below, we cannot *grant* a petition for certiorari, *vacate* the judgment below, and *remand* the case (GVR) simply to obtain a re-do. *Webster* v. *Cooper*, 558 U. S. 1039, 1041–1042 (2009) (SCALIA, J., dissenting). Yet today the Court vacates the judgment of the Eleventh Circuit on the basis of an error that court did not commit, with respect to a statutory issue that had never previously been raised, and remands for more extensive consideration of a new argument that *might* affect the judgment. Under the taxonomy of our increasingly unprincipled GVR practice, this creature is of the same genus as the "Summary Remand for a More Extensive Opinion than Petitioner Requested" (SRMEOPR). *Id.*, at 1042. But it is a distinctly odious species, deserving of its own name: Summary Remand to Ponder a Point Raised Neither Here nor Below (SRPPRNHB).

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§ 2254(d) were at issue," whereas "[t]hat is not the case here." *Ante*, at 293. That is simply not so. As already noted, there was *no* "suggestion" here (let alone an actual *argument*) that paragraphs (2), (6), or (7) were in issue. And if the Court means no more than that petitioner here made some process-type noises, the same was true—and indeed more true—of *Parker* and *Demosthenes*. In *Parker*, we stated the "crux of [petitioner's] contentions" was that the state courts "fail[ed] to treat adequately" the evidence he presented. 498 U. S., at 313. In *Demosthenes*, the Ninth Circuit had said that the state court's process for determining whether the capital inmate was competent was deficient because "'a full evidentiary hearing on competence should have been held.'" 495 U. S., at 736 (quoting Order in *Baal* v. *Godinez*, No. 90–15716 (CA9, June 2, 1990), p. 5).

Syllabus

SAMANTAR *v.* YOUSUF ET AL.

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

No. 08–1555. Argued March 3, 2010—Decided June 1, 2010

Respondents, who were persecuted by the Somali government during the 1980's, filed a damages action alleging that petitioner, who then held high-level government positions, exercised command and control over the military forces committing the abuses; that he knew or should have known of these acts; and that he aided and abetted in their commission. The District Court concluded that it lacked subject-matter jurisdiction and granted petitioner's motion to dismiss the suit, resting its decision on the Foreign Sovereign Immunities Act of 1976 (FSIA or Act), which provides that a "foreign state shall be immune from the jurisdiction" of both federal and state courts except as provided in the Act, 28 U. S. C. § 1604. The Fourth Circuit reversed, holding that the FSIA does not apply to officials of a foreign state.

Held: The FSIA does not govern petitioner's claim of immunity. Pp. 311–326.

(a) Under the common-law doctrine of foreign sovereign immunity, see *Schooner Exchange* v. *McFaddon*, 7 Cranch 116, if the State Department granted a sovereign's diplomatic request for a "suggestion of immunity," the district court surrendered its jurisdiction, *Ex parte Peru*, 318 U. S. 578, 581, 587. If the State Department refused, the court could decide the immunity issue itself. *Id.*, at 587. In 1952, the State Department moved from a policy of requesting immunity in most actions against friendly sovereigns to a "restrictive" theory that confined immunity "to suits involving the foreign sovereign's public acts." *Verlinden B. V.* v. *Central Bank of Nigeria*, 461 U. S. 480, 487. Inconsistent application of sovereign immunity followed, leading to the FSIA, whose primary purposes are (1) to endorse and codify the restrictive theory, and (2) to transfer primary responsibility for deciding "claims of foreign states to immunity" from the State Department to the courts. § 1602. This Act now governs the determination whether a foreign state is entitled to sovereign immunity. Pp. 311–313.

(b) Reading the FSIA as a whole, there is nothing to suggest that "foreign state" should be read to include an official acting on behalf of that state. The Act specifies that a foreign state "includes a political subdivision . . . or an agency or instrumentality" of that state, § 1603(a), and specifically delimits what counts as an "agency or instrumentality,"

§ 1603(b). Textual clues in the "agency or instrumentality" definition—"any entity" matching three specified characteristics, *ibid.*—cut against reading it to include a foreign official. "Entity" typically refers to an organization; and the required statutory characteristics—*e. g.*, "separate legal person," § 1603(b)(1)—apply awkwardly, if at all, to individuals. Section 1603(a)'s "foreign state" definition is also inapplicable. The list set out there, even if illustrative rather than exclusive, does not suggest that officials are included, since the listed defendants are all entities. The Court's conclusion is also supported by the fact that Congress expressly mentioned officials elsewhere in the FSIA when it wished to count their acts as equivalent to those of the foreign state. Moreover, other FSIA provisions—*e. g.*, § 1608(a)—point away from reading "foreign state" to include foreign officials. Pp. 313–319.

(c) The FSIA's history and purposes also do not support petitioner's argument that the Act governs his immunity claim. There is little reason to presume that when Congress codified state immunity, it intended to codify, *sub silentio*, official immunity. The canon of construction that statutes should be interpreted consistently with the common law does not help decide the question whether, when a statute's coverage is ambiguous, Congress intended it to govern a particular field. State and official immunities may not be coextensive, and historically, the Government has suggested common-law immunity for individual officials even when the foreign state did not qualify. Though a foreign state's immunity may, in some circumstances, extend to an individual for official acts, it does not follow that Congress intended to codify that immunity in the FSIA. Official immunity was simply not the problem that Congress was addressing when enacting that Act. The Court's construction of the Act should not be affected by the risk that plaintiffs may use artful pleading to attempt to select between application of the FSIA or the common law. This case, where respondents have sued petitioner in his personal capacity and seek damages from his own pockets, is governed by the common law because it is not a claim against a foreign state as defined by the FSIA. Pp. 319–325.

(d) Whether petitioner may be entitled to common-law immunity and whether he may have other valid defenses are matters to be addressed in the first instance by the District Court. Pp. 325–326.

552 F. 3d 371, affirmed and remanded.

STEVENS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, GINSBURG, BREYER, ALITO, and SOTOMAYOR, JJ., joined. ALITO, J., filed a concurring opinion, *post*, p. 326. THOMAS, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 326. SCALIA, J., filed an opinion concurring in the judgment, *post*, p. 326.

Counsel

Shay Dvoretzky argued the cause for petitioner. With him on the briefs were *Michael A. Carvin*, *Paul V. Lettow*, *Julian H. Spirer*, and *Fred B. Goldberg.*

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Deputy Solicitor General Kneedler argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Kagan*, *Assistant Attorney General West*, *Ginger D. Anders*, *Douglas N. Letter*, *Sharon Swingle*, *Lewis S. Yelin*, and *Harold Hongju Koh.**

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*Briefs of *amici curiae* urging reversal were filed for the American Jewish Congress by *Marc D. Stern;* for Former Attorneys General of the United States by *Michael J. Edney;* for the Kingdom of Saudi Arabia by *Michael K. Kellogg;* and for the Zionist Organization of America et al. by *Nathan Lewin*, *Alyza D. Lewin*, *Stephen Greenwald*, *Nathan Diament*, and *David Zwiebel.*

Briefs of *amici curiae* urging affirmance were filed for Academic Experts in Somali History and Current Affairs by *Steven M. Schneebaum;* for Professors of International Litigation and Foreign Relations Law by *Michael D. Ramsey* and *William S. Dodge*, both *pro se*, and by *Richard M. Zuckerman;* for Professors of Public International Law and Comparative Law by *Chimène I. Keitner* and *Robert E. Freitas;* for Retired Military Professionals by *Virginia A. Seitz;* for Senator Arlen Specter et al. by *Mr. Specter, pro se;* and for Martin Weiss et al. by *Sonya D. Winner* and *Gregory S. Gordon.*

Briefs of *amici curiae* were filed for the Anti-Defamation League by *Charles S. Sims*, *Gregg M. Mashberg*, *Mark D. Harris*, *Steven M. Freeman*, and *Steven C. Sheinberg;* for Foreign Minister for the Republic of Somaliland Abdillahi Mohamed Duale by *Nancy L. Tompkins* and *Richard L. Grossman;* for Morton I. Abramowitz et al. by *Douglass Cassel;* and for Dolly Filártiga et al. by *Tyler R. Giannini* and *Susan H. Farbstein.*

JUSTICE STEVENS delivered the opinion of the Court.

From 1980 to 1986 petitioner Mohamed Ali Samantar was the First Vice President and Minister of Defense of Somalia, and from 1987 to 1990 he served as its Prime Minister. Respondents are natives of Somalia who allege that they, or members of their families, were the victims of torture and extrajudicial killings during those years. They seek damages from petitioner based on his alleged authorization of those acts. The narrow question we must decide is whether the Foreign Sovereign Immunities Act of 1976 (FSIA or Act), 28 U. S. C. §§ 1330, 1602 *et seq.*, provides petitioner with immunity from suit based on actions taken in his official capacity. We hold that the FSIA does not govern the determination of petitioner's immunity from suit.

I

Respondents are members of the Isaaq clan, which included well-educated and prosperous Somalis who were subjected to systematic persecution during the 1980's by the military regime then governing Somalia. They allege that petitioner exercised command and control over members of the Somali military forces who tortured, killed, or arbitrarily detained them or members of their families; that petitioner knew or should have known of the abuses perpetrated by his subordinates; and that he aided and abetted the commission of these abuses.[1] Respondents' complaint sought damages from petitioner pursuant to the Torture Victim Protection Act of 1991, 106 Stat. 73, note following 28 U. S. C. § 1350, and the Alien Tort Statute, 28 U. S. C. § 1350. Petitioner, who was in charge of Somalia's Armed Forces before its mili-

[1] Although we do not set out respondents' allegations in detail, the District Court's written opinion contains a comprehensive summary, describing not only the abuses respondents suffered but also the historical context in which the abuses occurred, as well as some of the attempts to establish a stable government in Somalia in recent years. See No. 1:04cv1360 (ED Va., Aug. 1, 2007), App. to Pet. for Cert. 31a–43a.

tary regime collapsed, fled Somalia in 1991 and is now a resident of Virginia. The United States has not recognized any entity as the government of Somalia since the fall of the military regime. See Brief for United States as *Amicus Curiae* 4.

Respondents filed their complaint in November 2004, and petitioner promptly moved to dismiss. The District Court stayed the proceedings to give the State Department an opportunity to provide a statement of interest regarding petitioner's claim of sovereign immunity. Each month during the ensuing two years, petitioner advised the court that the State Department had the matter "'still under consideration.'" No. 1:04cv1360 (ED Va., Aug. 1, 2007), App. to Pet. for Cert. 44a. In 2007, having received no response from the State Department, the District Court reinstated the case on its active docket. The court concluded that it did not have subject-matter jurisdiction and granted petitioner's motion to dismiss.

The District Court's decision rested squarely on the FSIA.[2] The FSIA provides that a "foreign state shall be immune from the jurisdiction" of both federal and state courts except as provided in the Act, 28 U. S. C. § 1604, and the District Court noted that none of the parties had argued that any exception was applicable, App. to Pet. for Cert. 46a–47a. Although characterizing the statute as silent on its applicability to the officials of a foreign state, the District Court followed appellate decisions holding that a foreign state's sovereign immunity under the Act extends to "'an individual acting in his official capacity on behalf of a foreign state,'" but not to "'an official who acts beyond the scope of his authority.'" *Id.*, at 47a (quoting *Velasco* v. *Government of Indonesia*, 370 F. 3d 392, 398, 399 (CA4 2004)). The court rejected respondents' argument that petitioner was neces-

[2] Petitioner argued that, in addition to his immunity under the FSIA, the complaint should be dismissed on a number of other grounds, which the District Court did not reach. See *id.*, at 45a, n. 11.

sarily acting beyond the scope of his authority because he allegedly violated international law.[3]

The Court of Appeals reversed, rejecting the District Court's ruling that the FSIA governs petitioner's immunity from suit. It acknowledged "the majority view" among the Circuits that "the FSIA applies to individual officials of a foreign state." 552 F. 3d 371, 378 (CA4 2009).[4] It disagreed with that view, however, and concluded, "based on the language and structure of the statute, that the FSIA does not apply to individual foreign government agents like [petitioner]." *Id.*, at 381.[5] Having found that the FSIA does not

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[3] Because we hold that the FSIA does not govern whether an individual foreign official enjoys immunity from suit, we need not reach respondents' argument that an official is not immune under the FSIA for acts of torture and extrajudicial killing. See Brief for Respondents 51–53. We note that in determining petitioner had not acted beyond the scope of his authority, the District Court afforded great weight to letters from the Somali Transitional Federal Government (TFG) to the State Department, App. to Pet. for Cert. 55a, in which the TFG supported petitioner's claim of immunity and stated "the actions attributed to [petitioner] in the lawsuit . . . would have been taken by [petitioner] in his official capacities," App. 104. Although the District Court described the TFG as "recognized by the United States as the governing body in Somalia," App. to Pet. for Cert. 54a, the United States does not recognize the TFG (or any other entity) as the Government of Somalia, see Brief for United States as *Amicus Curiae* 5.

[4] Compare 552 F. 3d, at 381 (holding the FSIA does not govern the immunity of individual foreign officials), and *Enahoro* v. *Abubakar*, 408 F. 3d 877, 881–882 (CA7 2005) (same), with *Chuidian* v. *Philippine Nat. Bank*, 912 F. 2d 1095, 1103 (CA9 1990) (concluding that a suit against an individual official for acts committed in his official capacity must be analyzed under the FSIA), *In re Terrorist Attacks on September 11, 2001*, 538 F. 3d 71, 83 (CA2 2008) (same), *Keller* v. *Central Bank of Nigeria*, 277 F. 3d 811, 815 (CA6 2002) (same), *Byrd* v. *Corporacion Forestal y Industrial de Olancho S. A.*, 182 F. 3d 380, 388 (CA5 1999) (same), and *El-Fadl* v. *Central Bank of Jordan*, 75 F. 3d 668, 671 (CADC 1996) (same).

[5] As an alternative basis for its decision, the Court of Appeals held that even if a current official is covered by the FSIA, a former official is not. See 552 F. 3d, at 381–383. Because we agree with the Court of Appeals on its broader ground that individual officials are not covered by the FSIA, petitioner's status as a former official is irrelevant to our analysis.

govern whether petitioner enjoys immunity from suit, the Court of Appeals remanded the case for further proceedings, including a determination of whether petitioner is entitled to immunity under the common law. *Id.*, at 383–384. We granted certiorari. 557 U. S. 965 (2009).

II

The doctrine of foreign sovereign immunity developed as a matter of common law long before the FSIA was enacted in 1976. In *Verlinden B. V.* v. *Central Bank of Nigeria*, 461 U. S. 480, 486 (1983), we explained that in *Schooner Exchange* v. *McFaddon*, 7 Cranch 116 (1812), "Chief Justice Marshall concluded that . . . the United States had impliedly waived jurisdiction over certain activities of foreign sovereigns." The Court's specific holding in *Schooner Exchange* was that a federal court lacked jurisdiction over "a national armed vessel . . . of the emperor of France," *id.*, at 146, but the opinion was interpreted as extending virtually absolute immunity to foreign sovereigns as "a matter of grace and comity," *Verlinden*, 461 U. S., at 486.

Following *Schooner Exchange*, a two-step procedure developed for resolving a foreign state's claim of sovereign immunity, typically asserted on behalf of seized vessels. See, *e. g.*, *Republic of Mexico* v. *Hoffman*, 324 U. S. 30, 34–36 (1945); *Ex parte Peru*, 318 U. S. 578, 587–589 (1943); *Compania Espanola de Navegacion Maritima, S. A.* v. *The Navemar*, 303 U. S. 68, 74–75 (1938). Under that procedure, the diplomatic representative of the sovereign could request a "suggestion of immunity" from the State Department. *Ex parte Peru*, 318 U. S., at 581. If the request was granted, the district court surrendered its jurisdiction. *Id.*, at 588; see also *Hoffman*, 324 U. S., at 34. But "in the absence of recognition of the immunity by the Department of State," a district court "had authority to decide for itself whether all the requisites for such immunity existed." *Ex parte Peru*, 318 U. S., at 587; see also *Compania Espanola*, 303 U. S., at 75 (approving judicial inquiry into sov-

ereign immunity when the "Department of State . . . declined to act"); *Heaney* v. *Government of Spain*, 445 F. 2d 501, 503, and n. 2 (CA2 1971) (evaluating sovereign immunity when the State Department had not responded to a request for its views). In making that decision, a district court inquired "whether the ground of immunity is one which it is the established policy of the [State Department] to recognize." *Hoffman*, 324 U. S., at 36. Although cases involving individual foreign officials as defendants were rare, the same two-step procedure was typically followed when a foreign official asserted immunity. See, *e. g.*, *Heaney*, 445 F. 2d, at 504–505; *Waltier* v. *Thomson*, 189 F. Supp. 319 (SDNY 1960).[6]

Prior to 1952, the State Department followed a general practice of requesting immunity in all actions against friendly sovereigns, but in that year the Department announced its adoption of the "restrictive" theory of sovereign immunity. *Verlinden*, 461 U. S., at 486–487; see also Letter from Jack B. Tate, Acting Legal Adviser, Dept. of State, to Acting Attorney General Philip B. Perlman (May 19, 1952), reprinted in 26 Dept. State Bull. 984–985 (1952). Under this theory, "immunity is confined to suits involving the foreign sovereign's public acts, and does not extend to cases arising out of a foreign state's strictly commercial acts." *Verlinden*, 461 U. S., at 487. This change threw "immunity determinations into some disarray," because "political considerations sometimes led the Department to file 'suggestions of immunity in cases where immunity would not have been available under the restrictive theory.'" *Republic of Austria* v. *Alt-*

[6] Diplomatic and consular officers could also claim the "specialized immunities" accorded those officials, Restatement (Second) of Foreign Relations Law of the United States § 66, Comment *b* (1964–1965) (hereinafter Restatement), and officials qualifying as the "head of state" could claim immunity on that basis, see *Schooner Exchange* v. *McFaddon*, 7 Cranch 116, 137 (1812) (describing "the exemption of the person of the sovereign" from "a jurisdiction incompatible with his dignity").

mann, 541 U. S. 677, 690 (2004) (quoting *Verlinden*, 461 U. S., at 487).

Congress responded to the inconsistent application of sovereign immunity by enacting the FSIA in 1976. *Altmann*, 541 U. S., at 690–691; see also *Verlinden*, 461 U. S., at 487–488. Section 1602 describes the Act's two primary purposes: (1) to endorse and codify the restrictive theory of sovereign immunity, and (2) to transfer primary responsibility for deciding "claims of foreign states to immunity" from the State Department to the courts.[7] After the enactment of the FSIA, the Act—and not the pre-existing common law—indisputably governs the determination of whether a foreign state is entitled to sovereign immunity.

What we must now decide is whether the Act also covers the immunity claims of foreign officials. We begin with the statute's text and then consider petitioner's reliance on its history and purpose.

III

The FSIA provides that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States" except as provided in the Act. § 1604. Thus, if a defendant is a "foreign state" within the meaning of the Act, then the defendant is immune from jurisdiction unless

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[7] The full text of § 1602, entitled "Findings and declaration of purpose," reads as follows:

"The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter."

one of the exceptions in the Act applies. See §§ 1605–1607 (2006 ed. and Supp. II) (enumerating exceptions). The Act, if it applies, is the "sole basis for obtaining jurisdiction over a foreign state in federal court." *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U. S. 428, 439 (1989). The question we face in this case is whether an individual sued for conduct undertaken in his official capacity is a "foreign state" within the meaning of the Act.

The Act defines "foreign state" in § 1603 (2006 ed.) as follows:

> "(a) A 'foreign state' . . . includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).
>
> "(b) An 'agency or instrumentality of a foreign state' means any entity—
>
> "(1) which is a separate legal person, corporate or otherwise, and
>
> "(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
>
> "(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country."

The term "foreign state" on its face indicates a body politic that governs a particular territory. See, *e. g.*, Restatement § 4 (defining "state" as "an entity that has a defined territory and population under the control of a government and that engages in foreign relations"). In § 1603(a), however, the Act establishes that "foreign state" has a broader meaning, by mandating the inclusion of the state's political subdivisions, agencies, and instrumentalities. Then, in § 1603(b), the Act specifically delimits what counts as an agency or instrumentality. Petitioner argues that either "foreign state," § 1603(a), or "agency or instrumentality," § 1603(b),

could be read to include a foreign official. Although we agree that petitioner's interpretation is literally possible, our analysis of the entire statutory text persuades us that petitioner's reading is not the meaning that Congress enacted.

We turn first to the term "agency or instrumentality of a foreign state," § 1603(b). It is true that an individual official could be an "agency or instrumentality," if that term is given the meaning of "any thing or person through which action is accomplished," *In re Terrorist Attacks on September 11, 2001*, 538 F. 3d 71, 83 (CA2 2008). But Congress has specifically defined "agency or instrumentality" in the FSIA, and all of the textual clues in that definition cut against such a broad construction.

First, the statute specifies that "'agency or instrumentality . . . ' means any *entity*" matching three specified characteristics, § 1603(b) (emphasis added), and "entity" typically refers to an organization, rather than an individual. See, *e. g.*, Black's Law Dictionary 612 (9th ed. 2009). Furthermore, several of the required characteristics apply awkwardly, if at all, to individuals. The phrase "separate legal person, corporate or otherwise," § 1603(b)(1), could conceivably refer to a natural person, solely by virtue of the word "person." But the phrase "separate legal person" typically refers to the legal fiction that allows an entity to hold personhood separate from the natural persons who are its shareholders or officers. Cf. *First Nat. City Bank* v. *Banco Para el Comercio Exterior de Cuba*, 462 U. S. 611, 625 (1983) ("Separate legal personality has been described as 'an almost indispensable aspect of the public corporation' "). It is similarly awkward to refer to a person as an "organ" of the foreign state. See § 1603(b)(2). And the third part of the definition could not be applied at all to a natural person. A natural person cannot be a citizen of a State "as defined in section 1332(c) and (e)," § 1603(b)(3), because those subsections refer to the citizenship of corporations and estates. Nor can a natural person be "created under the laws of any

third country." *Ibid.*[8] Thus, the terms Congress chose simply do not evidence the intent to include individual officials within the meaning of "agency or instrumentality."[9] Cf. *Dole Food Co.* v. *Patrickson*, 538 U. S. 468, 474 (2003) (describing § 1603(b) as containing "indicia that Congress had corporate formalities in mind").

Petitioner proposes a second textual route to including an official within the meaning of "foreign state." He argues

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[8] Petitioner points out that § 1603(b)(3) describes only which defendants *cannot* be agencies or instrumentalities. He suggests that it therefore tells us nothing about which defendants *can* be covered by that term. Brief for Petitioner 46. Even if so, reading § 1603(b) as petitioner suggests would leave us with the odd result that a corporation that is the citizen of a state is excluded from the definition under § 1603(b)(3), and thus not immune, whereas a natural person who is the citizen of a state is not excluded, and thus retains his immunity.

[9] Nor does anything in the legislative history suggest that Congress intended the term "agency or instrumentality" to include individuals. On the contrary, the legislative history, like the statute, speaks in terms of entities. See, *e. g.*, H. R. Rep. No. 94–1487, p. 15 (1976) (hereinafter H. R. Rep.) ("The first criterion, that the entity be a separate legal person, is intended to include a corporation, association, foundation, or any other entity which, under the law of the foreign state where it was created, can sue or be sued in its own name").

JUSTICE SCALIA may well be correct that it is not strictly necessary to confirm our reading of the statutory text by consulting the legislative history, see *post*, at 326–327 (opinion concurring in judgment). But as the Court explained some years ago in an opinion authored by Justice White:

"As for the propriety of using legislative history at all, common sense suggests that inquiry benefits from reviewing additional information rather than ignoring it. As Chief Justice Marshall put it, '[w]here the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived.' *United States* v. *Fisher*, 2 Cranch 358, 386 (1805). Legislative history materials are not generally so misleading that jurists should never employ them in a good-faith effort to discern legislative intent. Our precedents demonstrate that the Court's practice of utilizing legislative history reaches well into its past. See, *e. g.*, *Wallace* v. *Parker*, 6 Pet. 680, 687–690 (1832). We suspect that the practice will likewise reach well into the future." *Wisconsin Public Intervenor* v. *Mortier*, 501 U. S. 597, 611–612, n. 4 (1991) (alteration in original).

that the definition of "foreign state" in § 1603(a) sets out a nonexhaustive list that "includes" political subdivisions and agencies or instrumentalities but is not so limited. See Brief for Petitioner 22–23. It is true that use of the word "include" can signal that the list that follows is meant to be illustrative rather than exhaustive.[10] And, to be sure, there are fewer textual clues within § 1603(a) than within § 1603(b) from which to interpret Congress' silence regarding foreign officials. But even if the list in § 1603(a) is merely illustrative, it still suggests that "foreign state" does not encompass officials, because the types of defendants listed are all entities. See *Russell Motor Car Co.* v. *United States*, 261 U. S. 514, 519 (1923) ("[A] word may be known by the company it keeps").

Moreover, elsewhere in the FSIA Congress expressly mentioned officials when it wished to count their acts as equivalent to those of the foreign state, which suggests that officials are not included within the unadorned term "foreign state." Cf. *Kimbrough* v. *United States*, 552 U. S. 85, 103 (2007) ("Drawing meaning from silence is particularly inappropriate . . . [when] Congress has shown that it knows how to [address an issue] in express terms"). For example, Congress provided an exception from the general grant of immunity for cases in which "money damages are sought against a foreign state" for an injury in the United States "caused by the tortious act or omission *of that foreign state or of any official* or employee of that foreign state while acting within the scope of his office." § 1605(a)(5) (2006 ed., Supp. II) (emphasis added). The same reference to officials is made in a similar, later enacted exception. See § 1605A(a)(1) (eliminating immunity for suits "in which money damages are sought against a foreign state" for certain acts "engaged in

[10] See 2A N. Singer & J. Singer, Sutherland on Statutory Construction § 47.7, p. 305 (7th ed. 2007) ("[T]he word 'includes' is usually a term of enlargement, and not of limitation" (some internal quotation marks omitted)).

by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency"); see also § 1605A(c) (creating a cause of action against the "foreign state" and "any official, employee, or agent" thereof).[11] If the term "foreign state" by definition includes an individual acting within the scope of his office, the phrase "or of any official or employee . . . " in § 1605(a)(5) would be unnecessary. See *Dole Food Co.*, 538 U. S., at 476–477 ("[W]e should not construe the statute in a manner that is strained and, at the same time, would render a statutory term superfluous").

Other provisions of the statute also point away from reading "foreign state" to include foreign officials. Congress made no express mention of service of process on individuals in § 1608(a) (2006 ed.), which governs service upon a foreign state or political subdivision. Although some of the methods listed could be used to serve individuals—for example, by delivery "in accordance with an applicable international convention," § 1608(a)(2)—the methods specified are at best very roundabout ways of serving an individual official. Furthermore, Congress made specific remedial choices for different types of defendants. See § 1606 (allowing punitive damages for an agency or instrumentality but not for a foreign state); § 1610 (affording a plaintiff greater rights to attach the property of an agency or instrumentality as compared to the property of a foreign state). By adopting petitioner's

[11] Petitioner argues that § 1605A abrogates immunity for certain acts by individual officials, which would be superfluous if the officials were not otherwise immune. See Brief for Petitioner 41–43. But the import of § 1605A is precisely the opposite. First, § 1605A(a)(1) eliminates the immunity of the *state* for certain acts of its officers; it says a "foreign state shall not be immune" in a suit "in which money damages are sought against a foreign state." As it does not expressly refer to the immunity of individual officers, it adds nothing to petitioner's argument. Second, the creation of a cause of action against both the "foreign state" and "any official, employee, or agent" thereof, § 1605A(c), reinforces the idea that "foreign state" does not by definition include foreign officials.

reading of "foreign state," we would subject claims against officials to the more limited remedies available in suits against states, without so much as a whisper from Congress on the subject. (And if we were instead to adopt petitioner's other textual argument, we would subject those claims to the different, more expansive, remedial scheme for agencies.) The Act's careful calibration of remedies among the listed types of defendants suggests that Congress did not mean to cover other types of defendants never mentioned in the text.

In sum, "[w]e do not . . . construe statutory phrases in isolation; we read statutes as a whole." *United States* v. *Morton*, 467 U. S. 822, 828 (1984). Reading the FSIA as a whole, there is nothing to suggest we should read "foreign state" in § 1603(a) to include an official acting on behalf of the foreign state, and much to indicate that this meaning was not what Congress enacted.[12] The text does not expressly foreclose petitioner's reading, but it supports the view of respondents and the United States that the Act does not address an official's claim to immunity.

IV

Petitioner argues that the FSIA is best read to cover his claim to immunity because of its history and purpose. As discussed at the outset, one of the primary purposes of the FSIA was to codify the restrictive theory of sovereign im-

[12] Nor is it the case that the FSIA's "legislative history does not even hint of an intent to exclude individual officials," *Chuidian*, 912 F. 2d, at 1101. The legislative history makes clear that Congress did not intend the FSIA to address position-based individual immunities such as diplomatic and consular immunity. H. R. Rep., at 12 ("The bill is not intended . . . to affect either diplomatic or consular immunity"). It also suggests that general "official immunity" is something separate from the subject of the bill. See *id.*, at 23 ("The bill does not attempt to deal with questions of discovery. . . . [I]f a plaintiff sought to depose a diplomat in the United States or a high-ranking official of a foreign government, diplomatic and official immunity would apply").

munity, which Congress recognized as consistent with extant international law. See § 1602. We have observed that a related purpose was "codification of international law at the time of the FSIA's enactment," *Permanent Mission of India to United Nations* v. *City of New York*, 551 U. S. 193, 199 (2007), and have examined the relevant common law and international practice when interpreting the Act, *id.*, at 200–201. Because of this relationship between the Act and the common law that it codified, petitioner argues that we should construe the FSIA consistently with the common law regarding individual immunity, which—in petitioner's view—was coextensive with the law of state immunity and always immunized a foreign official for acts taken on behalf of the foreign state. Even reading the Act in light of Congress' purpose of codifying *state* sovereign immunity, however, we do not think that the Act codified the common law with respect to the immunity of individual officials.

The canon of construction that statutes should be interpreted consistently with the common law helps us interpret a statute that clearly covers a field formerly governed by the common law.[13] But the canon does not help us to decide the antecedent question whether, when a statute's coverage is ambiguous, Congress intended the statute to govern a particular field—in this case, whether Congress intended the FSIA to supersede the common law of official immunity.[14]

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[13] Congress "is understood to legislate against a background of common-law . . . principles," *Astoria Fed. Sav. & Loan Assn.* v. *Solimino*, 501 U. S. 104, 108 (1991), and when a statute covers an issue previously governed by the common law, we interpret the statute with the presumption that Congress intended to retain the substance of the common law, see *Isbrandtsen Co.* v. *Johnson*, 343 U. S. 779, 783 (1952) ("Statutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident").

[14] We find similarly inapposite petitioner's invocation of the canon that a statute should be interpreted in compliance with international law, see *Murray* v. *Schooner Charming Betsy*, 2 Cranch 64, 118 (1804), and his

Petitioner argues that because state and official immunities are coextensive, Congress must have codified official immunity when it codified state immunity. See Brief for Petitioner 26–30. But the relationship between a state's immunity and an official's immunity is more complicated than petitioner suggests, although we need not and do not resolve the dispute among the parties as to the precise scope of an official's immunity at common law. The very authority to which petitioner points us, and which we have previously found instructive, see, *e. g.*, *Permanent Mission*, 551 U. S., at 200, states that the immunity of individual officials is subject to a caveat not applicable to any of the other entities or persons[15] to which the foreign state's immunity extends. The Restatement provides that the "immunity of a foreign state . . . extends to . . . any other public minister, official, or agent of the state with respect to acts performed in his official capacity *if the effect of exercising jurisdiction would be to enforce a rule of law against the state.*" Restatement § 66 (emphasis added).[16] And historically, the Government some-

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argument that foreign relations and the reciprocal protection of United States officials abroad would be undermined if we do not adopt his reading of the Act. Because we are not deciding that the FSIA bars petitioner's immunity but rather that the Act does not address the question, we need not determine whether declining to afford immunity to petitioner would be consistent with international law.

[15] The Restatement does not apply this caveat to the head of state, head of government, or foreign minister. See Restatement § 66. Whether petitioner may be entitled to head of state immunity, or any other immunity, under the common law is a question we leave open for remand. See 552 F. 3d 371, 383 (CA4 2009). We express no view on whether Restatement § 66 correctly sets out the scope of the common-law immunity applicable to current or former foreign officials.

[16] Respondents contend that this caveat refers to "the compulsive effect of the judgment on the state," Brief for Respondents 42, but petitioner disputes that meaning, Reply Brief for Petitioner 17–18. We need not resolve their dispute, as it is enough for present purposes that the Restatement indicates a foreign official's immunity may turn upon a requirement not applicable to any other type of defendant.

times suggested immunity under the common law for individual officials even when the foreign state did not qualify. See, *e. g.*, *Greenspan* v. *Crosbie*, No. 74 Civ. 4734 (GLG), 1976 WL 841 (SDNY, Nov. 23, 1976). There is therefore little reason to presume that when Congress set out to codify state immunity, it must also have, *sub silentio*, intended to codify official immunity.

Petitioner urges that a suit against an official must always be equivalent to a suit against the state because acts taken by a state official on behalf of a state are acts of the state. See Brief for Petitioner 26. We have recognized, in the context of the act of state doctrine, that an official's acts can be considered the acts of the foreign state, and that "the courts of one country will not sit in judgment" of those acts when done within the territory of the foreign state. See *Underhill* v. *Hernandez*, 168 U. S. 250, 252, 254 (1897). Although the act of state doctrine is distinct from immunity, and instead "provides foreign states with a substantive defense on the merits," *Altmann*, 541 U. S., at 700, we do not doubt that in some circumstances the immunity of the foreign state extends to an individual for acts taken in his official capacity. But it does not follow from this premise that Congress intended to codify that immunity in the FSIA. It hardly furthers Congress' purpose of "clarifying the rules that judges should apply in resolving sovereign immunity claims," *id.*, at 699, to lump individual officials in with foreign states without so much as a word spelling out how and when individual officials are covered.[17]

[17] The Courts of Appeals have had to develop, in the complete absence of any statutory text, rules governing when an official is entitled to immunity under the FSIA. For example, Courts of Appeals have applied the rule that foreign sovereign immunity extends to an individual official "for acts committed in his official capacity" but not to "an official who acts beyond the scope of his authority." *Chuidian*, 912 F. 2d, at 1103, 1106. That may be correct as a matter of common-law principles, but it does not derive from any clarification or codification by Congress. Furthermore, if Congress intended the FSIA to reach individuals, one would expect the

Petitioner would have a stronger case if there were any indication that Congress' intent to enact a comprehensive solution for suits against states extended to suits against individual officials. But to the extent Congress contemplated the Act's effect upon officials at all, the evidence points in the opposite direction. As we have already mentioned, the legislative history points toward an intent to leave official immunity outside the scope of the Act. See n. 12, *supra*. And although questions of official immunity did arise in the pre-FSIA period, they were few and far between.[18] The immunity of officials simply was not the particular problem to which Congress was responding when it enacted the FSIA. The FSIA was adopted, rather, to address "a modern world where foreign state enterprises are every day participants in commercial activities," and to assure litigants that decisions regarding claims against states and their enterprises "are made on purely legal grounds." H. R. Rep., at 7. We have been given no reason to believe that Congress saw as a problem, or wanted to eliminate, the State Department's role in determinations regarding individual official immunity.[19]

Act to have addressed whether *former* officials are covered, an issue it settled with respect to instrumentalities, see *Dole Food Co.* v. *Patrickson*, 538 U. S. 468, 478 (2003) ("[I]nstrumentality status [must] be determined at the time suit is filed").

[18] A study that attempted to gather all of the State Department decisions related to sovereign immunity from the adoption of the restrictive theory in 1952 to the enactment of the FSIA reveals only four decisions related to official immunity, and two related to head of state immunity, out of a total of 110 decisions. Sovereign Immunity Decisions of the Dept. of State, May 1952 to Jan. 1977 (M. Sandler, D. Vagts, & B. Ristau eds.), in Digest of U. S. Practice in International Law 1977, pp. 1020, 1080 (hereinafter Digest).

[19] The FSIA was introduced in accordance with the recommendation of the State Department. H. R. Rep., at 6. The Department sought and supported the elimination of its role with respect to claims against foreign states and their agencies or instrumentalities. See Hearings on H. R. 11315 before the Subcommittee on Administrative Law and Governmental Relations of the House of Representatives Committee on the Judiciary,

Finally, our reading of the FSIA will not "in effect make the statute optional," as some Courts of Appeals have feared, by allowing litigants through "artful pleading . . . to take advantage of the Act's provisions or, alternatively, choose to proceed under the old common law," *Chuidian* v. *Philippine Nat. Bank*, 912 F. 2d 1095, 1102 (CA9 1990). Even if a suit is not governed by the Act, it may still be barred by foreign sovereign immunity under the common law. And not every suit can successfully be pleaded against an individual official alone.[20] Even when a plaintiff names only a foreign official, it may be the case that the foreign state itself, its political subdivision, or an agency or instrumentality is a required party, because that party has "an interest relating to the subject of the action" and "disposing of the action in the person's absence may . . . as a practical matter impair or impede the person's ability to protect the interest." Fed. Rule Civ. Proc. 19(a)(1)(B). If this is the case, and the entity is im-

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94th Cong., 2d Sess., 34 (1976) (testimony of Monroe Leigh, Legal Adviser, Dept. of State) ("[I]t is our judgment . . . that the advantages of having a judicial determination greatly outweigh the advantage of being able to intervene in a lawsuit"). But the Department has from the time of the FSIA's enactment understood the Act to leave intact the Department's role in official immunity cases. See Digest 1020 ("These decisions [of the Department regarding the immunity of officials] may be of some future significance, because the Foreign Sovereign Immunities Act does not deal with the immunity of individual officials, but only that of foreign states and their political subdivisions, agencies and instrumentalities").

[20] Furthermore, a plaintiff seeking to sue a foreign official will not be able to rely on the Act's service of process and jurisdictional provisions. Thus, a plaintiff will have to establish that the district court has personal jurisdiction over an official without the benefit of the FSIA provision that makes personal jurisdiction over a foreign state automatic when an exception to immunity applies and service of process has been accomplished in accordance with 28 U. S. C. §1608. See §1330(b) ("Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a)," *i. e.*, claims for which the foreign state is not entitled to immunity, "where service has been made under section 1608 of this title").

mune from suit under the FSIA, the district court may have to dismiss the suit, regardless of whether the official is immune or not under the common law. See *Republic of Philippines* v. *Pimentel*, 553 U. S. 851, 867 (2008) ("[W]here sovereign immunity is asserted, and the claims of the sovereign are not frivolous, dismissal of the action must be ordered where there is a potential for injury to the interests of the absent sovereign"). Or it may be the case that some actions against an official in his official capacity should be treated as actions against the foreign state itself, as the state is the real party in interest. Cf. *Kentucky* v. *Graham*, 473 U. S. 159, 166 (1985) ("[A]n official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. It is *not* a suit against the official personally, for the real party in interest is the entity" (citation omitted)).

We are thus not persuaded that our construction of the statute's text should be affected by the risk that plaintiffs may use artful pleading to attempt to select between application of the FSIA or the common law. And we think this case, in which respondents have sued petitioner in his personal capacity and seek damages from his own pockets, is properly governed by the common law because it is not a claim against a foreign state as the Act defines that term. Although Congress clearly intended to supersede the common-law regime for claims against foreign states, we find nothing in the statute's origin or aims to indicate that Congress similarly wanted to codify the law of foreign official immunity.

V

Our review of the text, purpose, and history of the FSIA leads us to the conclusion that the Court of Appeals correctly held the FSIA does not govern petitioner's claim of immunity. The Act therefore did not deprive the District Court of subject-matter jurisdiction. We emphasize, however, the narrowness of our holding. Whether petitioner may be entitled to immunity under the common law, and whether he may

have other valid defenses to the grave charges against him, are matters to be addressed in the first instance by the District Court on remand. The judgment of the Court of Appeals is affirmed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE ALITO, concurring.

I join the opinion of the Court, although I think that the citations to legislative history are of little if any value here.

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

I join the Court's opinion except for those parts relying on the legislative history of the Foreign Sovereign Immunities Act of 1976, 28 U. S. C. §§ 1330, 1602 *et seq.* In my view, the Court's textual analysis is sufficient to resolve this case. See *post* this page and 327–329 (SCALIA, J., concurring in judgment).

JUSTICE SCALIA, concurring in the judgment.

The Court's admirably careful textual analysis, *ante*, at 313–319, demonstrates that the term "foreign state" in the provision "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States," 28 U. S. C. § 1604, does not include foreign officials. Yet the Court insists on adding legislative history to its analysis. I could understand that (though not agree with it) if, in the absence of supposed legislative-history support, the Court would reach a different result. Or even if there was something in the legislative history that clearly contradicted the Court's result, and had to be explained away. That is not the situation here (or at least the Court's opinion does not think it to be so). The Court assures us, however (if this could be thought assurance), that legislative history is "'not generally so misleading'" that it should "'never'" be used.

Ante, at 316, n. 9 (quoting *Wisconsin Public Intervenor* v. *Mortier*, 501 U. S. 597, 611–612, n. 4 (1991)). Surely that is damning by faint praise. And the Court's mention of the past practice of using legislative history, *ante*, at 316, n. 9, does not support the Court's use of it today. The past practice was "*not* the practice of utilizing legislative history for the purpose of giving authoritative content to the meaning of a statutory text," *Mortier*, *supra*, at 622 (SCALIA, J., concurring in judgment).

The Court's introduction of legislative history serves no purpose except needlessly to inject into the opinion a mode of analysis that not all of the Justices consider valid. And it does so, to boot, in a fashion that does not isolate the superfluous legislative history in a section that those of us who disagree categorically with its use, or at least disagree with its superfluous use, can decline to join. I therefore do not join the opinion, and concur only in the result.

The Court relies on legislative history to support three of its positions. First, after explaining why the phrase "agency or instrumentality" in the definition of "foreign state," see § 1603(a), (b), does not refer to natural persons, *ante*, at 315–318, the Court says "[n]or does anything in the legislative history suggest that Congress intended the term 'agency or instrumentality' to include individuals," *ante*, at 316, n. 9. According to the Court, "the legislative history, like the statute, speaks in terms of entities." *Ibid.* Apparently, the legislative history must be consulted, not to show that it *supports* the Court's textual analysis, or even to explain why its seeming contradiction of the Court's analysis is inconsequential, but to show nothing more than that it contains the same ambiguous language as the text. This is beyond all reason.

Second, after concluding its review of the statute's text, the Court states that the "legislative history makes clear that Congress did not intend the [Foreign Sovereign Immunities Act of 1976] to address position-based individual im-

munities such as diplomatic and consular immunity," *ante,* at 319, n. 12. See also *ante,* at 323. It cites for this proposition a House Committee Report that we have no reason to believe was read (much less approved) by the Senate—or, indeed, by the Members of the House who were not on the Committee—or even, for that matter, by the members of the Committee, who never voted on the Report. In any case, the quoted excerpt does not address "position-based individual immunities" in general but only "diplomatic and consular immunity," which is not at issue here. Unless diplomatic and consular immunity, on the one hand, and, on the other hand, what *is* at issue here—state-agent immunity—are always treated the same (which I doubt and the Court does not attempt to establish), the passage contributes nothing to analysis of the present case.

The same footnote also quotes a portion of the same House Report as follows:

> "'The bill does not attempt to deal with questions of discovery. . . . [I]f a plaintiff sought to depose a diplomat in the United States or a high-ranking official of a foreign government, diplomatic and official immunity would apply.'" *Ante,* at 319, n. 12.

If anything, this passage cuts against the Court's result. The two sentences omitted from the above quotation read as follows:

> "Existing law appears to be adequate in this area. For example, if a private plaintiff sought the production of sensitive governmental documents of a foreign state, concepts of governmental privilege would apply." H. R. Rep. No. 94–1487, p. 23 (1976).

Thus, the House Report makes it clear that the bill's failure to deal with discovery applies to *both* discovery against sovereigns *and* discovery against foreign officials. But the latter would have been unnecessary if the bill dealt only with sovereigns. The implication (if any) is that the bill's provi-

sions regarding immunity from suit apply to both sovereigns and foreign officials.

Third, and finally, the Court points to legislative history to establish the purpose of the statute. See *ante*, at 323, and n. 19. This is particularly puzzling, because the *enacted* statutory text itself includes findings and a declaration of purpose—the very same purpose (surprise!) that the Court finds evidenced in the legislative history. See 28 U. S. C. § 1602. To make matters worse, the Court itself notes this statutory declaration of purpose twice earlier, in the body of its opinion, see *ante*, at 313, 319–320. If those textual references to the statute itself were deleted, the footnoted citation of legislative history would at least perform some function. As it is, however, it adds nothing except the demonstration of assiduous law-clerk research.

It should be no cause for wonder that, upon careful examination, all of the opinion's excerpts from legislative history turn out to be, at best, nonprobative or entirely duplicative of text. After all, legislative history is almost never the real reason for the Court's decision—and makeweights do not deserve a lot of the Court's time.

Syllabus

ALABAMA ET AL. *v.* NORTH CAROLINA

ON EXCEPTIONS TO PRELIMINARY AND SECOND REPORTS OF SPECIAL MASTER

No. 132, Orig. Argued January 11, 2010—Decided June 1, 2010

In 1986, Congress granted its consent to the Southeast Interstate Low-Level Radioactive Waste Management Compact (Compact), which was entered into by Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina, Tennessee, and Virginia. The Compact is administered by a Commission, which was required, *inter alia*, to "identif[y] . . . a host [S]tate for the development of a [new] regional disposal facility," and to "seek to ensure that such facility is licensed and ready to operate . . . no . . . later than 1991." Art. 4(E)(6), 99 Stat. 1875. The Commission designated North Carolina as a host State in 1986, thereby obligating North Carolina to take "appropriate steps to ensure that an application for a license to construct and operate a [low-level radioactive waste storage facility] is filed with and issued by the appropriate authority." Art. 5(C), *id.*, at 1877.

In 1988, North Carolina asked the Commission for assistance with the costs of licensing and building a facility. The Commission adopted a resolution declaring it "appropriate and necessary" to provide financial assistance, and ultimately paid almost $80 million to North Carolina from 1988 through 1997. North Carolina also expended $34 million of its own funds. Yet by the mid 1990's, North Carolina was still many years—and many tens of millions of dollars—away from obtaining a license.

In 1997, the Commission notified North Carolina that absent a plan for funding the remaining licensing steps, it would not disburse additional funds to North Carolina. North Carolina responded that it could not continue without additional funding. After the parties failed to agree on a long-term financing plan, in December 1997 the Commission ceased its financial assistance to North Carolina, and North Carolina subsequently began an orderly shutdown of its project.

In June 1999, Florida and Tennessee filed a complaint with the Commission seeking monetary sanctions against North Carolina. In July 1999, North Carolina exercised its right under Article 7(G) to withdraw from the Compact. In December 1999, the Commission concluded that North Carolina had failed to fulfill its obligations under the Compact and adopted a sanctions resolution demanding that the State repay approximately $80 million in addition to other monetary penalties. North Carolina did not comply.

Syllabus

In 2003, this Court granted Alabama, Florida, Tennessee, Virginia, and the Commission (Plaintiffs) leave to file a bill of complaint against North Carolina under this Court's original jurisdiction, U. S. Const., Art. III, § 2, cl. 2; 28 U. S. C. § 1251(a). The complaint sets forth claims of violation of Plaintiffs' rights under the Compact (Count I), breach of contract (Count II), unjust enrichment (Count III), promissory estoppel (Count IV), and money had and received (Count V), and requests monetary and other relief, including a declaration that North Carolina is subject to sanctions and that the Commission's sanctions resolution is valid and enforceable.

The Court assigned the case to a Special Master, who has conducted proceedings and has filed two reports. The Preliminary Report recommends denying without prejudice North Carolina's motion to dismiss the Commission's claims on sovereign immunity grounds; denying Plaintiffs' motion for summary judgment on Count I, which sought enforcement of the Commission's sanctions resolution; granting North Carolina's cross-motion to dismiss Count I and other portions of the complaint seeking such enforcement; and denying North Carolina's motion to dismiss the claims in Counts II–V. The Master's Second Report recommended denying Plaintiff's motion for summary judgment and granting North Carolina's motion for summary judgment on Count II; and denying North Carolina's motion for summary judgment on Plaintiffs' remaining claims in Counts III–V. The parties filed a total of nine exceptions to the Master's Reports.

Held:

1. Plaintiffs' seven exceptions are overruled. Pp. 339–353.

(a) The terms of the Compact do not authorize the Commission to impose monetary sanctions against North Carolina. The Court's conclusion is confirmed by a comparison of the Compact's terms with three other interstate compacts concerning low-level radioactive waste storage approved by Congress contemporaneously with the Compact, all of which expressly authorize their commissions to impose monetary sanctions against their party States. Pp. 339–342.

(b) Plaintiffs' exception that North Carolina could not avoid monetary sanctions by withdrawing from the Compact is moot, because the Compact does not permit the Commission to impose monetary sanctions in any event. The Court deems their exception that North Carolina forfeited its right to object to a monetary penalty by failing to participate at the sanctions hearing both abandoned and meritless. P. 342.

(c) Because the express terms of the Compact do not make the Commission the "sole arbiter" of disputes arising under the Compact, *Texas* v. *New Mexico*, 462 U. S. 554, 569–570, the Court is not bound by the Commission's conclusion that North Carolina breached its obligations under the Compact. Nor does the Court apply deferential

administrative-law standards of review to the Commission's conclusion, but instead exercises its independent judgment as to both fact and law in executing its role as the "exclusive" arbiter of controversies between the States, 28 U. S. C. § 1251(a). Pp. 342–344.

(d) North Carolina did not breach its contractual obligation to take "appropriate steps" toward the issuance of a license. Pp. 344–351.

(1) The Compact requires North Carolina to take only those licensing steps that are "appropriate." The parties' course of performance establishes that it was not appropriate for North Carolina to proceed with the very expensive licensing process without external financial assistance. Nothing in the Compact's text or structure requires North Carolina to cover all licensing and building costs on its own. Plaintiffs' assertion that it was understood that the host State would bear the upfront licensing and construction costs, but recoup those costs through its regional monopoly on radioactive waste disposal, is not reflected in the Compact. Pp. 344–350.

(2) Plaintiffs' alternative argument that North Carolina repudiated its obligation to take appropriate steps when it announced it would take no further steps to obtain a license fails for the same reasons their breach theory fails. Pp. 350–351.

(e) North Carolina did not breach an implied duty of good faith and fair dealing when it withdrew from the Compact. The Compact by its terms imposes no limitation on North Carolina's right to exercise its statutory right under Article 7(G) to withdraw from the Compact. A comparison between the Compact and other contemporaneously enacted compacts confirms the absence of a good-faith limitation in the Compact. Pp. 351–353.

2. North Carolina's two exceptions are overruled. Pp. 353–358.

(a) It was reasonable for the Special Master to deny without prejudice North Carolina's motion for summary judgment on the merits of Plaintiffs' equitable claims in Counts III–V. The Special Master concluded that those claims require further briefing, argument, and, possibly, discovery. The Court approves of the Special Master's reasonable exercise of his discretion to manage the proceedings. Pp. 353–354.

(b) Under *Arizona* v. *California*, 460 U. S. 605, 614, the Commission's claims are not barred by sovereign immunity so long as the Commission asserts the same claims and seeks the same relief as the plaintiff States. Nothing in the Court's subsequent cases suggests that *Arizona* v. *California* has been implicitly overruled, and North Carolina does not ask the Court to overrule that decision. At least with respect to Counts I and II, the Commission's claims under those Compact-related Counts are wholly derivative of the plaintiff States' claims. The summary judgment disallowing the claims in Counts I and II on their merits

renders the sovereign immunity question with regard to any *relief* the Commission alone might have on those claims moot. Counts III–V are on a different footing. The Special Master concluded that further factual and legal development was necessary to determine whether the Commission's claims under these Counts were identical to those of the plaintiff States. The Special Master's case-management decision was reasonable. Pp. 354–358.

Exceptions to Special Master's Reports overruled, and Master's recommendations adopted; North Carolina's motions to dismiss Count I and for summary judgment on Count II granted; Plaintiffs' motions for judgment on Counts I and II denied; and North Carolina's motions to dismiss the Commission's claims on sovereign immunity grounds and for summary judgment on Counts III–V denied without prejudice.

SCALIA, J., delivered the opinion of the Court, in which STEVENS, GINSBURG, and ALITO, JJ., joined, in which ROBERTS, C. J., joined as to all but Parts II–D and III–B, in which KENNEDY and SOTOMAYOR, JJ., joined as to all but Part II–E, in which THOMAS, J., joined as to all but Part III–B, and in which BREYER, J., joined as to all but Parts II–C, II–D, and II–E. KENNEDY, J., filed an opinion concurring in part and concurring in the judgment, in which SOTOMAYOR, J., joined, *post*, p. 358. ROBERTS, C. J., filed an opinion concurring in part and dissenting in part, in which THOMAS, J., joined, *post*, p. 360. BREYER, J., filed an opinion concurring in part and dissenting in part, in which ROBERTS, C. J., joined, *post*, p. 363.

Carter G. Phillips argued the cause for plaintiffs. With him on the briefs were Attorneys General *Troy King* of Alabama, *Bill McCollum* of Florida, *Robert E. Cooper, Jr.*, of Tennessee, and *William C. Mims* of Virginia, as well as *Virginia A. Seitz, Kristin Graham Koehler, HL Rogers*, and *Henry W. Jones, Jr.*

Deputy Solicitor General Kneedler argued the cause for the United States as *amicus curiae*. With him on the brief were *Solicitor General Kagan, Acting Assistant Attorney General Cruden*, and *Toby J. Heytens*.

Walter Dellinger argued the cause for defendant. With him on the briefs were *Roy Cooper*, Attorney General of North Carolina, *Grayson G. Kelley*, Chief Deputy Attorney General, *John F. Maddrey*, Assistant Solicitor General, *Ron-*

ald M. Marquette and *Mark A. Davis*, Special Deputy Attorneys General, and *Jonathan D. Hacker*.*

JUSTICE SCALIA delivered the opinion of the Court.

In this case, which arises under our original jurisdiction, U. S. Const., Art. III, § 2, cl. 2; 28 U. S. C. § 1251(a), we consider nine exceptions submitted by the parties to two reports filed by the Special Master.

I

In 1986, Congress granted its consent under the Compact Clause, U. S. Const., Art. I, § 10, cl. 3, to seven interstate compacts providing for the creation of regional facilities to dispose of low-level radioactive waste. Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act, 99 Stat. 1859. One of those compacts was the Southeast Interstate Low-Level Radioactive Waste Management Compact (Compact), entered into by Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina, Tennessee, and Virginia. *Id.*, at 1871–1880. That Compact established an "instrument and framework for a cooperative effort" to develop new facilities for the long-term disposal of low-level radioactive waste generated within the region. Art. 1, *id.*, at 1872. The Compact was to be administered by a Southeast Interstate Low-Level Radioactive Waste Management Commission (Commission), composed of two voting members from each party State. Art. 4(A), *id.*, at 1874.

A pre-existing facility in Barnwell, South Carolina, was to serve as the initial facility for regional generators to dispose of their low-level radioactive waste. Art. 2(10), *id.*, at 1873. That facility was scheduled to close as the regional-disposal facility for the Compact by the end of 1992, *ibid.*, and so the Compact required the Commission to develop "procedures

**Barbara J. B. Green, Alice M. Blado,* Assistant Attorney General of Washington, *Shawn D. Renner,* and *Richard M. Ihrig* filed a brief for the Rocky Mountain Low-Level Radioactive Waste Compact Board et al. as *amici curiae.*

and criteria for identifying . . . a host [S]tate for the development of a second regional disposal facility," and to "seek to ensure that such facility is licensed and ready to operate as soon as required but in no event later than 1991," Art. 4(E)(6), *id.*, at 1875. The Compact authorized the Commission to "designate" a party State as a host State for the facility. Art. 4(E)(7), *ibid.*

In September 1986, the Commission designated North Carolina as the host for the second facility. North Carolina therefore became obligated to "take appropriate steps to ensure that an application for a license to construct and operate a [low-level radioactive waste storage facility] is filed with and issued by the appropriate authority." Art. 5(C), *id.*, at 1877. In 1987, North Carolina's General Assembly created the North Carolina Low-Level Radioactive Waste Management Authority (Authority) to fulfill the State's obligation. N. C. Gen. Stat. § 104G, 1987 N. C. Sess. Laws ch. 850.

Although "[t]he Commission is not responsible for any costs associated with," among other things, "the creation of any facility," Art. 4(K)(1), 99 Stat. 1876, North Carolina asked the Commission for financial assistance with building and licensing costs. The Commission responded by adopting a resolution, which declared it was both "appropriate and necessary" for the Commission "to provide financial assistance" to North Carolina. App. 63. To that end, the Commission created a "Host States Assistance Fund" to help North Carolina with the "financial costs and burdens" of "preliminary planning, the administrative preparation, and other pre-operational" activities. *Id.*, at 64.

The estimate in 1989 was that it would cost approximately $21 million and take two years to obtain a license for North Carolina's regional-disposal facility. That proved to be wildly optimistic. By 1990, the cost estimate had ballooned to $45.8 million, and the estimated date for obtaining a license now extended far into 1993. At the beginning of 1994 there still was no license, and the estimated cost had grown

to $87.1 million. By end of 1994 the estimate was $112.5 million, and issuance of a license was not anticipated until 1997. And by December 1996 the estimated cost had increased by another $27 million and the projected date to receive a license had become August 2000.

North Carolina's own appropriations—approximately $27 million from Fiscal Year 1988 through Fiscal Year (FY) 1995—did not cover the costs of the licensing phase. But during the same time period, the Commission provided North Carolina with approximately $67 million. The funds came from surcharges and access fees collected for that purpose from generators disposing of low-level radioactive waste at the pre-existing Barnwell facility. *Id.*, at 71–74, 145.

In July 1995, however, South Carolina withdrew from the Compact, thereby depriving the Commission of continued revenues from the Barnwell facility. In 1996, the Commission accordingly informed North Carolina that it would no longer be able to provide financial support for licensing activities. The Governor of North Carolina responded that the State was not prepared to assume a greater portion of the project's costs, and would not be able to proceed without continued Commission funding. Shortly thereafter the Commission adopted a resolution declaring that it was willing and able to provide additional funds, but calling on North Carolina to work with it to develop long-term funding sources for the facility. From FY 1996 through FY 1998, the Commission provided North Carolina approximately an additional $12.27 million in financial assistance. North Carolina, for its part, continued to provide its own funds toward licensing activities—another $6 million during the same time period.

In August 1997, the Commission notified North Carolina that absent a plan for funding the remaining steps of the licensing phase, it would not disburse additional funds to North Carolina after November 30, 1997. North Carolina

responded that it would not be able to continue without additional guarantees of external funding. On December 1, 1997, the parties having failed to agree upon a long-term financing plan, the Commission ceased financial assistance to North Carolina. By then it had provided almost $80 million.

On December 19, 1997, North Carolina informed the Commission it would commence an orderly shutdown of its licensing project, and since that date has taken no further steps toward obtaining a license for the facility. But it did continue to fund the Authority for several more years, in the hope that the project would resume upon the restoration of external financial assistance. North Carolina maintained the proposed facility site, preserved the work it had completed to date, and retained the Authority's books and records. It also participated in discussions with the Commission, generators of low-level radioactive waste, and other stakeholders regarding options to resolve the financing shortfall. From FY 1988 through FY 2000, North Carolina had expended almost $34 million toward obtaining a license.

In June 1999, after attempts to resolve the funding impasse had failed, Florida and Tennessee filed with the Commission a complaint for sanctions against North Carolina. It alleged that North Carolina had failed to fulfill its obligations under the Compact, and requested (among other things) return of the almost $80 million paid to North Carolina by the Commission, plus interest, as well as damages and attorney's fees. The next month, North Carolina withdrew from the Compact by enacting a law repealing its status as a party State, see 1999 N. C. Sess. Laws ch. 357, as required by Article 7(G) of the Compact.

More than four months later, in December 1999, the Commission held a sanctions hearing. North Carolina did not participate. After the hearing, the Commission concluded that North Carolina had failed to fulfill its obligations under the Compact. It adopted a resolution demanding that North Carolina repay approximately $80 million, plus interest, to

the Commission; pay an additional $10 million penalty to compensate the Commission for the loss of future revenue (surcharges and access fees) it would have received had a facility been completed in North Carolina; and pay the Commission's attorney's fees. North Carolina did not comply.

In July 2000, seeking to enforce its sanctions resolution, the Commission moved for leave to file a bill of complaint under our original jurisdiction. *Southeast Interstate Low-Level Radioactive Waste Management Commission* v. *North Carolina*, No. 131, Orig. North Carolina opposed the motion on the grounds that the Commission could not invoke this Court's original jurisdiction, and we invited the Solicitor General to express the views of the United States. 531 U. S. 942 (2000). The Solicitor General filed a brief urging denial of the Commission's motion on the grounds that the Commission's bill of complaint did not fall within our exclusive original jurisdiction over "controversies between two or more States." § 1251(a). We denied the Commission's motion. 533 U. S. 926 (2001).

In June 2002, the States of Alabama, Florida, Tennessee, and Virginia, joined by the Commission (collectively Plaintiffs), moved for leave to file a bill of complaint against North Carolina. North Carolina opposed the motion, and we again sought the views of the Solicitor General. 537 U. S. 806 (2002). The United States urged that we grant Plaintiffs' motion, which we did. 539 U. S. 925 (2003). The bill of complaint contains five counts: violation of the party States' rights under the Compact (Count I); breach of contract (Count II); unjust enrichment (Count III); promissory estoppel (Count IV); and money had and received (Count V). Plaintiffs' prayer for relief requests a declaration that North Carolina is subject to sanctions and that the Commission's sanctions resolution is valid and enforceable, as well as the award of damages, costs, and other relief.

We assigned the case to a Special Master, 540 U. S. 1014 (2003), who has conducted proceedings and now has filed two

reports. The Master's Preliminary Report addressed three motions filed by the parties. He recommended denying without prejudice North Carolina's motion to dismiss the Commission's claims against North Carolina on the grounds of sovereign immunity. Preliminary Report 4–14. He recommended denying Plaintiffs' motion for summary judgment on Count I, which sought enforcement of the Commission's sanctions resolution. *Id.*, at 14–33. He recommended granting North Carolina's cross-motion to dismiss Count I and other portions of the bill of complaint that sought enforcement of the sanctions resolution. *Id.*, at 33–34. And he recommended denying North Carolina's motion to dismiss the claims in Counts II–V. *Id.*, at 34–43.

After the Special Master issued his Preliminary Report, the parties engaged in partial discovery and subsequently filed cross-motions for summary judgment. The Special Master's Second Report recommended denying Plaintiffs' motion for summary judgment on Count II, Second Report 8–35, and granting North Carolina's motion for summary judgment on Count II, *id.*, at 35–40. Finally, he recommended denying North Carolina's motion for summary judgment on Plaintiffs' remaining claims in Counts III–V. *Id.*, at 41–45.

II

Plaintiffs present a total of seven exceptions to the Special Master's two reports. We address them in turn.

A

Their first exception challenges the Special Master's conclusion that the Commission lacked authority to impose monetary sanctions upon North Carolina. The terms of the Compact determine that question.

Article 4(E) of the Compact sets forth the Commission's "duties and powers." 99 Stat. 1874. Among its powers are the authority "to revoke the membership of a party [S]tate that willfully creates barriers to the siting of a needed re-

gional facility," Art. 4(E)(7), *id.*, at 1875, and the authority "to revoke the membership of a party [S]tate in accordance with Article 7(f)," Art. 4(E)(11), *ibid.* Conspicuously absent from Article 4, however, is any mention of the authority to impose monetary sanctions. Plaintiffs contend that authority may be found elsewhere—in the first paragraph of Article 7(F), which provides in relevant part:

> "Any party [S]tate which fails to comply with the provisions of this compact or to fulfill the obligations incurred by becoming a party [S]tate to this compact may be subject to sanctions by the Commission, including suspension of its rights under this compact and revocation of its status as a party [S]tate." *Id.*, at 1879.

The sanctions expressly identified in Article 7(F)—"suspension" of rights and "revocation" of party-state status—flow directly from the Commission's power in Articles 4(E)(7) and (11) to revoke a party State's membership. That can fairly be understood to include the lesser power to suspend a party State's rights. There is no similar grounding in Article 4(E) of authority to impose monetary sanctions, and the absence is significant.

According to Plaintiffs, however, the word "sanctions" in Article 7(F) naturally "includ[es]" monetary sanctions. Since the Compact contains no definition of "sanctions," we give the word its ordinary meaning. A "sanction" (in the sense the word is used here) is "[t]he detriment loss of reward, or other coercive intervention, annexed to a violation of a law as a means of enforcing the law." Webster's New International Dictionary 2211 (2d ed. 1954) (hereinafter Webster's Second); see Black's Law Dictionary 1458 (9th ed. 2009) ("A penalty or coercive measure that results from failure to comply with a law, rule, or order"). A monetary penalty is assuredly one kind of "sanction." See generally *Department of Energy* v. *Ohio*, 503 U. S. 607, 621 (1992). But there are many others, ranging from the withholding of ben-

efits, or the imposition of a nonmonetary obligation, to capital punishment. The Compact surely does not authorize the Commission to impose all of them.

Ultimately, context dictates precisely which "sanctions" are authorized under Article 7(F), and nothing in the Compact suggests that these include monetary measures. The only two "sanctions" specifically identified as being included within Article 7(F) are "suspension" of a State's rights under the Compact and "revocation" of its status as a party State. These are arguably merely examples, and may not exhaust the universe of sanctions the Commission can impose. But they do establish "illustrative application[s] of the general principle," *Federal Land Bank of St. Paul* v. *Bismarck Lumber Co.*, 314 U. S. 95, 100 (1941), which underlies the kinds of sanctions the Commission can impose. It is significant that both these specifically authorized sanctions are prospective and nonmonetary in nature.

Moreover, Article 3 of the Compact provides: "The rights granted to the party [S]tates by this compact are additional to the rights enjoyed by sovereign [S]tates, and nothing in this compact shall be construed to infringe upon, limit, or abridge those rights." 99 Stat. 1873. Construing Article 7(F) to authorize monetary sanctions would violate this provision, since the primeval sovereign right is immunity from levies against the government fisc. See, *e. g.*, *Alden* v. *Maine*, 527 U. S. 706, 750–751 (1999).

Finally, a comparison of the Compact's terms with those of "[o]ther interstate compacts, approved by Congress contemporaneously," *Texas* v. *New Mexico*, 462 U. S. 554, 565 (1983), confirms that Article 7(F) does not authorize monetary sanctions. At the same time Congress consented to this Compact, it consented to three other interstate compacts that expressly authorize their commissions to impose monetary sanctions against the parties to the compacts. See Northeast Interstate Low-Level Radioactive Waste Management Compact, Art. IV(i)(14), 99 Stat. 1915 (hereinafter

Northeast Compact); Central Midwest Interstate Low-Level Radioactive Waste Compact, Art. VIII(f), *id.*, at 1891 (hereinafter Central Midwest Compact); Central Interstate Low-Level Radioactive Waste Compact, Art. VII(e), *id.*, at 1870 (hereinafter Central Compact). The Compact "clearly lacks the features of these other compacts, and we are not free to rewrite it" to empower the Commission to impose monetary sanctions. *Texas* v. *New Mexico*, 462 U. S., at 565.

B

Because the Compact does not authorize the Commission to impose monetary sanctions, Plaintiffs' second exception—that North Carolina could not avoid monetary sanctions by withdrawing from the Compact—is moot. The third exception also pertains to the Commission's sanctions resolution: that North Carolina forfeited its right to object to a monetary penalty by failing to participate at the sanctions hearing. Plaintiffs have failed to argue this exception. They have merely noted that North Carolina refused to participate at the sanctions hearing, and have cited no law in support of the proposition that this was a forfeit. We deem the exception abandoned. It was wisely abandoned, because it is meritless. North Carolina opposed the sanctions resolution and denied that the Commission had jurisdiction to impose sanctions against it.

C

Plaintiffs next take exception to the Special Master's recommendation that no binding effect or even deference be accorded to the Commission's conclusion that North Carolina violated Article 5(C) of the Compact. We are bound by the Commission's conclusion of breach only if there is "an explicit provision or other clear indicatio[n]" in the Compact making the Commission the "sole arbiter of disputes" regarding a party State's compliance with the Compact. *Id.*, at 569–570. Plaintiffs assert there is such a provision, the second sentence of Article 7(C), which states: "The Commission is the

judge of the qualifications of the party [S]tates and of its members and of their compliance with the conditions and requirements of this compact and the laws of the party [S]tates relating to the enactment of this compact." 99 Stat. 1879.

Plaintiffs greatly overread this provision. The limited nature of the authority to "judge" that it confers upon the Commission is clear from its context. The first sentence of Article 7(C) states that an eligible State "shall be declared" a party State "upon enactment of this compact into law by the [S]tate and upon [the] payment of" a $25,000 fee, as "required by Article 4(H)(1)." *Ibid.* The second sentence makes the Commission the "judge" of four matters, *all of which concern status as a party State or Commission member.* First, the Commission is the judge of the "qualifications" of a State to become a party State (the qualifications set forth in Article 7(A) for the initial party States and in Article 7(B) for States that subsequently petition to join). Second, the Commission is the judge of the qualifications of the members of the Commission, which are specified in Article 4(A). Third, the Commission is the judge of a party State's compliance with the "conditions" and "requirements" of the Compact. The former term is an obvious reference to Article 7(B): "The Commission may establish such conditions as it deems necessary and appropriate to be met by a [S]tate wishing . . . to become a party [S]tate to this [C]ompact." *Id.*, at 1878. The accompanying term "requirements" also refers to Article 7's prescriptions for prospective party States, such as paying the "fees required" under Article 7(C), *id.*, at 1879, and obtaining, as Article 7(B) requires, a two-thirds vote of the Commission in favor of admission. Finally, the Commission is the judge of the "laws of the party [S]tates relating to the enactment of this compact." Art. 7(C), *ibid.* Again, that concerns status as a party State, which requires that the State "enac[t] . . . this compact into law," *ibid.* The Commission is the "judge" of only these specific matters.

This is not to say the Commission lacks authority to interpret the Compact or to say whether a party State has violated its terms. That is of course implicit in its power to sanction under Article 7(F). But because "the express terms of the [Southeast] Compact do not constitute the Commission as the sole arbiter" regarding North Carolina's compliance with its obligations under the Compact, *Texas* v. *New Mexico*, 462 U. S., at 569, we are not bound to follow the Commission's findings.

Plaintiffs argue that we nonetheless owe deference to the Commission's conclusion. But unless the text of an interstate compact directs otherwise, we do not review the actions of a compact commission "on the deferential model of judicial review of administrative action by a federal agency." *Id.*, at 566–567. The terms of this Compact do not establish that "this suit may be maintained only as one for judicial review of the Commission's" determination of breach. *Id.*, at 567. Accordingly, we do not apply administrative-law standards of review, but exercise our independent judgment as to both fact and law in executing our role as the "exclusive" arbiter of controversies between the States, § 1251(a).

D

Plaintiffs' next two exceptions are to the Special Master's recommendations to deny their motion for summary judgment on their breach-of-contract claims, and to grant North Carolina's motion for summary judgment on those claims. In resolving motions for summary judgment in cases within our original jurisdiction, we are not technically bound by the Federal Rules of Civil Procedure, but we use Rule 56 as a guide. This Court's Rule 17.2; *Nebraska* v. *Wyoming*, 507 U. S. 584, 590 (1993). Hence, summary judgment is appropriate where there "is no genuine issue as to any material fact" and the moving party is "entitled to judgment as a matter of law." Fed. Rule Civ. Proc. 56(c)(2); see *Celotex Corp.* v. *Catrett*, 477 U. S. 317, 322 (1986); *Anderson* v. *Liberty Lobby, Inc.*, 477 U. S. 242, 248 (1986).

1

Plaintiffs claim North Carolina breached the Compact in December 1997, when (as it admits) it ceased all efforts toward obtaining a license. At that point, in their view, North Carolina was no longer "tak[ing] appropriate steps to ensure that an application for a license to construct and operate a [low-level radioactive waste storage facility] is filed with and issued by the appropriate authority," Art. 5(C), 99 Stat. 1877. North Carolina says that once the Commission ceased providing financial assistance on December 1, and once it became clear there was insufficient funding to complete the licensing phase, there were no more "appropriate" steps to take. The Special Master concluded that the phrase "appropriate steps" in Article 5(C) was ambiguous, and that the parties' course of performance established that North Carolina was not required to take steps toward obtaining a license once it was made to bear the remaining financial burden of the licensing phase. Second Report 10–24, 35–36. Plaintiffs take exception to that conclusion.

Article 5(C) does not require North Carolina to take any and all steps to license a regional-disposal facility; only those that are "appropriate." Plaintiffs contend that this requires North Carolina to take the steps set forth in the regulations of the Nuclear Regulatory Commission governing the filing and disposition of applications for licenses to operate radioactive waste disposal facilities, 10 CFR pt. 61 (1997). Those regulations set forth some, but certainly not all, of the "steps" the State would have to take to obtain a license. But Article 5(C) does not incorporate the regulations by reference, much less describe them as the *appropriate* steps.

We could accept Plaintiffs' contention if "appropriate" meant "necessary" (the steps set forth in the regulation are assuredly necessary to obtaining a license). But it does not. Whether a *particular* step is "appropriate"—"[s]pecially suitable; fit; proper," Webster's Second 133—could depend upon many factors other than its mere indispensability to obtaining a license. It would not be appropriate, for exam-

ple, to take a step whose cost greatly exceeded whatever benefits the license would confer, or if it was highly uncertain the license would ever issue.

In determining whether, in terminating its efforts to obtain a license, North Carolina failed to take what the parties considered "appropriate" steps, the parties' course of performance under the Compact is highly significant. See, *e. g.*, *New Jersey* v. *New York*, 523 U. S. 767, 830–831 (1998) (SCALIA, J., dissenting); Restatement (Second) of Contracts §§ 202(4), 203 (1979) (hereinafter Restatement). That firmly establishes that North Carolina was not expected to go it alone—to proceed with the very expensive licensing process without any external financial assistance. The history of the Compact consists entirely of shared financial burdens. From the beginning, North Carolina made clear that it required financial assistance to do the extensive work required for obtaining a license. The Commission promptly declared it was "appropriate and necessary" to assist North Carolina with the costs. App. 63. It provided the vast majority of funding for licensing-related activities—$80 million, compared to North Carolina's $34 million. The Commission repeatedly noted the necessity (and propriety) of providing financial assistance to North Carolina, and reiterated its dedication to sharing the substantial financial burdens of the licensing phase. See, *e. g.*, *id.*, at 63, 71, 145. There is nothing to support the proposition that the other States had an obligation under the Compact to share the licensing costs through the Commission; but we doubt that they did so out of love for the Tarheel State. They did it, we think, because that was their understanding of how the Compact was supposed to work. One must take the Commission at its word, that it was "appropriate" to share the cost—which suggests that it would not have been appropriate to make North Carolina proceed on its own.

Nor was North Carolina required after December 19, 1997, to continue to expend its own funds at the same level it had

previously (which Plaintiffs concede had satisfied North Carolina's obligation to take "appropriate steps"). Once the Commission refused to provide any further financial assistance, North Carolina would have had to assume an unlimited financial commitment to cover all remaining licensing costs. Even if it maintained its prior rate of appropriations going forward, it would not have come close to covering the at least $34 million needed for the last steps of the licensing phase. And since the income from the South Carolina facility had been terminated, there was no apparent prospect of funding for the construction phase (expected to cost at least $75 million). In connection with its August 1997 refusal to provide further assistance, the Commission itself had said, "[I]t will be imprudent to continue to deplete Commission resources for this purpose if a source of funds is not established soon for the ultimate completion of the project." *Id.*, at 306, 307; App. to Joint Supp. Fact Brief 36, 37. And in March 1998, the Commission "strongly" reiterated that "it would be imprudent to spend additional funds for licensing activities if funds will not be available to complete the project." *Id.*, at 59. What was imprudent for the Commission would surely have been imprudent (and hence inappropriate) for North Carolina as well. The State would have wasted millions of its taxpayers' dollars on what seemed to be a futile effort.

JUSTICE BREYER would uphold Plaintiffs' challenge on this point. He believes that the Compact obligated North Carolina to fund and complete the licensing and construction of a nuclear waste facility. *Post*, at 364, 366–368 (opinion concurring in part and dissenting in part). In fact, however, North Carolina was not even contractually required to "secur[e] a license," *post*, at 364, but only to take "appropriate steps" to obtain one, Art. 5(C), 99 Stat. 1877. And nothing in the terms of the Compact required North Carolina either to provide "adequate funding" for or to "beg[i]n construction" on a regional facility, *post*, at 364. Other contempora-

neously enacted interstate compacts expressly provide that the host State is "responsible for the timely development" of a regional facility, Central Midwest Compact, Art. VI(f), 99 Stat. 1887; Midwest Interstate Low-Level Radioactive Waste Management Compact, Art. VI(e), *id.*, at 1898 (hereinafter Midwest Compact), or "shall . . . [c]ause a regional facility to be developed on a timely basis," Rocky Mountain Low-Level Radioactive Waste Compact, Art. III(d)(i), *id.*, at 1903–1904. But the Compact here before us has no such provision, and the contrast is telling.[1] *Texas* v. *New Mexico*, 462 U. S., at 565. Moreover, the Commission's statements described in the preceding paragraph, that it would be imprudent to commit additional resources "if a source of funds is not established soon for the ultimate completion of the project," or "if funds will not be available to complete the project," surely suggest that North Carolina is not committed to the funding by contract.

JUSTICE BREYER asserts, *post*, at 366–367, that the rotating-host requirement in the Compact, see Art. 5(A), 99 Stat. 1877, necessarily implies that North Carolina is solely responsible for the licensing and construction costs of its facility. But all that requirement entails is that a party State "shall not be designated" as a host State for a second

[1] The Compact provides only that the host State is "responsible for the availability . . . of their regional facilities in accordance with" Article 5(B). Art. 3(C), 99 Stat. 1873–1874. The latter section makes clear that responsibility for "availability" does not mean that the host State will fund construction of the facility, but that it will keep it open and not impose unreasonable restrictions on its use. JUSTICE BREYER is correct that the Compact says the Commission is not "responsible" for the costs of "the creation" of a regional facility. Art. 4(K)(1), *id.*, at 1876. But what is important here is that it does *not* say that the host State *is* responsible—which (if it were true) would almost certainly have been joined with saying who was not responsible. What JUSTICE BREYER overlooks is the possibility that *no one* is responsible, and the licensing and construction of the facility is meant to depend upon *voluntary* funding by interested parties, such as the party States, the Commission, and low-level radioactive waste generators.

time before "each [other] party [S]tate" has taken a turn. *Ibid.* It can perfectly well envision that the States will take turns in bearing the lead responsibility for getting the facility licensed, supervising its construction, and operating the facility on its soil. In fact, that is just what its text suggests, since it describes the responsibility that is to be rotated as the host State's "obligation . . . to have a regional facility operated within its borders." *Ibid.* Not to construct it, or pay for its construction, but to "have [it] operated within its borders." As noted above, other contemporaneously enacted compacts do spell out the obligation of the host State to construct the facility. Still others at least provide that the host State will recoup its costs through disposal fees—which arguably suggests that the host State is to bear the costs. See, *e. g.*, Central Compact, Art. III(d), *id.*, at 1865; Northeast Compact, Art. III(c)(2), *id.*, at 1913. The Compact before us here does not even contain that arguable suggestion.

What it comes down to, then, is JUSTICE BREYER's intuition that the whole *point* of the Compact was that each designated host State would bear the upfront costs of licensing and construction, but would eventually recoup those costs through its regional monopoly on the disposal of low-level radioactive waste. *Post*, at 366–367. He can cite no provision in the Compact which reflects such an understanding, and the behavior of the parties contradicts it.[2] It would, moreover, have been a foolish understanding, since the regional monopoly to recoup construction costs would not be a

[2] The course-of-dealing evidence that JUSTICE BREYER identifies, *post*, at 368–369, is not probative. The Commission's statements that it is not legally responsible for costs and that at some point Commission funds will no longer be available, and North Carolina's assurances that it will keep its commitments and honor its obligations, are perfectly compatible with the proposition that North Carolina did not have to provide *all* funding for licensing the facility, and that it would be "inappropriate" to proceed toward obtaining a license for a facility that would never be needed or built.

monopoly if South Carolina withdrew and continued to operate its facility—which is exactly what happened in 1995.[3] Even leaving aside the principle, discussed *infra*, at 351–352, that implied obligations are not to be read into interstate compacts, JUSTICE BREYER's intuition fails to reflect the reality of what was implied.

2

Plaintiffs take exception to the Special Master's rejection of their alternative argument that North Carolina repudiated the Compact when it announced it would not take further steps toward obtaining a license. They argue that North Carolina's announcement that it was shutting down the project constituted a refusal to tender any further performance under the contract.

Plaintiffs' repudiation theory fails for the same reasons their breach theory fails. A repudiation occurs when an obligor either informs an obligee "that the obligor will commit a breach that would of itself give the obligee a claim for damages for total breach," Restatement § 250(a), or performs "a voluntary affirmative act which renders the obligor unable or apparently unable to perform without such a breach," *id.*, § 250(b). Neither event occurred here. North Carolina

[3] South Carolina's withdrawal from the Compact not only "*could*" affect North Carolina's ability to recoup its facility costs, as JUSTICE BREYER grudgingly concedes, *post*, at 367; it unquestionably *would*. With a regional competitor in the Barnwell facility and declining demand for waste disposal facilities due to technological and other factors, App. 261, 263–264, North Carolina would receive significantly lower revenues from its facility, *id.*, at 261–262, 265. The document attached to a 1996 letter from North Carolina to the Commission trumpeting "$600 million in cost savings" that would come from a new facility, *post*, at 367, proves precisely the opposite of what JUSTICE BREYER thinks. The cost savings were to accrue "to all *generators*" of waste, App. 266 (emphasis added)—that is, those who would use North Carolina's facility. Those savings would come, of course, from lower costs for waste disposal, which means that North Carolina would be charging *lower* rates than the Barnwell facility (and thus receiving *lower* revenues).

never informed the Commission (or any party State) that it would not fulfill its Article 5(C) obligation to take appropriate steps toward obtaining a license. Rather, it refused to take further steps that were not appropriate. Nor did North Carolina take an affirmative act that rendered it unable to perform. To the contrary, it continued to fund the Authority for almost two years; it maintained the records of the Authority; and it preserved the work completed to date while waiting for alternative funding sources that would enable resumption of the project. Plaintiffs further argue that a repudiation was effected by North Carolina's refusal to take further steps toward licensing "except on conditions which go beyond" the terms of the Compact, *id.*, § 250, Comment *b* (internal quotation marks omitted)—*i. e.*, the provision of external financial assistance. But, as we have discussed, external financial assistance was contemplated by the Compact.

E

Plaintiffs' final exception is to the Special Master's recommendation to deny their motion for summary judgment, and to grant North Carolina's cross-motion for summary judgment, on their claim that North Carolina violated the implied duty of good faith and fair dealing when it withdrew from the Compact in July 1999. Plaintiffs concede that North Carolina could withdraw from the Compact, but contend it could not do so in "bad faith." And, they assert, its withdrawal after accepting $80 million from the Commission, and with monetary sanctions pending against it, was the epitome of bad faith.

We have never held that an interstate compact approved by Congress includes an implied duty of good faith and fair dealing. Of course "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." *Id.*, § 205. But an interstate compact is not just a contract; it is a federal statute enacted by Congress. If courts were authorized to add a fairness

requirement to the implementation of federal statutes, judges would be potent lawmakers indeed. We do not—we cannot—add provisions to a federal statute. See, *e. g.*, *Connecticut Nat. Bank* v. *Germain*, 503 U. S. 249, 254 (1992). And in that regard a statute which is a valid interstate compact is no different. *Texas* v. *New Mexico*, 462 U. S., at 564, 565. We are especially reluctant to read absent terms into an interstate compact given the federalism and separation-of-powers concerns that would arise were we to rewrite an agreement among sovereign States, to which the political branches consented. As we have said before, we will not "'order relief inconsistent with [the] express terms'" of a compact, "no matter what the equities of the circumstances might otherwise invite." *New Jersey* v. *New York*, 523 U. S., at 811 (quoting *Texas* v. *New Mexico*, *supra*, at 564).

The Compact imposes no limitation on North Carolina's exercise of its statutory right to withdraw. Under Article 7(G), which governed North Carolina's withdrawal,[4] "[a]ny party [S]tate may withdraw from the compact by enacting a law repealing the compact." 99 Stat. 1879. There is no restriction upon a party State's enactment of such a law, and nothing in the Compact suggests the parties understood there were "certain purposes for which the expressly conferred power . . . could not be employed." *Tymshare, Inc.* v. *Covell*, 727 F. 2d 1145, 1153 (CADC 1984) (opinion for the court by Scalia, J.). Moreover, Article 3 ensures that no such restrictions may be implied, since it provides that the Compact shall not be "construed to infringe upon, limit, or abridge" the sovereign rights of a party State.

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[4] After North Carolina was designated as a host State, the Compact was amended to add Article 7(H), which restricted the ability of a party State to withdraw to within 30 days after a second regional-disposal facility opened. Southeast Interstate Low-Level Radioactive Waste Compact Amendments Consent Act of 1989, § 2, 103 Stat. 1289. That provision did not apply when North Carolina withdrew, because its facility had not been opened.

A comparison of the Compact with other, contemporaneously enacted, compacts confirms there is no such limitation on North Carolina's right to withdraw. See *Texas* v. *New Mexico*, *supra*, at 565. In contrast to the Compact, several other compacts concerning the creation of regional facilities for the disposal of low-level radioactive waste contain express good-faith limitations upon a State's exercise of its rights. See, *e. g.*, Central Compact, Art. III(f), 99 Stat. 1865; Central Midwest Compact, Art. V(a), *id.*, at 1886; Midwest Compact, Art. V(a), *id.*, at 1897.

III

North Carolina submits two exceptions—one to the Special Master's Second Report and one to his Preliminary Report.

A

North Carolina takes exception to the recommendation of the Second Report to deny without prejudice its motion for summary judgment on the merits of Plaintiffs' equitable claims in Counts III–V. North Carolina's motion was based on the ground that, as a matter of law, its obligations are governed entirely by the Compact. The Special Master recommended denying the motion without prejudice, because the claims in Counts III–V "requir[e] further briefing and argument, and possibly further discovery." Second Report 41. A threshold question for all claims in those Counts, for example, is whether they "belong to the Commission, the Plaintiff States, or both." *Ibid.* Perhaps the States can bring them in their capacity as *parens patriae*, but as the Special Master noted "the parties have not adequately briefed this issue, and its resolution in this case is unclear." *Id.*, at 42–43.

We think it was reasonable for the Special Master to defer ruling. We granted the Special Master discretion to "direct subsequent proceedings" and "to submit such reports as he may deem appropriate." 540 U. S., at 1014. He could have

deferred filing any report until full factual discovery had been completed and all of the legal issues, many of which are novel and challenging, had been fully briefed, considered, and decided. Instead, he concluded that our immediate resolution of Counts I and II would facilitate the efficient disposition of the case; and in agreeing to hear exceptions to his Preliminary Report and Second Report we implicitly agreed. His deferral of ruling on the merits of Counts III–V is part and parcel of the same case management, and we find no reason to upset it.

B

North Carolina takes exception to the Special Master's recommendation in his Preliminary Report to deny without prejudice its motion to dismiss the Commission's claims on the ground that they are barred by the Eleventh Amendment to the Constitution and by structural principles of state sovereign immunity. The Special Master assumed for the sake of argument that a State possesses sovereign immunity against a claim brought by an entity, like the Commission, created by an interstate compact,[5] Preliminary Report 5. But he recommended denying North Carolina's motion to dismiss "at this point in the proceedings." *Ibid.*

The Special Master relied upon our decision in *Arizona* v. *California*, 460 U. S. 605 (1983), which held that the Eleventh Amendment did not bar the participation of several Indian Tribes in an original action concerning the allocation of rights to the waters of the Colorado River. The United States had already intervened, in its capacity as trustee for several Indian Tribes; but the Tribes moved to intervene as well, and the States opposed. We granted the Tribes' motion, stating that the States do not enjoy sovereign immunity

[5] We have held that an entity created through a valid exercise of the Interstate Compact Clause is not entitled to immunity from suit under the Eleventh Amendment, see *Hess* v. *Port Authority Trans-Hudson Corporation*, 513 U. S. 30 (1994), but we have not decided whether such an entity's suit *against* a State is barred by sovereign immunity.

against the United States, and "[t]he Tribes do not seek to bring new claims or issues against the States, but only ask leave to participate in an adjudication of their vital water rights that was commenced by the United States." *Id.*, at 614. Thus, "our judicial power over the controversy is not enlarged by granting leave to intervene, and the States' sovereign immunity protected by the Eleventh Amendment is not compromised." *Ibid.* Relying on this holding, the Special Master held that sovereign immunity does not bar the Commission's suit, so long as the Commission asserts the same claims and seeks the same relief as the other plaintiffs. Whether that is so, he said, "cannot be resolved without further factual and legal development[s]," Preliminary Report 6, and so North Carolina is free to renew its motion at a later point, *id.*, at 13–14. See Second Report 45–48.

Assuming (as the Special Master did) that the Commission's claims against North Carolina implicate sovereign immunity, we agree with his disposition. North Carolina contends that making application of the Constitution's waiver of sovereign immunity turn upon whether a nonsovereign party seeks to expand the relief sought is inconsistent with our decisions construing state sovereign immunity as a "personal privilege." *College Savings Bank* v. *Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U. S. 666, 675 (1999) (internal quotation marks omitted); see also *Alden*, 527 U. S., at 758. But nothing in those cases suggests that *Arizona* v. *California* has been implicitly overruled.[6] See *Shalala* v. *Illinois Council on Long Term Care, Inc.*, 529 U. S. 1, 18 (2000). Neither of them arose under our original jurisdiction, and neither cited *Arizona* v. *California* or discussed—at all—the sovereign immunity issue that case addressed. That sovereign immunity is a personal privilege of the States

[6] North Carolina has not asked us to overrule *Arizona* v. *California*, 460 U. S. 605 (1983). We decline to do so on our own motion and without argument. We therefore do not address the merits of THE CHIEF JUSTICE's dissent.

says nothing about whether that privilege "is not compromised," *Arizona* v. *California*, *supra*, at 614, by an additional, nonsovereign plaintiff's bringing an entirely overlapping claim for relief that burdens the State with no additional defense or liability.[7]

North Carolina contends that *Arizona* v. *California* cannot apply to the Commission's claims, because the Commission does not—indeed, cannot—assert the same claims or seek the same relief as the plaintiff States. We disagree. In the bill of complaint, the States and the Commission assert the same claims and request the same relief. Bill of Complaint ¶¶ 62–86 and Prayer for Relief. Their claim for restitution of $80 million cannot, given the other allegations of the complaint, be thought to be $80 million payable to each of the four plaintiff States and the Commission.

North Carolina argues, however, that summary judgment in its favor is appropriate because it is clear that the Commission, and not the plaintiff States, provided $80 million to North Carolina—wherefore, as a matter of law, only the Commission can claim entitlement to $80 million, either as a measure of damages for breach of the Compact under Counts I and II of the bill of complaint, see Restatement § 370, Comment *a*, and § 373, or under the unjust enrichment, promissory estoppel, and money-had-and-received theories of recovery in Counts III, IV, and V, see, *e. g.*, Restatement of Restitution § 1, Comment *a* (1936). And, it contends, a stand-alone suit by the Commission is barred by sovereign immunity.

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[7] North Carolina also asserts that our decisions in *Pennhurst State School and Hospital* v. *Halderman*, 465 U. S. 89 (1984), and *County of Oneida* v. *Oneida Indian Nation of N. Y.*, 470 U. S. 226 (1985), undermine *Arizona* v. *California*, *supra*, at 614. They do not. In neither case were there entirely overlapping claims for relief between sovereign and nonsovereign plaintiffs. See *Pennhurst*, *supra*, at 103, n. 12. Indeed, in *County of Oneida* there was no sovereign plaintiff.

With regard to Counts I and II, at least, we disagree. The Commission's claims under those Compact-related Counts are wholly derivative of the States' claims. See *Arizona* v. *California*, 460 U. S., at 614. The Commission is "a legal entity separate and distinct from" the States that are parties to the Compact. Art. 4(M)(1), 99 Stat. 1877. Since it is not a party it has neither a contractual right to performance by the party States nor enforceable statutory rights under Article 5 of the Compact, see *Bennett* v. *Spear*, 520 U. S. 154, 162–163 (1997). The Compact does, however, authorize the Commission to "act or appear on behalf of any party [S]tate or [S]tates . . . as an intervenor or party in interest before . . . any court of law," Art. 4(E)(10), 99 Stat. 1875, and it is obviously in this capacity that the Commission seeks to vindicate the *plaintiff States'* statutory and contractual rights in Counts I and II. Its Count I and Count II claims therefore rise or fall with the claims of the States. While the Commission may not bring them in a stand-alone action under this Court's original jurisdiction, see § 1251(a), it may assert them in this Court alongside the plaintiff States, see *Arizona* v. *California*, *supra*, at 614. The summary judgment disallowing the underlying claims on their merits renders the sovereign immunity question with regard to any *relief* the Commission alone might have on those claims moot.

Counts III–V, which do not rely upon the Compact, stand on a different footing. As to them, while the Commission again seemingly makes the same claims and seeks the same relief as the States, it is conceivable that as a matter of law the Commission's claims are not identical. The Commission can claim restitution as the party that paid the money to North Carolina; the other plaintiffs cannot claim it on that basis. Whether this means that the claims are not identical for *Arizona* v. *California* purposes, and that the Commission's Counts III–V claims must be dismissed on sovereign

immunity grounds, is a question that the Special Master declined to resolve until the merits issues were further clarified. We have approved his deferral of those issues, and we likewise approve his deferral of the related sovereign immunity issue.

* * *

We overrule the exceptions of Plaintiffs and North Carolina to the Special Master's Reports, and we adopt the recommendations of the Special Master. We grant North Carolina's motion to dismiss Count I. We grant North Carolina's motion for summary judgment on Count II. We deny Plaintiffs' motions for judgment on Counts I and II. And we deny without prejudice North Carolina's motion to dismiss the Commission's claims on the grounds of sovereign immunity and its motion for summary judgment on Counts III–V.

It is so ordered.

JUSTICE KENNEDY, with whom JUSTICE SOTOMAYOR joins, concurring in part and concurring in the judgment.

The Court is correct, in my view, to conclude that we may not "add provisions to a federal statute." *Ante*, at 352. Plaintiffs do not request as much, however, in contending that North Carolina was required by the Southeast Interstate Low-Level Radioactive Waste Management Compact (Compact) to carry out its obligations in good faith. Rather, plaintiffs' argument is that the Compact's terms, properly construed, speak not only to the specific duties imposed upon the parties but also to the manner in which those duties must be carried out. This is an interpretive argument familiar to contract disputes. See, *e. g.*, Restatement (Second) of Contracts § 205 (1979) (hereinafter Restatement).

As the opinion for the Court notes, congressional consent to an interstate compact gives it the status of a federal statute. See *ante*, at 351. This is an apt and proper way to indicate that a compact has all the dignity of an Act of Con-

gress. And that is surely what was meant in *New Jersey* v. *New York*, 523 U. S. 767, 811 (1998), where it was stated that the Court may not "'order relief inconsistent with [the] express terms'" of a compact. *Ante*, at 352 (quoting *New Jersey;* alteration in original; some internal quotation marks omitted); see also *Cuyler* v. *Adams*, 449 U. S. 433, 438 (1981) ("[C]ongressional consent transforms an interstate compact . . . into a law of the United States").

From this principle, however, it simply does not follow that a law's nature and origin as a compact must be dismissed as irrelevant. Like a treaty, a compact represents an agreement between parties. See *New Jersey*, *supra*, at 831 (SCALIA, J., dissenting) ("[T]he Compact here is of course a treaty"). The Court's duty in interpreting a compact involves ascertaining the intent of the parties. See *Sullivan* v. *Kidd*, 254 U. S. 433, 439 (1921) ("[T]reaties are to be interpreted upon the principles which govern the interpretation of contracts . . . with a view to making effective the purposes of the high contracting parties"); *Wright* v. *Henkel*, 190 U. S. 40, 57 (1903) ("Treaties must receive a fair interpretation, according to the intention of the contracting parties"). Carrying out this duty may lead the Court to consult sources that might differ from those normally reviewed when an ordinary federal statute is at issue. That much is surely implicit in the Court's reference to contract law principles elsewhere in its opinion in the instant case. See, *e. g.*, *ante*, at 346 ("[T]he parties' course of performance under the Compact is highly significant"); *ibid.* (citing the Restatement); *ante*, at 350 (same); see also *New Jersey*, *supra*, at 830–831 (SCALIA, J., dissenting) (construing a compact in light of "hornbook contracts law that the practical construction of an ambiguous agreement revealed by later conduct of the parties is good indication of its meaning").

That said, it is quite correct to hold here that the reasonable expectations of the contracting States, as manifested in the Compact, do not reveal an intent to limit North Caroli-

na's power of withdrawal. For purposes of rejecting this argument, it is sufficient to note—as the Court does—that the Compact permits any State to withdraw; imposes no limitation on this right; and explicitly provides that the Compact shall not be construed to abridge the sovereign rights of any party State. See *ante*, at 352. Federalism concerns also counsel reluctance to find that a State has implicitly restricted its sovereignty in such a manner.

The Court is therefore correct to reject plaintiffs' final exception. With these observations, I join the Court's opinion with the exception of Part II–E.

CHIEF JUSTICE ROBERTS, with whom JUSTICE THOMAS joins, concurring in part and dissenting in part.

The parties to this case are Alabama, Florida, North Carolina, Tennessee, Virginia, and the Southeast Interstate Low-Level Radioactive Waste Management Commission. One of these things is not like the others: The Commission is not a sovereign State. The Court entertains its suit—despite North Carolina's sovereign immunity—because the Commission "asserts the same claims and seeks the same relief as the other plaintiffs." *Ante*, at 355. Our Constitution does not countenance such "no harm, no foul" jurisdiction, and I respectfully dissent.

The Court has made this mistake before. In *Arizona* v. *California*, 460 U. S. 605 (1983), we allowed Indian Tribes that could not sue sovereign States to piggyback on the claims of the United States, which could. We reasoned that once the United States had initiated suit, the state defendants could "no longer . . . assert [their] immunity with respect to the subject matter of [the] action," so the Tribes were free to pile on and join the suit. *Id.*, at 614. Today the Court retraces *Arizona*'s steps, quoting that case for the proposition that when private plaintiffs "'do not seek to bring new claims or issues, . . . our judicial power over the controversy is not enlarged . . . , and the States' sovereign immu-

nity protected by the Eleventh Amendment is not compromised.'" *Ante*, at 355 (quoting *Arizona*, *supra*, at 614).

That statement is contrary to the language of the Constitution. The Eleventh Amendment provides:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

The immunity conferred is against the "commence[ment] or prosecut[ion]" of "any suit in law or equity." There is no carve-out for suits "prosecuted" by private parties so long as those parties "'do not seek to bring new claims or issues.'" *Ante*, at 355 (quoting *Arizona*, *supra*, at 614).

Understandably, the Court's opinion leans heavily on *Arizona*, which has never been squarely overruled. *Ante*, at 354–356. But *Arizona* itself is built on sand. The relevant portion of that opinion is almost wholly unreasoned. It cites only a footnote in a prior case, the pertinent paragraph of which failed even to discuss the State's immunity from private suit. See 460 U. S., at 614 (citing *Maryland* v. *Louisiana*, 451 U. S. 725, 745, n. 21 (1981)). That paragraph addressed only intervention, not sovereign immunity, and the two issues are distinct. See *South Carolina* v. *North Carolina*, 558 U. S. 256, 268, n. 5 (2010).

Most importantly, the subsequent development of our sovereign immunity jurisprudence has only undermined *Arizona*'s already weak foundations. We recognized in *Alden* v. *Maine*, 527 U. S. 706, 718 (1999), that the Constitution left intact the States' pre-existing "immunity from private suits"; as the Eleventh Amendment confirms, the States did not "'surrender . . . this immunity in the plan of the convention,'" *id.*, at 717 (quoting The Federalist No. 81, p. 487 (C. Rossiter ed. 1961) (A. Hamilton)); see also *Alden*, *supra*, at 718–722, 755–756. There is no reason to suppose that the

States, at the founding, made an exception for private suits that happen to mimic other plaintiffs' claims—and neither *Arizona* nor the Court today suggests otherwise.

Whether or not a plaintiff "seeks the same relief" or imposes any "additional defense or liability," *ante*, at 355, 356, simply does not matter in light of our recognition that sovereign immunity provides an "immunity from suit," not a "defense to . . . liability," *Federal Maritime Comm'n* v. *South Carolina Ports Authority*, 535 U. S. 743, 766 (2002). As we have explained, "the relief sought by a plaintiff suing a State is irrelevant to the question whether the suit is barred." *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44, 58 (1996). Indeed, we have suggested that private parties may not sue even if a court is "precluded . . . from awarding them *any* relief." *Federal Maritime Comm'n*, *supra*, at 766 (emphasis added) (dictum). It is the fact that a private party is allowed to sue a sovereign State—not the burden of litigation or the relief sought—that infringes the immunity of the State. "The Eleventh Amendment is concerned not only with the States' ability to withstand suit, but with their privilege not to be sued." *Puerto Rico Aqueduct and Sewer Authority* v. *Metcalf & Eddy, Inc.*, 506 U. S. 139, 147, n. 5 (1993).

It is therefore impossible for the Court to hear private claims against a nonconsenting State without expanding "our judicial power over the controversy." *Arizona*, *supra*, at 614. Sovereign immunity is a limitation on that power. The similarity of claims may be relevant to joinder or intervention, but those are procedural means of processing claims, not fonts of judicial authority. See *Henderson* v. *United States*, 517 U. S. 654, 664 (1996).

Nor may the Court entertain private claims without "compromis[ing]" "the States' sovereign immunity." *Arizona*, *supra*, at 614. As a party, the Commission enjoys legally enforceable rights against the defendant State: It may object

to settlement, seek taxation of costs, advance arguments we are obliged to consider, and plead the judgment as res judicata in future litigation. If the Commission truly sought nothing for itself—other than "a full exposition of the issues," Preliminary Report of the Special Master 14—it could have participated as an *amicus*.

The Commission and North Carolina know that more is at stake if the Commission is allowed to sue the State. It is precisely the Commission's status as a *party*, its attempt to "prosecut[e]" a "suit in law or equity . . . against one of the United States," U. S. Const., Amdt. 11, that sovereign immunity forbids.

I would sustain North Carolina's first exception to the Special Master's reports.*

JUSTICE BREYER, with whom THE CHIEF JUSTICE joins, concurring in part and dissenting in part.

I join Parts I, II–A, II–B, and III of the Court's opinion. Unlike the Court, however, I believe that North Carolina breached the Southeast Interstate Low-Level Radioactive Waste Management Compact (Southeast Compact or Compact) when it suspended its efforts toward building a waste disposal facility. (THE CHIEF JUSTICE joins all but Parts II–D and III–B of the Court's opinion.)

Article 5(C) is the critical term of the Compact. It states:

> "Each party state designated as a host state for a regional facility shall take appropriate steps to ensure that an application for a license to construct and operate a facility . . . is filed with and issued by the appropriate authority." Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act (Consent Act), 99 Stat. 1877.

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*I also join JUSTICE BREYER's opinion and all of the Court's opinion save Parts II–D and III–B. JUSTICE THOMAS joins all but Part III–B of the Court's opinion.

In September 1986, North Carolina was "designated as a host state for a regional" low-level nuclear waste disposal "facility." *Ibid.;* see also App. 417, 432. Soon thereafter, North Carolina's General Assembly enacted legislation authorizing a state agency to "site, finance, [and] build" a waste disposal facility. N. C. Gen. Stat. § 104G–4 (1987) (repealed 2000). Pursuant to this legislation, a new facility was to be completed by January 1, 1993. *Ibid.*

From August 1987 until December 1997, North Carolina took a series of steps to prepare for the construction of the storage facility. See Brief for North Carolina in Support of Exceptions to Reports of the Special Master 6–8. And while doing so it continually assured its Compact partners that it "remain[ed] committed to fulfilling its obligations to the Compact to serve as the next host state." App. 92 (Letter from James G. Martin, Governor of North Carolina, to Carroll A. Campbell, Jr., Governor of South Carolina (Oct. 25, 1990)); Statement of Undisputed Material Facts ¶¶ 24–26, 28, 33, 37, 39 (detailing press releases, gubernatorial letters, and other statements made by North Carolina expressing its commitment to its Compact obligations).

But North Carolina never secured a license, never obtained adequate funding, and never began construction on a new facility. See Second Report of Special Master 2–3 (hereinafter Second Report). Eventually, the State simply stopped trying: On December 19, 1997, North Carolina informed its fellow member States that it would "commence the orderly shutdown" of the waste disposal "project." App. 319. After this point, North Carolina admittedly took no further steps toward obtaining a license or building a facility before withdrawing from the Compact in July 1999. *Id.*, at 460 (North Carolina Admissions ¶ 11) (North Carolina "did not [after 1997] take additional steps to . . . license a waste disposal facility"); Second Report 10 ("The parties do not dispute that North Carolina did not take additional steps to pursue a license for a waste facility" after December 1997).

Whatever one might think of the sufficiency of North Carolina's activities during the previous decade, I do not see how the Court can find that a year and a half of doing nothing—which North Carolina admits it did between December 1997 and July 1999—constitutes "tak[ing] appropriate steps." If a student promises to "take appropriate steps to ensure" that he will pass the bar and then refuses to study, has he not broken his promise? More to the point, if a builder promises that he will "take appropriate steps to ensure" that a customer will be able to move into a new home in two years, and then does nothing at all, has the builder not broken his promise?

As the majority notes, "[o]ther contemporaneously enacted interstate compacts" delineated a host State's obligations in more detail than the Southeast Compact does. *Ante*, at 347–348. But this fact may just as easily be read to indicate what the parties here intended, rather than, as the majority argues, what they did not intend. Regardless, the language of the Compact and the context in which it was enacted—as part of a congressional effort to encourage regional solutions to this Nation's low-level radioactive waste problem, see Consent Act, 99 Stat. 1859; Low-Level Radioactive Waste Policy Act, § 4(a)(1), 94 Stat. 3348—both indicate that North Carolina was supposed to take "appropriate steps" to build a low-level radioactive waste disposal facility. And North Carolina's General Assembly passed a state statute recognizing and accepting this responsibility. See N. C. Gen. Stat. § 104G–4 (creating a state agency to "site, finance, [and] build" a waste disposal facility). How can it be that two years of inactivity followed by withdrawal satisfies this promise?

The answer, says the Court, is that any further "appropriate steps" would have cost a significant amount of money. *Ante*, at 346, 347. In 1997, the Southeast Interstate Low-Level Radioactive Waste Management Commission (Commission), the entity responsible for administering the Com-

pact, made clear that it would not advance North Carolina any more money toward building a facility. See App. 315. In response, North Carolina concluded that it was unwilling to fund the rest of the project itself. See *id.*, at 317–319. And the Court agrees that it would have been "imprudent" for North Carolina to spend further funds, in light of the Commission's refusal to do so also. *Ante*, at 347, 348.

But this is an odd excuse. If a builder promises to "take appropriate steps" to build me a house, the fact that he runs out of funds would not normally excuse his breaking his promise—at least if it is he, and not I, who is responsible for financing the project. See 2 E. Farnsworth, Contracts § 9.6, p. 638 (3d ed. 2004) (hereinafter Farnsworth) (courts "generally" conclude that "additional expense" "does not rise to the level of impracticability" so as to excuse a party from performance). And here it is North Carolina, and not anyone else, who bears ultimate responsibility for finding the funds.

The text, structure, and purpose of the Compact all demonstrate this fact. As the Court recognizes, *ante*, at 335, the Compact expressly provides that the Commission "is not responsible for any costs associated with . . . the creation of any facility," Art. 4(K)(1), 99 Stat. 1876. Rather, the Compact States determined that each "party state" should take a turn as the "host state," during which time that State would be obligated to build a facility and then operate it for 20 years. See Art. 3(A), *id.*, at 1873; Art. 5(A), *id.*, at 1877; Art. 5(C), *ibid.;* Art. 5(E), 103 Stat. 1289; see also Art. 3(C), 99 Stat. 1873–1874 ("Host states are responsible for the availability, the subsequent post-closure observation and maintenance, and the extended institutional control of their regional facilities"). The host State would then recover its upfront construction expenses from the considerable fees and surcharges charged to the waste generators served by the facility. N. C. Gen. Stat. §§ 104G–15(a), (b) (repealed 2000) ("It is the intent of the General Assembly that the cost of all activities [toward siting, building, and operating a facility] be

borne by the waste generators" who use it); Brief for Plaintiffs in Surreply to North Carolina's Reply 1, n. 1 (noting that a disposal facility in South Carolina collected over $47 million in fees in 2008).

Of course, as the majority notes, South Carolina's withdrawal from the Compact *could* have affected North Carolina's ability to "recoup" its "construction costs." *Ante*, at 349. But, as far as I am aware, North Carolina did not seriously seek to amend the Compact when South Carolina departed (even though the State had sought and obtained an amendment previously, see *ante*, at 352, n. 4; Brief for North Carolina in Reply to Exceptions by Plaintiffs to Reports of the Special Master 27), nor has it argued to this Court that South Carolina's departure voided its contractual obligations. Indeed, there is evidence in the record indicating that, even after South Carolina left the Compact, North Carolina continued to believe that the operation of a waste disposal facility presented a substantial financial opportunity. App. 255, 266 (Attachment to Letter from John H. MacMillan, Executive Director, North Carolina Low-Level Radioactive Waste Management Authority, to Richard S. Hodes, M. D., Chairman, Southeast Compact Commission (Dec. 13, 1996)) (enclosing a business plan identifying $600 million in cost savings that could provide a "substantial return" on the "investment needed to put the North Carolina facility into operation").

I thus cannot conclude, as the majority does, that the Compact's rotational design, as I understand it, is "foolish." *Ante*, at 349. Rather, the Compact's structure represents what, in my view, was an understandable decision by the contracting States, all of whom needed a waste disposal facility, to bind themselves together so that each would take a turn "bear[ing] the cos[t] of building" the necessary facility. Preliminary Report of Special Master 21 (citing Art. 4(K), 99 Stat. 1876); see Brief for Rocky Mountain Low-Level Radioactive Waste Compact Board et al. as *Amici Curiae* 16–18.

This rotational approach is surely a sensible solution to the problems caused by the widespread existence of low-level nuclear waste and the political unpopularity of building the necessary facilities to house it. See *id.*, at 13–16; *New York* v. *United States*, 505 U. S. 144, 149–151 (1992).

The only contrary evidence—*i. e.*, that indicates that North Carolina did not bear ultimate funding responsibility—consists of the fact that the Commission voluntarily advanced North Carolina nearly $80 million between 1988 and 1998 in order to help it defray its costs. Second Report 16. The Court believes that this "course of performance" demonstrates that, once the Commission turned off its monetary spigot, North Carolina was no longer required to do anything further. *Ante*, at 346–347. But why? If I advance my builder *half* the cost of a building, I have not thereby promised to advance him the *whole* cost. This is particularly true when the contract says I am responsible for *none* of the cost of the building. At the very least, something more in the circumstances would have to show that additional expenditure had become a reasonable expectation.

In this case, nothing suggests that North Carolina could reasonably expect further financing assistance. Indeed, I can find nothing in the majority's opinion, or the record, that suggests that the Commission or the other Compact States intended to let North Carolina off the hook. And numerous documents indicate precisely the opposite—that despite the Commission's funding assistance, North Carolina was still responsible for funding the project. See, *e. g.*, App. 63 (Resolution (Feb. 9, 1988)) ("[T]he Commission, although not obligated to do so under the Compact," provides funding for North Carolina); *id.*, at 215 (Letter from Richard S. Hodes, M. D., Chairman, Southeast Compact Commission, to James B. Hunt, Governor of North Carolina (Jan. 5, 1996)) ("At some point, Commission funds will no longer be available to North Carolina . . . , and North Carolina will need to make alternate plans . . . "); *id.*, at 75 (Press Release by

James G. Martin, Governor of North Carolina (Nov. 8, 1989)) ("'The task of siting and operating a low-level radioactive waste disposal facility is a commitment the state of North Carolina has made and one which I am personally committed to keeping'"); *id.*, at 92 (Letter from James G. Martin, Governor of North Carolina, to Carrol A. Campbell, Jr., Governor of South Carolina (Oct. 25, 1990)) ("North Carolina remains committed to fulfilling its obligations to the Compact to serve as the next host state"); *id.*, at 183 (Letter from James B. Hunt, Jr., Governor of North Carolina, to David M. Beasley, Governor of South Carolina (Mar. 14, 1995)) ("Let me assure you that North Carolina is committed to honoring its obligation to the Compact"); Statement of Undisputed Material Facts ¶¶ 28, 33, 39 (other public statements about North Carolina's commitment to building a facility).

Without better evidence of a reallocation of funding responsibility, I can only conclude that North Carolina remained under an obligation to "take appropriate steps" at all times relevant to this case. And North Carolina admittedly took *no steps* towards building a disposal facility from December 1997 to July 1999: It did no indepth study of the further financing that might be necessary; it made no serious effort to look for alternative funding; the Executive of the State did not ask its legislature for any appropriation. Rather, North Carolina simply withdrew from the Compact. *Ante*, at 337.

Of course, North Carolina was free to withdraw from the Compact. Art. 7(G), 99 Stat. 1879–1880. But that fact does not repair what, in my view, was a breach of a key contractual provision. See *Franconia Associates* v. *United States*, 536 U. S. 129, 142–143 (2002) ("Failure by the promisor to perform . . . establishes an immediate breach"); Restatement (Second) of Contracts § 235(2) (1979) ("When performance of a duty under a contract is due *any non-performance* is a breach" (emphasis added)); 2 Farnsworth § 8.8, at 471.

With respect, I dissent.

Syllabus

BERGHUIS, WARDEN *v.* THOMPKINS

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

No. 08–1470. Argued March 1, 2010—Decided June 1, 2010

After advising respondent Thompkins of his rights, in full compliance with *Miranda* v. *Arizona*, 384 U. S. 436, Detective Helgert and another Michigan officer interrogated him about a shooting in which one victim died. At no point did Thompkins say that he wanted to remain silent, that he did not want to talk with the police, or that he wanted an attorney. He was largely silent during the 3-hour interrogation, but near the end, he answered "yes" when asked if he prayed to God to forgive him for the shooting. He moved to suppress his statements, claiming that he had invoked his Fifth Amendment right to remain silent, that he had not waived that right, and that his inculpatory statements were involuntary. The trial court denied the motion. At trial on first-degree murder and other charges, the prosecution called Eric Purifoy, who drove the van in which Thompkins and a third accomplice were riding at the time of the shooting, and who had been convicted of firearm offenses but acquitted of murder and assault. Thompkins' defense was that Purifoy was the shooter. Purifoy testified that he did not see who fired the shots. During closing arguments, the prosecution suggested that Purifoy lied about not seeing the shooter and pondered whether Purifoy's jury had made the right decision. Defense counsel did not ask the court to instruct the jury that it could consider evidence of the outcome of Purifoy's trial only to assess his credibility, not to establish Thompkins' guilt. The jury found Thompkins guilty, and he was sentenced to life in prison without parole. In denying his motion for a new trial, the trial court rejected as nonprejudicial his ineffective-assistance-of-counsel claim for failure to request a limiting instruction about the outcome of Purifoy's trial. On appeal, the Michigan Court of Appeals rejected both Thompkins' *Miranda* and his ineffective-assistance claims. The Federal District Court denied his subsequent habeas request, reasoning that Thompkins did not invoke his right to remain silent and was not coerced into making statements during the interrogation, and that it was not unreasonable, for purposes of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), see 28 U. S. C. § 2254(d)(1), for the State Court of Appeals to determine that he had waived his right to remain silent. The Sixth Circuit reversed, holding that the state court was

unreasonable in finding an implied waiver of Thompkins' right to remain silent and in rejecting his ineffective-assistance-of-counsel claim.

Held:

1. The state court's decision rejecting Thompkins' *Miranda* claim was correct under *de novo* review and therefore necessarily reasonable under AEDPA's more deferential standard of review. Pp. 380–389.

(a) Thompkins' silence during the interrogation did not invoke his right to remain silent. A suspect's *Miranda* right to counsel must be invoked "unambiguously." *Davis* v. *United States*, 512 U. S. 452, 459. If the accused makes an "ambiguous or equivocal" statement or no statement, the police are not required to end the interrogation, *ibid.*, or ask questions to clarify the accused's intent, *id.*, at 461–462. There is no principled reason to adopt different standards for determining when an accused has invoked the *Miranda* right to remain silent and the *Miranda* right to counsel at issue in *Davis*. Both protect the privilege against compulsory self-incrimination by requiring an interrogation to cease when either right is invoked. The unambiguous invocation requirement results in an objective inquiry that "avoid[s] difficulties of proof and . . . provide[s] guidance to officers" on how to proceed in the face of ambiguity. *Davis*, *supra*, at 458–459. Had Thompkins said that he wanted to remain silent or that he did not want to talk, he would have invoked his right to end the questioning. He did neither. Pp. 380–382.

(b) Thompkins waived his right to remain silent when he knowingly and voluntarily made a statement to police. A waiver must be "the product of a free and deliberate choice rather than intimidation, coercion, or deception" and "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Moran* v. *Burbine*, 475 U. S. 412, 421. Such a waiver may be "implied" through a "defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver." *North Carolina* v. *Butler*, 441 U. S. 369, 373. If the State establishes that a *Miranda* warning was given and that it was understood by the accused, an accused's uncoerced statement establishes an implied waiver. The record here shows that Thompkins waived his right to remain silent. First, the lack of any contention that he did not understand his rights indicates that he knew what he gave up when he spoke. See *Burbine*, *supra*, at 421. Second, his answer to the question about God is a "course of conduct indicating waiver" of that right. *Butler*, *supra*, at 373. Had he wanted to remain silent, he could have said nothing in response or unambiguously invoked his *Miranda* rights, ending the interrogation. That he made a statement nearly three hours after receiving a *Miranda* warning does not overcome the fact that he engaged in

a course of conduct indicating waiver. Third, there is no evidence that his statement was coerced. See *Burbine*, *supra*, at 421. He does not claim that police threatened or injured him or that he was fearful. The interrogation took place in a standard-sized room in the middle of the day, and there is no authority for the proposition that a 3-hour interrogation is inherently coercive. Cf. *Colorado* v. *Connelly*, 479 U. S. 157, 163–164, n. 1. The fact that the question referred to religious beliefs also does not render his statement involuntary. *Id.*, at 170. Pp. 382–387.

(c) Thompkins argues that, even if his answer to Helgert could constitute a waiver of his right to remain silent, the police were not allowed to question him until they first obtained a waiver. However, a rule requiring a waiver at the outset would be inconsistent with *Butler*'s holding that courts can infer a waiver "from the actions and words of the person interrogated." 441 U. S., at 373. Any waiver, express or implied, may be contradicted by an invocation at any time, terminating further interrogation. When the suspect knows that *Miranda* rights can be invoked at any time, he or she can reassess his or her immediate and long-term interests as the interrogation progresses. After giving a *Miranda* warning, police may interrogate a suspect who has neither invoked nor waived *Miranda* rights. Thus, the police were not required to obtain a waiver of Thompkins' *Miranda* rights before interrogating him. Pp. 387–389.

2. Even if his counsel provided ineffective assistance, Thompkins cannot show prejudice under a *de novo* review of this record. To establish ineffective assistance, a defendant "must show both deficient performance . . . and prejudice." *Knowles* v. *Mirzayance*, 556 U. S. 111, 122. To establish prejudice, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *Strickland* v. *Washington*, 466 U. S. 668, 694, considering "the totality of the evidence before the judge or jury," *id.*, at 695. Here, the Sixth Circuit did not account for the other evidence presented against Thompkins. The state court rejected his claim that he was prejudiced by evidence of Purifoy's earlier conviction. Even if it used an incorrect legal standard, this Court need not determine whether AEDPA's deferential standard of review applies here, since Thompkins cannot show prejudice under *de novo* review, a more favorable standard for him. *De novo* review can be used in this case because a habeas petitioner will not be entitled to relief if his or her claim is rejected on *de novo* review. See § 2254(a). Assuming that failure to request a limiting instruction here was deficient representation, Thompkins cannot show prejudice, for the record shows that it was not reasonably likely that such an instruction would have made any

difference in light of other evidence of guilt. The surviving victim identified Thompkins as the shooter, and the identification was supported by a surveillance camera photograph. A friend testified that Thompkins confessed to him, and the details of that confession were corroborated by evidence that Thompkins stripped and abandoned the van after the shooting. The jury, moreover, was capable of assessing Purifoy's credibility, as it was instructed to do. Pp. 389–391.

547 F. 3d 572, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, THOMAS, and ALITO, JJ., joined. SOTOMAYOR, J., filed a dissenting opinion, in which STEVENS, GINSBURG, and BREYER, JJ., joined, *post*, p. 391.

B. Eric Restuccia, Solicitor General of Michigan, argued the cause for petitioner. With him on the briefs were *Michael A. Cox*, Attorney General, and *Brad H. Beaver* and *William E. Molner*, Assistant Attorneys General.

Nicole A. Saharsky argued the cause for the United States as *amicus curiae* urging reversal. With her on the brief were *Solicitor General Kagan*, *Assistant Attorney General Breuer*, *Deputy Solicitor General Dreeben*, and *Deborah Watson*.

Elizabeth L. Jacobs argued the cause and filed a brief for respondent.*

JUSTICE KENNEDY delivered the opinion of the Court.

The United States Court of Appeals for the Sixth Circuit, in a habeas corpus proceeding challenging a Michigan conviction for first-degree murder and certain other offenses, ruled that there had been two separate constitutional errors in the trial that led to the jury's guilty verdict. First, the Court

*Briefs of *amici curiae* urging reversal were filed for the Criminal Justice Legal Foundation by *Kent S. Scheidegger;* and for Wayne County, Michigan, by *Kym L. Worthy* and *Timothy A. Baughman.*

Jonathan L. Abram, *Catherine E. Stetson*, *Christopher T. Handman*, *Jonathan D. Hacker*, and *Steven R. Shapiro* filed a brief for the National Association of Criminal Defense Lawyers et al. as *amici curiae* urging affirmance.

of Appeals determined that a statement by the accused, relied on at trial by the prosecution, had been elicited in violation of *Miranda* v. *Arizona*, 384 U. S. 436 (1966). Second, it found that failure to ask for an instruction relating to testimony from an accomplice was ineffective assistance by defense counsel. See *Strickland* v. *Washington*, 466 U. S. 668 (1984). Both of these contentions had been rejected in Michigan courts and in the habeas corpus proceedings before the United States District Court. Certiorari was granted to review the decision by the Court of Appeals on both points. The warden of a Michigan correctional facility is the petitioner here, and Van Chester Thompkins, who was convicted, is the respondent.

I

A

On January 10, 2000, a shooting occurred outside a mall in Southfield, Michigan. Among the victims was Samuel Morris, who died from multiple gunshot wounds. The other victim, Frederick France, recovered from his injuries and later testified. Thompkins, who was a suspect, fled. About one year later he was found in Ohio and arrested there.

Two Southfield police officers traveled to Ohio to interrogate Thompkins, then awaiting transfer to Michigan. The interrogation began around 1:30 p.m. and lasted about three hours. The interrogation was conducted in a room that was 8 by 10 feet, and Thompkins sat in a chair that resembled a school desk (it had an arm on it that swings around to provide a surface to write on). App. 144a–145a. At the beginning of the interrogation, one of the officers, Detective Helgert, presented Thompkins with a form derived from the *Miranda* rule. It stated:

> "NOTIFICATION OF CONSTITUTIONAL RIGHTS AND STATEMENT
>
> "1. You have the right to remain silent.

"2. Anything you say can and will be used against you in a court of law.
"3. You have a right to talk to a lawyer before answering any questions and you have the right to have a lawyer present with you while you are answering any questions.
"4. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning, if you wish one.
"5. You have the right to decide at any time before or during questioning to use your right to remain silent and your right to talk with a lawyer while you are being questioned." Brief for Petitioner 60 (some capitalization omitted).

Helgert asked Thompkins to read the fifth warning out loud. App. 8a. Thompkins complied. Helgert later said this was to ensure that Thompkins could read, and Helgert concluded that Thompkins understood English. *Id.*, at 9a. Helgert then read the other four *Miranda* warnings out loud and asked Thompkins to sign the form to demonstrate that he understood his rights. App. 8a–9a. Thompkins declined to sign the form. The record contains conflicting evidence about whether Thompkins then verbally confirmed that he understood the rights listed on the form. Compare *id.*, at 9a (at a suppression hearing, Helgert testified that Thompkins verbally confirmed that he understood his rights), with *id.*, at 148a (at trial, Helgert stated, "I don't know that I orally asked him" whether Thompkins understood his rights).

Officers began an interrogation. At no point during the interrogation did Thompkins say that he wanted to remain silent, that he did not want to talk with the police, or that he wanted an attorney. *Id.*, at 10a. Thompkins was "[l]argely" silent during the interrogation, which lasted about three hours. *Id.*, at 19a. He did give a few limited verbal responses, however, such as "yeah," "no," or "I don't know." And on occasion he communicated by nodding his

head. *Id.*, at 23a. Thompkins also said that he "didn't want a peppermint" that was offered to him by the police and that the chair he was "sitting in was hard." *Id.*, at 152a.

About 2 hours and 45 minutes into the interrogation, Helgert asked Thompkins, "Do you believe in God?" *Id.*, at 11a, 153a. Thompkins made eye contact with Helgert and said "Yes," as his eyes "well[ed] up with tears." *Id.*, at 11a. Helgert asked, "Do you pray to God?" Thompkins said "Yes." *Id.*, at 11a, 153a. Helgert asked, "Do you pray to God to forgive you for shooting that boy down?" *Id.*, at 153a. Thompkins answered "Yes" and looked away. *Ibid.* Thompkins refused to make a written confession, and the interrogation ended about 15 minutes later. *Id.*, at 11a.

Thompkins was charged with first-degree murder, assault with intent to commit murder, and certain firearms-related offenses. He moved to suppress the statements made during the interrogation. He argued that he had invoked his Fifth Amendment right to remain silent, requiring police to end the interrogation at once, see *Michigan* v. *Mosley*, 423 U. S. 96, 103 (1975) (citing *Miranda*, 384 U. S., at 474), that he had not waived his right to remain silent, and that his inculpatory statements were involuntary. The trial court denied the motion.

At trial, the prosecution's theory was that Thompkins shot the victims from the passenger seat of a van driven by Eric Purifoy. Purifoy testified that he had been driving the van and that Thompkins was in the passenger seat while another man, one Myzell Woodward, was in the back. The defense strategy was to pin the blame on Purifoy. Purifoy testified he did not see who fired the weapon because the van was stopped and he was bending over near the floor when shots were fired. Purifoy explained that, just after the shooting, Thompkins, holding a pistol, told Purifoy, "What the hell you doing? Pull off." Purifoy then drove away from the scene. App. 170a.

So that the Thompkins jury could assess Purifoy's credibility and knowledge, the prosecution elicited testimony from Purifoy that he had been tried earlier for the shooting under an aiding-and-abetting theory. Purifoy and Detective Helgert testified that a jury acquitted him of the murder and assault charges, convicted him of carrying a concealed weapon in a motor vehicle, and hung on two other firearms offenses to which he later pleaded guilty. At Purifoy's trial, the prosecution had argued that Purifoy was the driver and Thompkins was the shooter. This was consistent with the prosecution's argument at Thompkins' trial.

After Purifoy's trial had ended—but before Thompkins' trial began—Purifoy sent Thompkins some letters. The letters expressed Purifoy's disappointment that Thompkins' family thought Purifoy was a "snitch" and a "rat." *Id.*, at 179a–180a. In one letter Purifoy offered to send a copy of his trial transcript to Thompkins as proof that Purifoy did not place the blame on Thompkins for the shooting. *Id.*, at 180a. The letters also contained statements by Purifoy that claimed they were both innocent. *Id.*, at 178a–179a. At Thompkins' trial, the prosecution suggested that one of Purifoy's letters appeared to give Thompkins a trial strategy. It was, the prosecution suggested, that Woodward shot the victims, allowing Purifoy and Thompkins to say they dropped to the floor when the shooting started. *Id.*, at 187a–189a.

During closing arguments, the prosecution suggested that Purifoy lied when he testified that he did not see Thompkins shoot the victims:

> "Did Eric Purifoy's Jury make the right decision? I'm not here to judge that. You are not bound by what his Jury found. Take his testimony for what it was, [a] twisted attempt to help not just an acquaintance but his tight buddy." *Id.*, at 202a.

Defense counsel did not object. Defense counsel also did not ask for an instruction informing the jury that it could consider evidence of the outcome of Purifoy's trial only to assess Purifoy's credibility, not to establish Thompkins' guilt.

The jury found Thompkins guilty on all counts. He was sentenced to life in prison without parole.

B

The trial court denied a motion for new trial filed by Thompkins' appellate counsel. The trial court rejected the claim of ineffective assistance of trial counsel for failure to ask for a limiting instruction regarding the outcome of Purifoy's trial, reasoning that this did not prejudice Thompkins. *Id.*, at 236a.

Thompkins appealed this ruling, along with the trial court's refusal to suppress his pretrial statements under *Miranda*. The Michigan Court of Appeals rejected the *Miranda* claim, ruling that Thompkins had not invoked his right to remain silent and had waived it. It also rejected the ineffective-assistance-of-counsel claim, finding that Thompkins failed to show that evidence of Purifoy's conviction for firearms offenses resulted in prejudice. *People* v. *Thompkins*, No. 242478, (Feb. 3, 2004), App. to Pet. for Cert. 74a–82a. The Michigan Supreme Court denied discretionary review. 471 Mich. 866, 683 N. W. 2d 676 (2004) (table).

Thompkins filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Michigan. The District Court rejected Thompkins' *Miranda* and ineffective-assistance claims. App. to Pet. for Cert. 39a–72a. It noted that, under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), a federal court cannot grant a petition for a writ of habeas corpus unless the state court's adjudication of the merits was "contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U. S. C. § 2254(d)(1). The District Court reasoned that Thompkins did not invoke his right to remain silent and was not coerced into making statements

during the interrogation. It held further that the Michigan Court of Appeals was not unreasonable in determining that Thompkins had waived his right to remain silent.

The United States Court of Appeals for the Sixth Circuit reversed, ruling for Thompkins on both his *Miranda* and ineffective-assistance-of-counsel claims. 547 F. 3d 572 (2008). The Court of Appeals ruled that the state court, in rejecting Thompkins' *Miranda* claim, unreasonably applied clearly established federal law and based its decision on an unreasonable determination of the facts. See 28 U. S. C. § 2254(d). The Court of Appeals acknowledged that a waiver of the right to remain silent need not be express, as it can be "'inferred from the actions and words of the person interrogated.'" 547 F. 3d, at 582 (quoting *North Carolina* v. *Butler*, 441 U. S. 369, 373 (1979)). The panel held, nevertheless, that the state court was unreasonable in finding an implied waiver in the circumstances here. The Court of Appeals found that the state court unreasonably determined the facts because "the evidence demonstrates that Thompkins was silent for two hours and forty-five minutes." 547 F. 3d, at 586. According to the Court of Appeals, Thompkins' "persistent silence for nearly three hours in response to questioning and repeated invitations to tell his side of the story offered a clear and unequivocal message to the officers: Thompkins did not wish to waive his rights." *Id.*, at 588.

The Court of Appeals next determined that the state court unreasonably applied clearly established federal law by rejecting Thompkins' ineffective-assistance-of-counsel claim based on counsel's failure to ask for a limiting instruction regarding Purifoy's acquittal. The Court of Appeals asserted that because Thompkins' central strategy was to pin the blame on Purifoy, there was a reasonable probability that the result of Thompkins' trial would have been different if there had been a limiting instruction regarding Purifoy's acquittal.

We granted certiorari. 557 U. S. 965 (2009).

II

Under AEDPA, a federal court may not grant a habeas corpus application "with respect to any claim that was adjudicated on the merits in State court proceedings," 28 U. S. C. § 2254(d), unless the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," § 2254(d)(1), or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," § 2254(d)(2). See *Knowles* v. *Mirzayance*, 556 U. S. 111, 114 (2009). The relevant state-court decision here is the Michigan Court of Appeals' decision affirming Thompkins' conviction and rejecting his *Miranda* and ineffective-assistance-of-counsel claims on the merits.

III

The *Miranda* Court formulated a warning that must be given to suspects before they can be subjected to custodial interrogation. The substance of the warning still must be given to suspects today. A suspect in custody must be advised as follows:

> "He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." 384 U. S., at 479.

All concede that the warning given in this case was in full compliance with these requirements. The dispute centers on the response—or nonresponse—from the suspect.

A

Thompkins makes various arguments that his answers to questions from the detectives were inadmissible. He first

contends that he "invoke[d] his privilege" to remain silent by not saying anything for a sufficient period of time, so the interrogation should have "cease[d]" before he made his inculpatory statements. *Id.*, at 474; see *Mosley*, 423 U. S., at 103 (police must "'scrupulously hono[r]'" this "critical safeguard" when the accused invokes his or her "'right to cut off questioning'" (quoting *Miranda*, *supra*, at 474, 479)).

This argument is unpersuasive. In the context of invoking the *Miranda* right to counsel, the Court in *Davis* v. *United States*, 512 U. S. 452, 459 (1994), held that a suspect must do so "unambiguously." If an accused makes a statement concerning the right to counsel "that is ambiguous or equivocal" or makes no statement, the police are not required to end the interrogation, *ibid.*, or ask questions to clarify whether the accused wants to invoke his or her *Miranda* rights, 512 U. S., at 461–462.

The Court has not yet stated whether an invocation of the right to remain silent can be ambiguous or equivocal, but there is no principled reason to adopt different standards for determining when an accused has invoked the *Miranda* right to remain silent and the *Miranda* right to counsel at issue in *Davis*. See, *e. g.*, *Solem* v. *Stumes*, 465 U. S. 638, 648 (1984) ("[M]uch of the logic and language of *[Mosley]*," which discussed the *Miranda* right to remain silent, "could be applied to the invocation of the [*Miranda* right to counsel]"). Both protect the privilege against compulsory self-incrimination, *Miranda*, *supra*, at 467–473, by requiring an interrogation to cease when either right is invoked, *Mosley*, *supra*, at 103 (citing *Miranda*, *supra*, at 474); *Fare* v. *Michael C.*, 442 U. S. 707, 719 (1979).

There is good reason to require an accused who wants to invoke his or her right to remain silent to do so unambiguously. A requirement of an unambiguous invocation of *Miranda* rights results in an objective inquiry that "avoid[s] difficulties of proof and . . . provide[s] guidance to officers" on how to proceed in the face of ambiguity. *Davis*, 512 U. S.,

at 458–459. If an ambiguous act, omission, or statement could require police to end the interrogation, police would be required to make difficult decisions about an accused's unclear intent and face the consequence of suppression "if they guess wrong." *Id.*, at 461. Suppression of a voluntary confession in these circumstances would place a significant burden on society's interest in prosecuting criminal activity. See *id.*, at 459–461; *Moran* v. *Burbine*, 475 U. S. 412, 427 (1986). Treating an ambiguous or equivocal act, omission, or statement as an invocation of *Miranda* rights "might add marginally to *Miranda*'s goal of dispelling the compulsion inherent in custodial interrogation." *Burbine*, 475 U. S., at 425. But "as *Miranda* holds, full comprehension of the rights to remain silent and request an attorney are sufficient to dispel whatever coercion is inherent in the interrogation process." *Id.*, at 427; see *Davis*, *supra*, at 460.

Thompkins did not say that he wanted to remain silent or that he did not want to talk with the police. Had he made either of these simple, unambiguous statements, he would have invoked his "'right to cut off questioning.'" *Mosley*, *supra*, at 103 (quoting *Miranda*, *supra*, at 474). Here he did neither, so he did not invoke his right to remain silent.

B

We next consider whether Thompkins waived his right to remain silent. Even absent the accused's invocation of the right to remain silent, the accused's statement during a custodial interrogation is inadmissible at trial unless the prosecution can establish that the accused "in fact knowingly and voluntarily waived *[Miranda]* rights" when making the statement. *Butler*, 441 U. S., at 373. The waiver inquiry "has two distinct dimensions": waiver must be "voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception," and "made with a full awareness of both the nature of the right

being abandoned and the consequences of the decision to abandon it." *Burbine*, *supra*, at 421.

Some language in *Miranda* could be read to indicate that waivers are difficult to establish absent an explicit written waiver or a formal, express oral statement. *Miranda* said "a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained." 384 U. S., at 475; see *id.*, at 470 ("No effective waiver . . . can be recognized unless specifically made after the *[Miranda]* warnings . . . have been given"). In addition, the *Miranda* Court stated that "a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." *Id.*, at 475.

The course of decisions since *Miranda*, informed by the application of *Miranda* warnings in the whole course of law enforcement, demonstrates that waivers can be established even absent formal or express statements of waiver that would be expected in, say, a judicial hearing to determine if a guilty plea has been properly entered. Cf. Fed. Rule Crim. Proc. 11. The main purpose of *Miranda* is to ensure that an accused is advised of and understands the right to remain silent and the right to counsel. See *Davis*, *supra*, at 460; *Burbine*, *supra*, at 427. Thus, "[i]f anything, our subsequent cases have reduced the impact of the *Miranda* rule on legitimate law enforcement while reaffirming the decision's core ruling that unwarned statements may not be used as evidence in the prosecution's case in chief." *Dickerson* v. *United States*, 530 U. S. 428, 443–444 (2000).

One of the first cases to decide the meaning and import of *Miranda* with respect to the question of waiver was *North Carolina* v. *Butler*. The *Butler* Court, after discussing some of the problems created by the language in *Miranda*, established certain important propositions. *Butler* interpreted the *Miranda* language concerning the "heavy bur-

den" to show waiver, 384 U. S., at 475, in accord with usual principles of determining waiver, which can include waiver implied from all the circumstances. See *Butler*, *supra*, at 373, 376. And in a later case, the Court stated that this "heavy burden" is not more than the burden to establish waiver by a preponderance of the evidence. *Colorado* v. *Connelly*, 479 U. S. 157, 168 (1986).

The prosecution therefore does not need to show that a waiver of *Miranda* rights was express. An "implicit waiver" of the "right to remain silent" is sufficient to admit a suspect's statement into evidence. *Butler*, *supra*, at 376. *Butler* made clear that a waiver of *Miranda* rights may be implied through "the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver." 441 U. S., at 373. The Court in *Butler* therefore "retreated" from the "language and tenor of the *Miranda* opinion," which "suggested that the Court would require that a waiver . . . be 'specifically made.'" *Connecticut* v. *Barrett*, 479 U. S. 523, 531–532 (1987) (Brennan, J., concurring in judgment).

If the State establishes that a *Miranda* warning was given and the accused made an uncoerced statement, this showing, standing alone, is insufficient to demonstrate "a valid waiver" of *Miranda* rights. *Miranda*, *supra*, at 475. The prosecution must make the additional showing that the accused understood these rights. See *Colorado* v. *Spring*, 479 U. S. 564, 573–575 (1987); *Barrett*, *supra*, at 530; *Burbine*, 475 U. S., at 421–422. Cf. *Tague* v. *Louisiana*, 444 U. S. 469, 469, 471 (1980) *(per curiam)* (no evidence that accused understood his *Miranda* rights); *Carnley* v. *Cochran*, 369 U. S. 506, 516 (1962) (government could not show that accused "understandingly" waived his right to counsel in light of "silent record"). Where the prosecution shows that a *Miranda* warning was given and that it was understood by the accused, an accused's uncoerced statement establishes an implied waiver of the right to remain silent.

Although *Miranda* imposes on the police a rule that is both formalistic and practical when it prevents them from interrogating suspects without first providing them with a *Miranda* warning, see *Burbine*, 475 U. S., at 427, it does not impose a formalistic waiver procedure that a suspect must follow to relinquish those rights. As a general proposition, the law can presume that an individual who, with a full understanding of his or her rights, acts in a manner inconsistent with their exercise has made a deliberate choice to relinquish the protection those rights afford. See, *e. g.*, *Butler*, *supra*, at 372–376; *Connelly*, *supra*, at 169–170 ("There is obviously no reason to require more in the way of a 'voluntariness' inquiry in the *Miranda* waiver context than in the [due process] confession context"). The Court's cases have recognized that a waiver of *Miranda* rights need only meet the standard of *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938). See *Butler*, *supra*, at 374–375; *Miranda*, *supra*, at 475–476 (applying *Zerbst* standard of intentional relinquishment of a known right). As *Butler* recognized, 441 U. S., at 375–376, *Miranda* rights can therefore be waived through means less formal than a typical waiver on the record in a courtroom, cf. Fed. Rule Crim. Proc. 11, given the practical constraints and necessities of interrogation and the fact that *Miranda*'s main protection lies in advising defendants of their rights, see *Davis*, 512 U. S., at 460; *Burbine*, 475 U. S., at 427.

The record in this case shows that Thompkins waived his right to remain silent. There is no basis in this case to conclude that he did not understand his rights; and on these facts it follows that he chose not to invoke or rely on those rights when he did speak. First, there is no contention that Thompkins did not understand his rights; and from this it follows that he knew what he gave up when he spoke. See *id.*, at 421. There was more than enough evidence in the record to conclude that Thompkins understood his *Miranda* rights. Thompkins received a written copy of the *Miranda* warnings; Detective Helgert determined that Thompkins

could read and understand English; and Thompkins was given time to read the warnings. Thompkins, furthermore, read aloud the fifth warning, which stated that "you have the right to decide at any time before or during questioning to use your right to remain silent and your right to talk with a lawyer while you are being questioned." Brief for Petitioner 60 (capitalization omitted). He was thus aware that his right to remain silent would not dissipate after a certain amount of time and that police would have to honor his right to be silent and his right to counsel during the whole course of interrogation. Those rights, the warning made clear, could be asserted at any time. Helgert, moreover, read the warnings aloud.

Second, Thompkins' answer to Detective Helgert's question about whether Thompkins prayed to God for forgiveness for shooting the victim is a "course of conduct indicating waiver" of the right to remain silent. *Butler*, *supra*, at 373. If Thompkins wanted to remain silent, he could have said nothing in response to Helgert's questions, or he could have unambiguously invoked his *Miranda* rights and ended the interrogation. The fact that Thompkins made a statement about three hours after receiving a *Miranda* warning does not overcome the fact that he engaged in a course of conduct indicating waiver. Police are not required to rewarn suspects from time to time. Thompkins' answer to Helgert's question about praying to God for forgiveness for shooting the victim was sufficient to show a course of conduct indicating waiver. This is confirmed by the fact that before then Thompkins had given sporadic answers to questions throughout the interrogation.

Third, there is no evidence that Thompkins' statement was coerced. See *Burbine*, *supra*, at 421. Thompkins does not claim that police threatened or injured him during the interrogation or that he was in any way fearful. The interrogation was conducted in a standard-sized room in the middle of the afternoon. It is true that apparently he was in a

straight-backed chair for three hours, but there is no authority for the proposition that an interrogation of this length is inherently coercive. Indeed, even where interrogations of greater duration were held to be improper, they were accompanied, as this one was not, by other facts indicating coercion, such as an incapacitated and sedated suspect, sleep and food deprivation, and threats. Cf. *Connelly*, 479 U. S., at 163–164, n. 1. The fact that Helgert's question referred to Thompkins' religious beliefs also did not render Thompkins' statement involuntary. "[T]he Fifth Amendment privilege is not concerned 'with moral and psychological pressures to confess emanating from sources other than official coercion.'" *Id.*, at 170 (quoting *Oregon* v. *Elstad*, 470 U. S. 298, 305 (1985)). In these circumstances, Thompkins knowingly and voluntarily made a statement to police, so he waived his right to remain silent.

C

Thompkins next argues that, even if his answer to Detective Helgert could constitute a waiver of his right to remain silent, the police were not allowed to question him until they obtained a waiver first. *Butler* forecloses this argument. The *Butler* Court held that courts can infer a waiver of *Miranda* rights "from the actions and words of the person interrogated." 441 U. S., at 373. This principle would be inconsistent with a rule that requires a waiver at the outset. The *Butler* Court thus rejected the rule proposed by the *Butler* dissent, which would have "requir[ed] the police to obtain an express waiver of [*Miranda* rights] before proceeding with interrogation." *Id.*, at 379 (Brennan, J., dissenting). This holding also makes sense given that "the primary protection afforded suspects subject[ed] to custodial interrogation is the *Miranda* warnings themselves." *Davis*, *supra*, at 460. The *Miranda* rule and its requirements are met if a suspect receives adequate *Miranda* warnings, understands them, and has an opportunity to invoke the rights before giving any answers or admissions. Any waiver, express or implied,

may be contradicted by an invocation at any time. If the right to counsel or the right to remain silent is invoked at any point during questioning, further interrogation must cease.

Interrogation provides the suspect with additional information that can put his or her decision to waive, or not to invoke, into perspective. As questioning commences and then continues, the suspect has the opportunity to consider the choices he or she faces and to make a more informed decision, either to insist on silence or to cooperate. When the suspect knows that *Miranda* rights can be invoked at any time, he or she has the opportunity to reassess his or her immediate and long-term interests. Cooperation with the police may result in more favorable treatment for the suspect; the apprehension of accomplices; the prevention of continuing injury and fear; beginning steps toward relief or solace for the victims; and the beginning of the suspect's own return to the law and the social order it seeks to protect.

In order for an accused's statement to be admissible at trial, police must have given the accused a *Miranda* warning. See *Miranda*, 384 U. S., at 471. If that condition is established, the court can proceed to consider whether there has been an express or implied waiver of *Miranda* rights. *Id.*, at 476. In making its ruling on the admissibility of a statement made during custodial questioning, the trial court, of course, considers whether there is evidence to support the conclusion that, from the whole course of questioning, an express or implied waiver has been established. Thus, after giving a *Miranda* warning, police may interrogate a suspect who has neither invoked nor waived his or her *Miranda* rights. On these premises, it follows the police were not required to obtain a waiver of Thompkins' *Miranda* rights before commencing the interrogation.

D

In sum, a suspect who has received and understood the *Miranda* warnings, and has not invoked his *Miranda* rights,

waives the right to remain silent by making an uncoerced statement to the police. Thompkins did not invoke his right to remain silent and stop the questioning. Understanding his rights in full, he waived his right to remain silent by making a voluntary statement to the police. The police, moreover, were not required to obtain a waiver of Thompkins' right to remain silent before interrogating him. The state court's decision rejecting Thompkins' *Miranda* claim was thus correct under *de novo* review and therefore necessarily reasonable under the more deferential AEDPA standard of review, 28 U. S. C. § 2254(d). See *Knowles*, 556 U. S., at 123–124 (state court's decision was correct under *de novo* review and not unreasonable under AEDPA).

IV

The second issue in this case is whether Thompkins' counsel provided ineffective assistance by failing to request a limiting instruction regarding how the jury could consider the outcome of Purifoy's trial. To establish ineffective assistance of counsel, a defendant "must show both deficient performance by counsel and prejudice." *Id.,* at 122 (citing *Strickland*, 466 U. S., at 687). To establish prejudice, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U. S., at 694. In assessing prejudice, courts "must consider the totality of the evidence before the judge or jury." *Id.*, at 695. The Court of Appeals, however, neglected to take into account the other evidence presented against Thompkins.

The Court of Appeals determined that the state court was unreasonable, 28 U. S. C. § 2254(d), when it found that Thompkins suffered no prejudice from failure of defense counsel to request an instruction regarding Purifoy's earlier acquittal of the murder and assault charges. The state court had rejected Thompkins' claim that he was prejudiced by evidence of Purifoy's earlier conviction for firearms offenses, noting that "the record does not disclose an attempt to argue

that conviction for an improper purpose." App. to Pet. for Cert. 80a. It is unclear what prejudice standard the state court applied. The Court of Appeals ruled that the state court used the incorrect standard for assessing prejudice under *Strickland* because "[q]uestions of the prosecution's purpose or intent are completely irrelevant in . . . analyzing whether an error resulted in prejudice, which by definition concerns the error's effect upon the outcome." 547 F. 3d, at 591–592 (emphasis deleted).

Even if the state court used an incorrect legal standard, we need not determine whether AEDPA's deferential standard of review, 28 U. S. C. § 2254(d), applies in this situation. Cf. *Williams* v. *Taylor*, 529 U. S. 362, 397–398 (2000). That is because, even if AEDPA deference does not apply, Thompkins cannot show prejudice under *de novo* review, the more favorable standard of review for Thompkins. Courts cannot grant writs of habeas corpus under § 2254 by engaging only in *de novo* review when it is unclear whether AEDPA deference applies, § 2254(d). In those situations, courts must resolve whether AEDPA deference applies, because if it does, a habeas petitioner may not be entitled to a writ of habeas corpus under § 2254(d). Courts can, however, deny writs of habeas corpus under § 2254 by engaging in *de novo* review when it is unclear whether AEDPA deference applies, because a habeas petitioner will not be entitled to a writ of habeas corpus if his or her claim is rejected on *de novo* review, see § 2254(a).

It seems doubtful that failure to request the instruction about the earlier acquittal or conviction was deficient representation; but on the assumption that it was, on this record Thompkins cannot show prejudice. The record establishes that it was not reasonably likely that the instruction would have made any difference in light of all the other evidence of guilt. The surviving victim, Frederick France, identified Thompkins as the shooter, and the identification was supported by a photograph taken from a surveillance camera.

Thompkins' friend Omar Stephens testified that Thompkins confessed to him during a phone conversation, and the details of that confession were corroborated by evidence that Thompkins stripped the van and abandoned it after the shooting. The jury, moreover, was capable of assessing Purifoy's credibility, as it was instructed to do. The jury in Thompkins' case could have concluded that the earlier jury in Purifoy's case made a mistake, or alternatively, that Purifoy was not in fact guilty of the crime for which he had been charged. There was ample evidence in the record to support Thompkins' guilt under either theory, and his jury was instructed to weigh all of the evidence in determining whether there was guilt beyond a reasonable doubt. Under our *de novo* review of this record, Thompkins cannot show prejudice.

* * *

The judgment of the Court of Appeals is reversed, and the case is remanded with instructions to deny the petition.

It is so ordered.

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

The Court concludes today that a criminal suspect waives his right to remain silent if, after sitting tacit and uncommunicative through nearly three hours of police interrogation, he utters a few one-word responses. The Court also concludes that a suspect who wishes to guard his right to remain silent against such a finding of "waiver" must, counterintuitively, speak—and must do so with sufficient precision to satisfy a clear-statement rule that construes ambiguity in favor of the police. Both propositions mark a substantial retreat from the protection against compelled self-incrimination that *Miranda* v. *Arizona*, 384 U. S. 436 (1966), has long provided during custodial interrogation. The broad rules the Court announces today are also trou-

bling because they are unnecessary to decide this case, which is governed by the deferential standard of review set forth in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U. S. C. § 2254(d). Because I believe Thompkins is entitled to relief under AEDPA on the ground that his statements were admitted at trial without the prosecution having carried its burden to show that he waived his right to remain silent; because longstanding principles of judicial restraint counsel leaving for another day the questions of law the Court reaches out to decide; and because the Court's answers to those questions do not result from a faithful application of our prior decisions, I respectfully dissent.

I

We granted certiorari to review the judgment of the Court of Appeals for the Sixth Circuit, which held that Thompkins was entitled to habeas relief under both *Miranda* and *Strickland* v. *Washington*, 466 U. S. 668 (1984). 547 F. 3d 572 (2008). As to the *Miranda* claims, Thompkins argues first that through his conduct during the 3-hour custodial interrogation he effectively invoked his right to remain silent, requiring police to cut off questioning in accordance with *Miranda* and *Michigan* v. *Mosley*, 423 U. S. 96 (1975). Thompkins also contends his statements were in any case inadmissible because the prosecution failed to meet its heavy burden under *Miranda* of proving that he knowingly and intelligently waived his right to remain silent. The Sixth Circuit agreed with Thompkins as to waiver and declined to reach the question of invocation. 547 F. 3d, at 583–584, n. 4. In my view, even if Thompkins cannot prevail on his invocation claim under AEDPA, he is entitled to relief as to waiver. Because I would affirm the judgment of the Sixth Circuit on that ground, I would not reach Thompkins' claim that he received constitutionally ineffective assistance of counsel.

The strength of Thompkins' *Miranda* claims depends in large part on the circumstances of the 3-hour interrogation,

at the end of which he made inculpatory statements later introduced at trial. The Court's opinion downplays record evidence that Thompkins remained almost completely silent and unresponsive throughout that session. One of the interrogating officers, Detective Helgert, testified that although Thompkins was administered *Miranda* warnings, the last of which he read aloud, Thompkins expressly declined to sign a written acknowledgment that he had been advised of and understood his rights. There is conflicting evidence in the record about whether Thompkins ever verbally confirmed understanding his rights.[1] The record contains no indication that the officers sought or obtained an express waiver.

As to the interrogation itself, Helgert candidly characterized it as "very, very one-sided" and "nearly a monologue." App. 10a, 17a. Thompkins was "[p]eculiar," "[s]ullen," and "[g]enerally quiet." *Id.*, at 149a. Helgert and his partner "did most of the talking," as Thompkins was "not verbally communicative" and "[l]argely" remained silent. *Id.*, at 149a, 17a, 19a. To the extent Thompkins gave any response, his answers consisted of "a word or two. A 'yeah,' or a 'no,' or 'I don't know.' . . . And sometimes . . . he simply sat down . . . with [his] head in [his] hands looking down. Sometimes . . . he would look up and make eye-contact would be the only response." *Id.*, at 23a–24a. After proceeding in this fashion for approximately 2 hours and 45 minutes, Helgert

[1] At the suppression hearing, Detective Helgert testified that after reading Thompkins the warnings, "I believe I asked him if he understood the Rights, and I think I got a verbal answer to that as a 'yes.'" App. 9a. In denying the motion to suppress, the trial court relied on that factual premise. *Id.*, at 26a. In his later testimony at trial, Helgert remembered the encounter differently. Asked whether Thompkins "indicate[d] that he understood [the warnings]" after they had been read, Helgert stated "I don't know that I orally asked him that question." *Id.*, at 148a. Nevertheless, the Michigan Court of Appeals stated that Thompkins verbally acknowledged understanding his rights, *People* v. *Thompkins*, No. 242478 (Feb. 3, 2004), App. to Pet. for Cert. 75a.

asked Thompkins three questions relating to his faith in God. The prosecution relied at trial on Thompkins' one-word answers of "yes." See *id.*, at 10a–11a.

Thompkins' nonresponsiveness is particularly striking in the context of the officers' interview strategy, later explained as conveying to Thompkins that "this was his opportunity to explain his side [of the story]" because "[e]verybody else, including [his] co-[d]efendants, had given their version," and asking him "[w]ho is going to speak up for you if you don't speak up for yourself?" *Id.*, at 10a, 21a. Yet, Helgert confirmed that the "*only* thing [Thompkins said] relative to his involvement [in the shooting]" occurred near the end of the interview—*i. e.*, in response to the questions about God. *Id.*, at 10a–11a (emphasis added). The only other responses Helgert could remember Thompkins giving were that "'[h]e didn't want a peppermint'" and "'the chair that he was sitting in was hard.'" *Id.*, at 152a. Nevertheless, the Michigan court concluded on this record that Thompkins had not invoked his right to remain silent because "he continued to talk with the officer, albeit sporadically," and that he voluntarily waived that right, *People* v. *Thompkins*, No. 242478, (Feb. 3, 2004), App. to Pet. for Cert. 75a.

Thompkins' federal habeas petition is governed by AEDPA, under which a federal court may not grant the writ unless the state court's adjudication of the merits of the claim at issue "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." §§2254(d)(1), (2).

The relevant clearly established federal law for purposes of §2254(d)(1) begins with our landmark *Miranda* decision, which "g[a]ve force to the Constitution's protection against compelled self-incrimination" by establishing "'certain procedural safeguards that require police to advise criminal sus-

pects of their rights under the Fifth and Fourteenth Amendments before commencing custodial interrogation,'" *Florida* v. *Powell*, 559 U. S. 50, 59 (2010) (quoting *Duckworth* v. *Eagan*, 492 U. S. 195, 201 (1989)). *Miranda* prescribed the now-familiar warnings that police must administer prior to questioning. See 384 U. S., at 479; *ante*, at 380. *Miranda* and our subsequent cases also require police to "respect the accused's decision to exercise the rights outlined in the warnings." *Moran* v. *Burbine*, 475 U. S. 412, 420 (1986). "If [an] individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent" or if he "states that he wants an attorney," the interrogation "must cease." 384 U. S., at 473–474.

Even when warnings have been administered and a suspect has not affirmatively invoked his rights, statements made in custodial interrogation may not be admitted as part of the prosecution's case in chief "unless and until" the prosecution demonstrates that an individual "knowingly and intelligently waive[d] [his] rights." *Id.*, at 479; accord, *ante*, at 382. "[A] heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." *Miranda*, 384 U. S., at 475. The government must satisfy the "high standar[d] of proof for the waiver of constitutional rights [set forth in] *Johnson* v. *Zerbst*, 304 U. S. 458 (1938)." *Ibid.*

The question whether a suspect has validly waived his right is "entirely distinct" as a matter of law from whether he invoked that right. *Smith* v. *Illinois*, 469 U. S. 91, 98 (1984) *(per curiam)*. The questions are related, however, in terms of the practical effect on the exercise of a suspect's rights. A suspect may at any time revoke his prior waiver of rights—or, closer to the facts of this case, guard against the possibility of a future finding that he implicitly waived his rights—by invoking the rights and thereby requiring the police to cease questioning. Accord, *ante*, at 387–388.

II

A

Like the Sixth Circuit, I begin with the question whether Thompkins waived his right to remain silent. Even if Thompkins did not invoke that right, he is entitled to relief because Michigan did not satisfy its burden of establishing waiver.

Miranda's discussion of the prosecution's burden in proving waiver speaks with particular clarity to the facts of this case and therefore merits reproducing at length:

> "If [an] interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. . . . Since the State is responsible for establishing the isolated circumstances under which [an] interrogation takes place and has the only means of making available corroborated evidence of warnings given during incommunicado interrogation, the burden is rightly on its shoulders.
>
> "An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver. But a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained." 384 U. S., at 475.

Miranda went further in describing the facts likely to satisfy the prosecution's burden of establishing the admissibility of statements obtained after a lengthy interrogation:

> "Whatever the testimony of the authorities as to waiver of rights by an accused, the fact of lengthy interrogation or incommunicado incarceration before a state-

> ment is made is strong evidence that the accused did not validly waive his rights. In these circumstances the fact that the individual eventually made a statement is consistent with the conclusion that the compelling influence of the interrogation finally forced him to do so. It is inconsistent with any notion of a voluntary relinquishment of the privilege." *Id.*, at 476.

This Court's decisions subsequent to *Miranda* have emphasized the prosecution's "heavy burden" in proving waiver. See, *e. g.*, *Tague* v. *Louisiana*, 444 U. S. 469, 470–471 (1980) *(per curiam); Fare* v. *Michael C.*, 442 U. S. 707, 724 (1979). We have also reaffirmed that a court may not presume waiver from a suspect's silence or from the mere fact that a confession was eventually obtained. See *North Carolina* v. *Butler*, 441 U. S. 369, 373 (1979).

Even in concluding that *Miranda* does not invariably require an express waiver of the right to silence or the right to counsel, this Court in *Butler* made clear that the prosecution bears a substantial burden in establishing an implied waiver. The Federal Bureau of Investigation had obtained statements after advising Butler of his rights and confirming that he understood them. When presented with a written waiver-of-rights form, Butler told the agents, "'I will talk to you but I am not signing any form.'" 441 U. S., at 371. He then made inculpatory statements, which he later sought to suppress on the ground that he had not expressly waived his right to counsel.

Although this Court reversed the state-court judgment concluding that the statements were inadmissible, we quoted at length portions of the *Miranda* opinion reproduced above. We cautioned that even an "express written or oral statement of waiver of the right to remain silent or of the right to counsel" is not "inevitably . . . sufficient to establish waiver," emphasizing that "[t]he question is . . . whether the defendant in fact knowingly and voluntarily waived the rights delineated in the *Miranda* case." 441 U. S., at 373. *Miranda*,

we observed, "unequivocally said . . . mere silence is not enough." 441 U. S., at 373. While we stopped short in *Butler* of announcing a *per se* rule that "the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver, may never support a conclusion that a defendant has waived his rights," we reiterated that "courts must presume that a defendant did not waive his rights; the prosecution's burden is great." *Ibid.*[2]

Rarely do this Court's precedents provide clearly established law so closely on point with the facts of a particular case. Together, *Miranda* and *Butler* establish that a court "must presume that a defendant did not waive his rights"; the prosecution bears a "heavy burden" in attempting to demonstrate waiver; the fact of a "lengthy interrogation" prior to obtaining statements is "strong evidence" against a finding of valid waiver; "mere silence" in response to questioning is "not enough"; and waiver may not be presumed "simply from the fact that a confession was in fact eventually obtained." *Miranda*, *supra*, at 475–476; *Butler*, *supra*, at 372–373.[3]

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[2] The Court cites *Colorado* v. *Connelly*, 479 U. S. 157, 168 (1986), for the proposition that the prosecution's "'heavy burden'" under *Miranda* "is not more than the burden to establish waiver by a preponderance of the evidence." *Ante*, at 384. *Connelly* did reject a clear and convincing evidence standard of proof in favor of a preponderance burden. But nothing in *Connelly* displaced the core presumption against finding a waiver of rights, and we have subsequently relied on *Miranda*'s characterization of the prosecution's burden as "heavy." See *Arizona* v. *Roberson*, 486 U. S. 675, 680 (1988).

[3] Likely reflecting the great weight of the prosecution's burden in proving implied waiver, many contemporary police training resources instruct officers to obtain a waiver of rights prior to proceeding at all with an interrogation. See, *e. g.*, F. Inbau, J. Reid, J. Buckley, & B. Jayne, Criminal Interrogation and Confessions 491 (4th ed. 2004) (hereinafter Inbau) ("Once [a] waiver is given, the police may proceed with the interrogation"); D. Zulawski & D. Wicklander, Practical Aspects of Interview and Interrogation 55 (2d ed. 2002) ("Only upon the waiver of th[e] *[Miranda]* rights by the suspect can an interrogation occur"); see also Brief for National

It is undisputed here that Thompkins never expressly waived his right to remain silent. His refusal to sign even an acknowledgment that he understood his *Miranda* rights evinces, if anything, an intent not to waive those rights. Cf. *United States* v. *Plugh*, 576 F. 3d 135, 142 (CA2 2009) (suspect's refusal to sign waiver-of-rights form "constituted an unequivocally negative answer to the question . . . whether he was willing to waive his rights"). That Thompkins did not make the inculpatory statements at issue until after approximately 2 hours and 45 minutes of interrogation serves as "strong evidence" against waiver. *Miranda* and *Butler* expressly preclude the possibility that the inculpatory statements themselves are sufficient to establish waiver.

In these circumstances, Thompkins' "actions and words" preceding the inculpatory statements simply do not evidence a "course of conduct indicating waiver" sufficient to carry the prosecution's burden. See *Butler*, *supra*, at 373.[4] Al-

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Association of Criminal Defense Lawyers et al. as *Amici Curiae* 11–12 (hereinafter NACDL Brief) (collecting authorities).

[4] Although such decisions are not controlling under AEDPA, it is notable that lower courts have similarly required a showing of words or conduct beyond inculpatory statements. See, *e. g.*, *United States* v. *Wallace*, 848 F. 2d 1464, 1475 (CA9 1988) (no implied waiver when warned suspect "maintained her silence for . . . perhap[s] as many as ten minutes" before answering a question); *McDonald* v. *Lucas*, 677 F. 2d 518, 521–522 (CA5 1982) (no implied waiver when defendant refused to sign waiver and there was "no evidence of words or actions implying a waiver, except the [inculpatory] statement"). Generally, courts have found implied waiver when a warned suspect has made incriminating statements "as part of a steady stream of speech or as part of a back-and-forth conversation with the police," or when a warned suspect who previously invoked his right "spontaneously recommences the dialogue with his interviewers." *Bui* v. *DiPaolo*, 170 F. 3d 232, 240 (CA1 1999) (citation and internal quotation marks omitted); see also *United States* v. *Smith*, 218 F. 3d 777, 781 (CA7 2000) (implied waiver where suspect "immediately began talking to the agents after refusing to sign the waiver form and continued to do so for an hour"); *United States* v. *Scarpa*, 897 F. 2d 63, 68 (CA2 1990) (implied waiver where warned suspect engaged in a "'relaxed and friendly'" conversation with officers during a 2-hour drive).

though the Michigan court stated that Thompkins "sporadically" participated in the interview, App. to Pet. for Cert. 75a, that court's opinion and the record before us are silent as to the subject matter or context of even a single question to which Thompkins purportedly responded, other than the exchange about God and the statements respecting the peppermint and the chair. Unlike in *Butler*, Thompkins made no initial declaration akin to "I will talk to you." See also 547 F. 3d, at 586–587 (case below) (noting that the case might be different if the record showed Thompkins had responded affirmatively to an invitation to tell his side of the story or described any particular question that Thompkins answered). Indeed, Michigan and the United States concede that no waiver occurred in this case until Thompkins responded "yes" to the questions about God. See Tr. of Oral Arg. 7, 30. I believe it is objectively unreasonable under our clearly established precedents to conclude the prosecution met its "heavy burden" of proof on a record consisting of three one-word answers, following 2 hours and 45 minutes of silence punctuated by a few largely nonverbal responses to unidentified questions.

B

Perhaps because our prior *Miranda* precedents so clearly favor Thompkins, the Court today goes beyond AEDPA's deferential standard of review and announces a new general principle of law. Any new rule, it must be emphasized, is unnecessary to the disposition of this case. If, in the Court's view, the Michigan court did not unreasonably apply our *Miranda* precedents in denying Thompkins relief, it should simply say so and reverse the Sixth Circuit's judgment on that ground. "It is a fundamental rule of judicial restraint . . . that this Court will not reach constitutional questions in advance of the necessity of deciding them." *Three Affiliated Tribes of Fort Berthold Reservation* v. *Wold Engineering, P. C.*, 467 U. S. 138, 157 (1984). Consistent with that rule, we have frequently declined to address questions beyond

what is necessary to resolve a case under AEDPA. See, *e. g.*, *Tyler* v. *Cain*, 533 U. S. 656, 667–668 (2001) (declining to address question where any statement by this Court would be "dictum" in light of AEDPA's statutory constraints on habeas review); cf. *Wiggins* v. *Smith*, 539 U. S. 510, 522 (2003) (noting that *Williams* v. *Taylor*, 529 U. S. 362 (2000), "made no new law" because the "case was before us on habeas review"). No necessity exists to justify the Court's broad announcement today.

The Court concludes that when *Miranda* warnings have been given and understood, "an accused's uncoerced statement establishes an implied waiver of the right to remain silent." *Ante*, at 384. More broadly still, the Court states that, "[a]s a general proposition, the law can presume that an individual who, with a full understanding of his or her rights, acts in a manner inconsistent with their exercise has made a deliberate choice to relinquish the protection those rights afford." *Ante*, at 385.

These principles flatly contradict our longstanding views that "a valid waiver will not be presumed . . . simply from the fact that a confession was in fact eventually obtained," *Miranda*, 384 U. S., at 475, and that "[t]he courts must presume that a defendant did not waive his rights," *Butler*, 441 U. S., at 373. Indeed, we have in the past summarily reversed a state-court decision that inverted *Miranda*'s antiwaiver presumption, characterizing the error as "readily apparent." *Tague*, 444 U. S., at 470–471. At best, the Court today creates an unworkable and conflicting set of presumptions that will undermine *Miranda*'s goal of providing "concrete constitutional guidelines for law enforcement agencies and courts to follow," 384 U. S., at 442. At worst, it overrules *sub silentio* an essential aspect of the protections *Miranda* has long provided for the constitutional guarantee against self-incrimination.

The Court's conclusion that Thompkins' inculpatory statements were sufficient to establish an implied waiver, *ante*, at

386–387, finds no support in *Butler*. *Butler* itself distinguished between a sufficient "course of conduct" and inculpatory statements, reiterating *Miranda*'s admonition that "'a valid waiver will not be presumed simply from . . . the fact that a confession was in fact eventually obtained.'" 441 U. S., at 373 (quoting *Miranda*, *supra*, at 475). Michigan suggests Butler's silence "'when advised of his right to the assistance of a lawyer,'" combined with our remand for the state court to apply the implied-waiver standard, shows that silence followed by statements can be a "'course of conduct.'" Brief for Petitioner 26 (quoting *Butler*, *supra*, at 371). But the evidence of implied waiver in *Butler* was worlds apart from the evidence in this case, because Butler unequivocally said "I will talk to you" after having been read *Miranda* warnings. Thompkins, of course, made no such statement.

The Court also relies heavily on *Burbine* in characterizing the scope of the prosecution's burden in proving waiver. Consistent with *Burbine*, the Court observes, the prosecution must prove that waiver was "'voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation'" and "'made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.'" *Ante*, at 382–383 (quoting 475 U. S., at 421). I agree with the Court's statement, so far as it goes. What it omits, however, is that the prosecution also bears an antecedent burden of showing there was, in fact, either an express waiver or a "course of conduct" sufficiently clear to support a finding of implied waiver. Nothing in *Burbine* even hints at removing that obligation. The question in that case, rather, was whether a suspect's multiple express waivers of his rights were invalid because police "misinformed an inquiring attorney about their plans concerning the suspect or because they failed to inform the suspect of the attorney's efforts to reach him." *Id.*, at 420; see also *Colorado* v. *Spring*, 479 U. S. 564, 573

(1987). The Court's analysis in *Burbine* was predicated on the existence of waiver in fact.

Today's dilution of the prosecution's burden of proof to the bare fact that a suspect made inculpatory statements after *Miranda* warnings were given and understood takes an unprecedented step away from the "high standards of proof for the waiver of constitutional rights" this Court has long demanded. *Miranda*, *supra*, at 475; cf. *Brewer* v. *Williams*, 430 U. S. 387, 404 (1977) ("[C]ourts indulge in every reasonable presumption against waiver"); *Zerbst*, 304 U. S., at 464. When waiver is to be inferred during a custodial interrogation, there are sound reasons to require evidence beyond inculpatory statements themselves. *Miranda* and our subsequent cases are premised on the idea that custodial interrogation is inherently coercive. See 384 U. S., at 455 ("Even without employing brutality, the 'third degree' or [other] specific strategems . . . the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals"); *Dickerson* v. *United States*, 530 U. S. 428, 435 (2000). Requiring proof of a course of conduct beyond the inculpatory statements themselves is critical to ensuring that those statements are voluntary admissions and not the dubious product of an overborne will.

Today's decision thus ignores the important interests *Miranda* safeguards. The underlying constitutional guarantee against self-incrimination reflects "many of our fundamental values and most noble aspirations," our society's "preference for an accusatorial rather than an inquisitorial system of criminal justice"; a "fear that self-incriminating statements will be elicited by inhumane treatment and abuses" and a resulting "distrust of self-deprecatory statements"; and a realization that while the privilege is "sometimes a shelter to the guilty, [it] is often a protection to the innocent." *Withrow* v. *Williams*, 507 U. S. 680, 692 (1993) (internal quotation marks omitted). For these reasons, we have observed, a criminal law system "which comes to depend on the 'confes-

sion' will, in the long run, be less reliable and more subject to abuses than a system relying on independent investigation." *Ibid.* (some internal quotation marks omitted). "By bracing against 'the possibility of unreliable statements in every instance of in-custody interrogation,' " *Miranda*'s prophylactic rules serve to " 'protect the fairness of the trial itself.' " 507 U. S., at 692 (quoting *Johnson* v. *New Jersey*, 384 U. S. 719, 730 (1966); *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 240 (1973)). Today's decision bodes poorly for the fundamental principles that *Miranda* protects.

III

Thompkins separately argues that his conduct during the interrogation invoked his right to remain silent, requiring police to terminate questioning. Like the Sixth Circuit, I would not reach this question because Thompkins is in any case entitled to relief as to waiver. But even if Thompkins would not prevail on his invocation claim under AEDPA's deferential standard of review, I cannot agree with the Court's much broader ruling that a suspect must clearly invoke his right to silence by speaking. Taken together with the Court's reformulation of the prosecution's burden of proof as to waiver, today's novel clear-statement rule for invocation invites police to question a suspect at length—notwithstanding his persistent refusal to answer questions—in the hope of eventually obtaining a single inculpatory response which will suffice to prove waiver of rights. Such a result bears little semblance to the "fully effective" prophylaxis, 384 U. S., at 444, that *Miranda* requires.

A

Thompkins' claim for relief under AEDPA rests on the clearly established federal law of *Miranda* and *Mosley*. In *Miranda*, the Court concluded that "[i]f [an] individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must

cease. . . . [A]ny statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise." 384 U. S., at 473–474. In *Mosley*, the Court said that a "critical safeguard" of the right to remain silent is a suspect's "'right to cut off questioning.'" 423 U. S., at 103 (quoting *Miranda*, *supra*, at 474). Thus, "the admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his 'right to cut off questioning' was 'scrupulously honored.'" 423 U. S., at 104.[5]

Thompkins contends that in refusing to respond to questions he effectively invoked his right to remain silent, such that police were required to terminate the interrogation prior to his inculpatory statements. In Michigan's view, Thompkins cannot prevail under AEDPA because this Court's precedents have not previously established whether a suspect's ambiguous statements or actions require the police to stop questioning. We have held that a suspect who has "'invoked his right to have counsel present . . . is not subject to further interrogation by the authorities until counsel has been made available to him, unless [he] initiates further communication, exchanges, or conversations with the police.'" *Maryland* v. *Shatzer*, 559 U. S. 98, 104 (2010) (quoting *Edwards* v. *Arizona*, 451 U. S. 477, 484–485 (1981)). Notwithstanding *Miranda*'s statement that "there can be no questioning" if a suspect "indicates in any manner . . . that he wishes to consult with an attorney," 384 U. S., at 444–445, the Court in *Davis* v. *United States*, 512 U. S. 452, 461 (1994),

[5] In holding that Mosley's right had been "'scrupulously honored,'" the Court observed that he was properly advised of his rights and indicated his understanding in writing; that police "immediately ceased" interrogation when Mosley stated he did not want to discuss the crime and allowed an "interval of more than two hours" to pass before reapproaching Mosley "at another location about an unrelated [crime]"; and that Mosley was readministered "full and complete *Miranda* warnings at the outset of the second interrogation" and had a "full and fair opportunity to exercise th[o]se options." 423 U. S., at 103–105.

established a clear-statement rule for invoking the right to counsel. After a suspect has knowingly and voluntarily waived his *Miranda* rights, Davis held, police may continue questioning "until and unless the suspect *clearly* requests an attorney." 512 U. S., at 461 (emphasis added).

Because this Court has never decided whether *Davis*' clear-statement rule applies to an invocation of the right to silence, Michigan contends, there was no clearly established federal law prohibiting the state court from requiring an unambiguous invocation. That the state court's decision was not objectively unreasonable is confirmed, in Michigan's view, by the number of Federal Courts of Appeals to have applied *Davis* to invocation of the right to silence. Brief for Petitioner 44.

Under AEDPA's deferential standard of review, it is indeed difficult to conclude that the state court's application of our precedents was objectively unreasonable. Although the duration and consistency of Thompkins' refusal to answer questions throughout the 3-hour interrogation provide substantial evidence in support of his claim, Thompkins did not remain absolutely silent, and this Court has not previously addressed whether a suspect can invoke the right to silence by remaining uncooperative and nearly silent for 2 hours and 45 minutes.

B

The Court, however, eschews this narrow ground of decision, instead extending *Davis* to hold that police may continue questioning a suspect until he unambiguously invokes his right to remain silent. Because Thompkins neither said "he wanted to remain silent" nor said "he did not want to talk with the police," the Court concludes, he did not clearly invoke his right to silence. *Ante,* at 380–382.[6]

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[6] The Court also ignores a second available avenue to avoid reaching the constitutional question. Because the Sixth Circuit declined to decide Thompkins' invocation claim, a remand would permit the lower court to

I disagree with this novel application of *Davis*. Neither the rationale nor holding of that case compels today's result. *Davis* involved the right to counsel, not the right to silence. The Court in *Davis* reasoned that extending *Edwards*' "rigid" prophylactic rule to ambiguous requests for a lawyer would transform *Miranda* into a "'wholly irrational obstacl[e] to legitimate police investigative activity'" by "needlessly prevent[ing] the police from questioning a suspect in the absence of counsel even if [he] did not wish to have a lawyer present." *Davis*, *supra*, at 460. But *Miranda* itself "distinguished between the procedural safeguards triggered by a request to remain silent and a request for an attorney." *Mosley*, 423 U. S., at 104, n. 10; accord, *Edwards*, *supra*, at 485. *Mosley* upheld the admission of statements when police immediately stopped interrogating a suspect who invoked his right to silence, but reapproached him after a 2-hour delay and obtained inculpatory responses relating to a different crime after administering fresh *Miranda* warnings. The different effects of invoking the rights are consistent with distinct standards for invocation. To the extent *Mosley* contemplates a more flexible form of prophylaxis than *Edwards*—and, in particular, does not categorically bar police from reapproaching a suspect who has invoked his right to remain silent—*Davis*' concern about "'wholly irrational obstacles'" to police investigation applies with less force.

In addition, the suspect's equivocal reference to a lawyer in *Davis* occurred only *after* he had given express oral and written waivers of his rights. *Davis*' holding is explicitly predicated on that fact. See 512 U. S., at 461 ("We therefore hold that, after a knowing and voluntary waiver of the *Miranda* rights, law enforcement officers may continue questioning until and unless the suspect clearly requests an attorney"). The Court ignores this aspect of *Davis*, as well as the decisions of numerous federal and state courts declining

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address the question in the first instance. Cf. *Cutter* v. *Wilkinson*, 544 U. S. 709, 718, n. 7 (2005).

to apply a clear-statement rule when a suspect has not previously given an express waiver of rights.[7]

In my mind, a more appropriate standard for addressing a suspect's ambiguous invocation of the right to remain silent is the constraint *Mosley* places on questioning a suspect who has invoked that right: The suspect's "'right to cut off questioning'" must be "'scrupulously honored.'" See 423 U. S., at 104. Such a standard is necessarily precautionary and fact specific. The rule would acknowledge that some statements or conduct are so equivocal that police may scrupulously honor a suspect's rights without terminating questioning—for instance, if a suspect's actions are reasonably understood to indicate a willingness to listen before deciding whether to respond. But other statements or actions—in particular, when a suspect sits silent throughout prolonged interrogation, long past the point when he could be deciding whether to respond—cannot reasonably be understood other than as an invocation of the right to remain silent. Under such circumstances, "scrupulous" respect for the suspect's rights will require police to terminate questioning under *Mosley*.[8]

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[7] See, *e. g.*, *United States* v. *Plugh*, 576 F. 3d 135, 143 (CA2 2009) ("*Davis* only provides guidance . . . [when] a defendant makes a claim that he *subsequently* invoked previously waived Fifth Amendment rights"); *United States* v. *Rodriguez*, 518 F. 3d 1072, 1074 (CA9 2008) (*Davis*' "'clear statement'" rule "applies only *after* the police have already obtained an unambiguous and unequivocal waiver of *Miranda* rights"); *State* v. *Tuttle*, 2002 SD 94, ¶ 14, 650 N. W. 2d 20, 28; *State* v. *Holloway*, 2000 ME 172, ¶ 12, 760 A. 2d 223, 228; *State* v. *Leyva*, 951 P. 2d 738, 743 (Utah 1997).

[8] Indeed, this rule appears to reflect widespread contemporary police practice. Thompkins' *amici* collect a range of training materials that instruct police not to engage in prolonged interrogation after a suspect has failed to respond to initial questioning. See NACDL Brief 32–34. One widely used police manual, for example, teaches that a suspect who "indicates," "even by silence itself," his unwillingness to answer questions "has obviously exercised his constitutional privilege against self-incrimination." Inbau 498.

To be sure, such a standard does not provide police with a bright-line rule. Cf. *ante*, at 381–382. But, as we have previously recognized, *Mosley* itself does not offer clear guidance to police about when and how interrogation may continue after a suspect invokes his rights. See *Solem* v. *Stumes*, 465 U. S. 638, 648 (1984); see also *Shatzer*, 559 U. S., at 119 (THOMAS, J., concurring in part and concurring in judgment). Given that police have for nearly 35 years applied *Mosley*'s fact-specific standard in questioning suspects who have invoked their right to remain silent; that our cases did not during that time resolve what statements or actions suffice to invoke that right; and that neither Michigan nor the Solicitor General has provided evidence in this case that the status quo has proved unworkable, I see little reason to believe today's clear-statement rule is necessary to ensure effective law enforcement.

Davis' clear-statement rule is also a poor fit for the right to silence. Advising a suspect that he has a "right to remain silent" is unlikely to convey that he must speak (and must do so in some particular fashion) to ensure the right will be protected. Cf. *Soffar* v. *Cockrell*, 300 F. 3d 588, 603 (CA5 2002) (en banc) (DeMoss, J., dissenting) ("What in the world must an individual do to exercise his constitutional right to remain silent beyond actually, in fact, remaining silent?"). By contrast, telling a suspect "he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires," *Miranda*, 384 U. S., at 479, implies the need for speech to exercise that right. *Davis*' requirement that a suspect must "clearly reques[t] an attorney" to terminate questioning thus aligns with a suspect's likely understanding of the *Miranda* warnings in a way today's rule does not. 512 U. S., at 461. The Court suggests Thompkins could have employed the "simple, unambiguous" means of saying "he wanted to remain silent" or "did not want to talk with the police." *Ante*, at 382. But the *Miranda* warnings give no

hint that a suspect should use those magic words, and there is little reason to believe police—who have ample incentives to avoid invocation—will provide such guidance.

Conversely, the Court's concern that police will face "difficult decisions about an accused's unclear intent" and suffer the consequences of "'guess[ing] wrong,'" *ante*, at 382 (quoting *Davis*, 512 U. S., at 461), is misplaced. If a suspect makes an ambiguous statement or engages in conduct that creates uncertainty about his intent to invoke his right, police can simply ask for clarification. See *id.*, at 467 (Souter, J., concurring in judgment). It is hardly an unreasonable burden for police to ask a suspect, for instance, "Do you want to talk to us?" The majority in *Davis* itself approved of this approach as protecting suspects' rights while "minimiz[ing] the chance of a confession [later] being suppressed." *Id.*, at 461. Given this straightforward mechanism by which police can "scrupulously hono[r]" a suspect's right to silence, today's clear-statement rule can only be seen as accepting "as tolerable the certainty that some poorly expressed requests [to remain silent] will be disregarded," *id.*, at 471 (opinion of Souter, J.), without any countervailing benefit. Police may well prefer not to seek clarification of an ambiguous statement out of fear that a suspect will invoke his rights. But "our system of justice is not founded on a fear that a suspect will exercise his rights. 'If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system.'" *Burbine*, 475 U. S., at 458 (STEVENS, J., dissenting) (quoting *Escobedo* v. *Illinois*, 378 U. S. 478, 490 (1964)).

The Court asserts in passing that treating ambiguous statements or acts as an invocation of the right to silence will only "'marginally'" serve *Miranda*'s goals. *Ante*, at 382. Experience suggests the contrary. In the 16 years since *Davis* was decided, ample evidence has accrued that criminal suspects often use equivocal or colloquial language in attempting to invoke their right to silence. A number of

lower courts that have (erroneously, in my view) imposed a clear-statement requirement for invocation of the right to silence have rejected as ambiguous an array of statements whose meaning might otherwise be thought plain.[9] At a minimum, these decisions suggest that differentiating "clear" from "ambiguous" statements is often a subjective inquiry. Even if some of the cited decisions are themselves in tension with *Davis*' admonition that a suspect need not "'speak with the discrimination of an Oxford don'" to invoke his rights,

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[9] See *United States* v. *Sherrod*, 445 F. 3d 980, 982 (CA7 2006) (suspect's statement "'I'm not going to talk about nothin' '" was ambiguous, "as much a taunt—even a provocation—as it [was] an invocation of the right to remain silent"); *Burket* v. *Angelone*, 208 F. 3d 172, 200 (CA4 2000) (upholding on AEDPA review a state court's conclusion that "'I just don't think that I should say anything'" was not a clear request to remain silent); *State* v. *Jackson*, 107 Ohio St. 3d 300, 310, 2006–Ohio–1, ¶¶ 96–98, 839 N. E. 2d 362, 373 (finding ambiguous "'I don't even like talking about it man . . . I told you . . . what happened, man . . . I mean, I don't even want to, you know what I'm saying, discuss no more about it, man'"); *State* v. *Speed*, 265 Kan. 26, 37–38, 961 P. 2d 13, 24 (1998) (finding ambiguous "'[a]nd since we're not getting anywhere I just ask you guys to go ahead and get this over with and go ahead and lock me up and let me go and deal with Sedgwick County, I'm ready to go to Sedgwick County, let's go'"); *State* v. *Markwardt*, 2007 WI App 242, ¶ 1, 306 Wis. 2d 420, 424, 742 N. W. 2d 546, 548 ("'Then put me in jail. Just get me out of here. I don't want to sit here anymore, alright? I've been through enough today'" ambiguous because it could be construed as part of "'thrust-and-parry'" between suspect and interrogator); *State* v. *Deen*, 42,403, pp. 2–4 (La. App. 4/27/07), 953 So. 2d 1057, 1058–1060 ("'Okay, if you're implying that I've done it, I wish to not say any more. I'd like to be done with this. Cause that's just ridiculous. I wish I'd . . . don't wish to answer any more questions'" ambiguous because conditioned on officer's implication that suspect committed specific assault). Courts have also construed statements as expressing a desire to remain silent only about a particular subject. See, *e. g.*, *People* v. *Silva*, 45 Cal. 3d 604, 629–630, 754 P. 2d 1070, 1083–1084 (1988) ("'I really don't want to talk about that'" only conveyed unwillingness to discuss certain subjects). See generally Strauss, The Sounds of Silence: Reconsidering the Invocation of the Right to Remain Silent Under *Miranda*, 17 Wm. & Mary Bill Rights J. 773, 788–802 (2009) (surveying cases).

512 U. S., at 459 (quoting *id.*, at 476 (opinion of Souter, J.)), they demonstrate that today's decision will significantly burden the exercise of the right to silence. Notably, when a suspect "understands his (expressed) wishes to have been ignored . . . in contravention of the 'rights' just read to him by his interrogator, he may well see further objection as futile and confession (true or not) as the only way to end his interrogation." *Id.*, at 472–473.

For these reasons, I believe a precautionary requirement that police "scrupulously hono[r]" a suspect's right to cut off questioning is a more faithful application of our precedents than the Court's awkward and needless extension of *Davis*.

* * *

Today's decision turns *Miranda* upside down. Criminal suspects must now unambiguously invoke their right to remain silent—which, counterintuitively, requires them to speak. At the same time, suspects will be legally presumed to have waived their rights even if they have given no clear expression of their intent to do so. Those results, in my view, find no basis in *Miranda* or our subsequent cases and are inconsistent with the fair-trial principles on which those precedents are grounded. Today's broad new rules are all the more unfortunate because they are unnecessary to the disposition of the case before us. I respectfully dissent.

Syllabus

LEVIN, TAX COMMISSIONER OF OHIO *v.* COMMERCE ENERGY, INC., ET AL.

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

No. 09–223. Argued March 22, 2010—Decided June 1, 2010

Historically, all Ohio natural gas consumers purchased gas from a local distribution company (LDC), the public utility serving their geographic area. Today, however, consumers in Ohio's major metropolitan areas can alternatively contract with independent marketers (IMs) that compete with LDCs for retail sales of natural gas. Respondents, mainly IMs offering to sell natural gas to Ohio consumers, sued petitioner Ohio Tax Commissioner in federal court, alleging discriminatory taxation of IMs and their patrons in violation of the Commerce and Equal Protection Clauses. They sought declaratory and injunctive relief invalidating three tax exemptions Ohio grants exclusively to LDCs. The court initially held that respondents' suit was not blocked by the Tax Injunction Act (TIA), which prohibits lower federal courts from restraining "the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State," 28 U. S. C. § 1341. Nevertheless, the court dismissed the suit based on the more embracive comity doctrine, which restrains federal courts from entertaining claims that risk disrupting state tax administration, see *Fair Assessment in Real Estate Assn., Inc.* v. *McNary*, 454 U. S. 100. The Sixth Circuit agreed with the District Court's TIA holding, but reversed the court's comity ruling, and remanded for adjudication of the merits. A footnote in *Hibbs* v. *Winn*, 542 U. S. 88, 107, n. 9, the Court of Appeals believed, foreclosed an expansive reading of this Court's comity precedents. The footnote stated that the Court "has relied upon 'principles of comity' to preclude original federal-court jurisdiction only when plaintiffs have sought district-court aid in order to arrest or countermand state tax collection." Respondents challenged only a few limited exemptions, the Sixth Circuit observed, therefore their success on the merits would not significantly intrude upon Ohio's administration of its tax system.

Held: Under the comity doctrine, a taxpayer's complaint of allegedly discriminatory state taxation, even when framed as a request to increase a competitor's tax burden, must proceed originally in state court. Pp. 421–433.

Syllabus

(a) The comity doctrine reflects a proper respect for the States and their institutions. *E. g., Fair Assessment*, 454 U. S., at 112. Comity's constraint has particular force when lower federal courts are asked to pass on the constitutionality of state taxation of commercial activity. States rely chiefly on taxation to fund their governments' operations, therefore their tax-enforcement methods should not be interfered with absent strong cause. See *Dows* v. *Chicago*, 11 Wall. 108, 110. The TIA was enacted specifically to constrain the issuance of federal injunctions in state tax cases, see *Fair Assessment*, 454 U. S., at 129, and is best understood as but a partial codification of the federal reluctance to interfere with state taxation, *National Private Truck Council, Inc.* v. *Oklahoma Tax Comm'n*, 515 U. S. 582, 590. Pp. 421–424.

(b) *Hibbs* does not restrict comity's compass. Plaintiffs in *Hibbs* were Arizona taxpayers who challenged, as violative of the Establishment Clause, a tax credit that allegedly served to support parochial schools. Their federal-court suit for declaratory and injunctive relief did not implicate in any way their own tax liability, and the relief they sought would not deplete the State's treasury. Rejecting Arizona's plea that the TIA barred the suit, the Court found that the case was "not rationally distinguishable" from pathmarking civil-rights controversies in which federal courts had entertained challenges to state tax credits without conceiving of the TIA as a jurisdictional barrier. 542 U. S., at 93–94, 110–112. The Court also dispatched Arizona's comity argument in the footnote that moved the Sixth Circuit here to reverse the District Court's comity-based dismissal. *Id.*, at 107, n. 9. Neither *Hibbs* nor any other decision of this Court, however, has considered the comity doctrine's application to cases of the kind presented here. Pp. 424–426.

(c) Respondents contend that state action "selects [them] out for discriminatory treatment by subjecting [them] to taxes not imposed on others of the same class." *Hillsborough* v. *Cromwell*, 326 U. S. 620, 623. When economic legislation does not employ classifications subject to heightened scrutiny or impinge on fundamental rights, courts generally view constitutional challenges with the skepticism due respect for legislative choices demands. See, *e. g., Hodel* v. *Indiana*, 452 U. S. 314, 331–332. And "in taxation, even more than in other fields, legislatures possess the greatest freedom in classification." *Madden* v. *Kentucky*, 309 U. S. 83, 88. Of key importance, when unlawful discrimination infects tax classifications or other legislative prescriptions, the Constitution simply calls for *equal treatment.* How equality is accomplished—by extension or invalidation of the unequally distributed benefit or burden, or some other measure—is a matter on which the Constitution is silent. See, *e. g., Heckler* v. *Mathews*, 465 U. S. 728, 740. On finding unlawful discrimination, courts may attempt, within the bounds of their

institutional competence, to implement what the legislature would have willed had it been apprised of the constitutional infirmity. *E. g.*, *id.*, at 739, n. 5. With the State's legislative prerogative firmly in mind, this Court, upon finding impermissible discrimination in a State's tax measure, generally remands the case, leaving the interim remedial choice to state courts. See, *e. g.*, *McKesson Corp.* v. *Division of Alcoholic Beverages and Tobacco, Fla. Dept. of Business Regulation*, 496 U. S. 18, 39–40. If lower federal courts were to consider the merits of suits alleging uneven state tax burdens, however, recourse to state court for the interim remedial determination would be unavailable, for federal tribunals lack authority to remand to state court an action initiated in federal court. Federal judges, moreover, are bound by the TIA, which generally precludes relief that would diminish state revenues, even if such relief is the remedy least disruptive of the state legislature's design. These limitations on the remedial competence of lower federal courts counsel that they refrain from taking up cases of this genre, so long as state courts are equipped fairly to adjudicate them. Pp. 426–428.

(d) Comity considerations warrant dismissal of respondents' suit. If Ohio's scheme is unconstitutional, the Ohio courts are better positioned to determine—unless and until the Ohio Legislature weighs in—how to comply with the mandate of equal treatment. See *Davis* v. *Michigan Dept. of Treasury*, 489 U. S. 803, 817–818. The unelaborated comity footnote in *Hibbs* does not counsel otherwise. Hardly a run-of-the-mine tax case, *Hibbs* was essentially an attack on the allocation of state resources for allegedly unconstitutional purposes. Plaintiffs there were third parties whose own tax liability was not a relevant factor. Here, by contrast, the very premise of respondents' suit is that they are taxed differently from LDCs. The *Hibbs* footnote is most sensibly read to affirm that, just as that case was a poor fit under the TIA, so it was a poor fit for comity. Respondents' argument that this case is fit for federal-court adjudication because of the simplicity of the relief sought is unavailing. Even if their claims had merit, respondents would not be entitled to their preferred remedy. In *Hibbs*, however, if the District Court found the Arizona tax credit impermissible under the Establishment Clause, only one remedy would redress the plaintiffs' grievance: invalidation of the tax credit at issue. Pp. 429–431.

(e) In sum, a confluence of factors in this case, absent in *Hibbs*, leads to the conclusion that the comity doctrine controls here. First, respondents seek federal-court review of commercial matters over which Ohio enjoys wide regulatory latitude; their suit does not involve any fundamental right or classification that attracts heightened judicial scrutiny. Second, while respondents portray themselves as third-party

Syllabus

challengers to an allegedly unconstitutional tax scheme, they are in fact seeking federal-court aid in an endeavor to improve their competitive position. Third, the Ohio courts are better positioned than their federal counterparts to correct any violation because they are more familiar with state legislative preferences and because the TIA does not constrain their remedial options. Individually, these considerations may not compel forbearance by federal district courts; in combination, however, they demand deference to the state adjudicative process. Pp. 431–432.

(f) The Sixth Circuit's concern that application of the comity doctrine here would render the TIA effectively superfluous overlooks Congress' aim, in enacting the TIA, to secure the comity doctrine against diminishment. Comity, moreover, is a prudential doctrine. "If the State voluntarily chooses to submit to a federal forum, principles of comity do not demand that the federal court force the case back into the State's own system." *Ohio Bureau of Employment Servs.* v. *Hodory*, 431 U. S. 471, 480. P. 432.

(g) In light of the foregoing, the Court need not decide whether the TIA would itself block this suit. P. 432.

554 F. 3d 1094, reversed and remanded.

GINSBURG, J., delivered the opinion of the Court, in which ROBERTS, C. J., and STEVENS, KENNEDY, BREYER, and SOTOMAYOR, JJ., joined. KENNEDY, J., filed a concurring opinion, *post*, p. 433. THOMAS, J., filed an opinion concurring in the judgment, in which SCALIA, J., joined, *post*, p. 433. ALITO, J., filed an opinion concurring in the judgment, *post*, p. 437.

Benjamin C. Mizer, Solicitor General of Ohio, argued the cause for petitioner. With him on the briefs were *Richard Cordray*, Attorney General, *Alexandra T. Schimmer*, Chief Deputy Solicitor General, *Stephen P. Carney* and *Elisabeth A. Long*, Deputy Solicitors, and *Barton A. Hubbard*, Assistant Attorney General.

Stephen C. Fitch argued the cause for respondents. With him on the brief was *Gerhardt A. Gosnell II*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Illinois et al. by *Lisa Madigan*, Attorney General of Illinois, *Michael A. Scodro*, Solicitor General, and *Jane Elinor Notz*, Deputy Solicitor General, and by the Attorneys General for their respective jurisdictions as follows: *Troy King* of Alabama, *Daniel S. Sullivan* of Alaska, *Terry Goddard* of Arizona, *Dustin McDaniel* of Arkansas, *John W. Suthers* of Colorado,

JUSTICE GINSBURG delivered the opinion of the Court.

This case presents the question whether a federal district court may entertain a complaint of allegedly discriminatory state taxation, framed as a request to increase a commercial competitor's tax burden. Relevant to our inquiry is the Tax Injunction Act (TIA or Act), 28 U. S. C. § 1341, which prohibits lower federal courts from restraining "the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." More embracive than the TIA, the comity doctrine applicable in state taxation cases restrains federal courts from entertaining claims for relief that risk disrupting state tax administration. See *Fair Assessment in Real Estate Assn., Inc.* v. *McNary*, 454 U. S. 100 (1981). The comity doctrine, we hold, requires that a claim of the kind here presented proceed originally in state court. In so ruling, we

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Richard Blumenthal of Connecticut, *Joseph R. Biden III* of Delaware, *Peter J. Nickles* of the District of Columbia, *Bill McCollum* of Florida, *Thurbert E. Baker* of Georgia, *Mark J. Bennett* of Hawaii, *Lawrence G. Wasden* of Idaho, *Gregory F. Zoeller* of Indiana, *Tom Miller* of Iowa, *James D. Caldwell* of Louisiana, *Janet T. Mills* of Maine, *Douglas F. Gansler* of Maryland, *Martha Coakley* of Massachusetts, *Michael A. Cox* of Michigan, *Lori Swanson* of Minnesota, *Jim Hood* of Mississippi, *Chris Koster* of Missouri, *Steve Bullock* of Montana, *Jon Bruning* of Nebraska, *Catherine Cortez Masto* of Nevada, *Michael A. Delaney* of New Hampshire, *Anne Milgram* of New Jersey, *Gary K. King* of New Mexico, *Roy Cooper* of North Carolina, *Wayne Stenehjem* of North Dakota, *John R. Kroger* of Oregon, *Thomas W. Corbett, Jr.*, of Pennsylvania, *Patrick C. Lynch* of Rhode Island, *Henry McMaster* of South Carolina, *Marty J. Jackley* of South Dakota, *Robert E. Cooper, Jr.*, of Tennessee, *Greg Abbott* of Texas, *Mark L. Shurtleff* of Utah, *William H. Sorrell* of Vermont, *William C. Mims* of Virginia, *Robert M. McKenna* of Washington, *Darrell V. McGraw, Jr.*, of West Virginia, *J. B. Van Hollen* of Wisconsin, and *Bruce A. Salzburg* of Wyoming; and for the Multistate Tax Commission by *Joe Huddleston* and *Shirley Sicilian.*

Beth Heifetz, Gregory A. Castanias, David E. Cowling, Charolette F. Noel, Todd A. Lard, and *Douglas L. Lindholm* filed a brief for the Council on State Taxation as *amicus curiae* urging affirmance.

distinguish *Hibbs* v. *Winn*, 542 U. S. 88 (2004), in which the Court held that neither the TIA nor the comity doctrine barred a federal district court from adjudicating an Establishment Clause challenge to a state tax credit that allegedly funneled public funds to parochial schools.

I

A

Historically, all natural gas consumers in Ohio purchased gas from the public utility, known as a local distribution company (LDC), serving their geographic area. In addition to selling gas as a commodity, LDCs own and operate networks of distribution pipelines to transport and deliver gas to consumers. LDCs offer customers a single, bundled product comprising both gas and delivery.

Today, consumers in Ohio's major metropolitan areas can alternatively contract with an independent marketer (IM) that competes with LDCs for retail sales of natural gas. IMs do not own or operate distribution pipelines; they use LDCs' pipelines. When a customer goes with an IM, therefore, she purchases two "unbundled" products: gas (from the IM) and delivery (from the LDC).

Ohio treats LDCs and IMs differently for tax purposes. Relevant here, Ohio affords LDCs three tax exemptions that IMs do not receive. First, LDCs' natural gas sales are exempt from sales and use taxes. Ohio Rev. Code Ann. § 5739.02(B)(7) (Lexis Supp. 2010); §§ 5739.021(E), .023(G), .026(F) (Lexis 2008); §§ 5741.02(C), .021(A), .022(A), .023(A) (Lexis 2008). LDCs owe instead a gross receipts excise tax, § 5727.24, which is lower than the sales and use taxes IMs must collect. Second, LDCs are not subject to the commercial activities tax imposed on IMs' taxable gross receipts. §§ 5751.01(E)(2), .02 (Lexis Supp. 2010). Finally, Ohio law excludes inter-LDC natural gas sales from the gross receipts tax, which IMs must pay when they purchase gas from LDCs. § 5727.33(B)(4) (Lexis 2008).

B

Plaintiffs-respondents Commerce Energy, Inc., a California corporation, and Interstate Gas Supply, Inc., an Ohio company, are IMs that market and sell natural gas to Ohio consumers. Plaintiff-respondent Gregory Slone is an Ohio citizen who has purchased natural gas from Interstate Gas Supply since 1999. Alleging discriminatory taxation of IMs and their patrons in violation of the Commerce and Equal Protection Clauses, Complaint ¶¶ 35–39, App. 11–13, respondents sued Richard A. Levin, Tax Commissioner of Ohio (Commissioner), in the U. S. District Court for the Southern District of Ohio. Invoking that court's federal-question jurisdiction under 28 U. S. C. § 1331, Complaint ¶ 6, App. 3, respondents sought declaratory and injunctive relief invalidating the three tax exemptions LDCs enjoy and ordering the Commissioner to stop "recognizing and/or enforcing" the exemptions. *Id.*, at 20–21. Respondents named the Commissioner as sole defendant; they did not extend the litigation to include the LDCs whose tax burden their suit aimed to increase.[1]

The District Court granted the Commissioner's motion to dismiss the complaint. The TIA did not block the suit, the District Court initially held, because respondents, like the plaintiffs in *Hibbs*, were "third-parties challenging the constitutionality of [another's] tax benefit," and their requested relief "would not disrupt the flow of tax revenue" to the State. App. to Pet. for Cert. 24a.

Nevertheless, the District Court "decline[d] to exercise jurisdiction" as a matter of comity. *Id.*, at 32a. Ohio's Legislature, the District Court observed, chose to provide the challenged tax exemptions to LDCs. Respondents re-

[1] In moving to dismiss the complaint, the Commissioner urged, *inter alia*, that the LDCs were parties necessary to a just adjudication. See Fed. Rule Civ. Proc. 19. Ruling for the Commissioner on comity grounds, the District Court did not reach the question whether the LDCs were indispensable parties. App. to Pet. for Cert. 21a, 32a–33a.

quested relief that would "requir[e] Ohio to collect taxes which its legislature has not seen fit to impose." *Ibid.* (internal quotation marks omitted). Such relief, the court said, would draw federal judges into "a particularly inappropriate involvement in a state's management of its fiscal operations." *Ibid.* (internal quotation marks omitted). A state court, the District Court recognized, could extend the exemptions to IMs, but the TIA proscribed this revenue-reducing relief in federal court. "Where there would be two possible remedies," the Court concluded, a federal court should not "impose its own judgment on the state legislature mandating which remedy is appropriate." *Ibid.*

The U. S. Court of Appeals for the Sixth Circuit reversed. 554 F. 3d 1094 (2009). While agreeing that the TIA did not bar respondents' suit, the Sixth Circuit rejected the District Court's comity ruling. A footnote in *Hibbs*, the Court of Appeals believed, foreclosed the District Court's "expansive reading" of this Court's comity precedents. 554 F. 3d, at 1098. The footnote stated that the Court "has relied upon 'principles of comity' to preclude original federal-court jurisdiction only when plaintiffs have sought district-court aid in order to arrest or countermand state tax collection." *Hibbs*, 542 U. S., at 107, n. 9 (citation omitted). A broad view of the comity cases, the Sixth Circuit feared, would render the TIA "effectively superfluous," and would "*sub silentio* overrule a series of important cases" presenting challenges to state tax measures. 554 F. 3d, at 1099, 1102 (citing *Milliken* v. *Bradley*, 433 U. S. 267 (1977); *Mueller* v. *Allen*, 463 U. S. 388 (1983)); 554 F. 3d, at 1099–1100.

In so ruling, the Sixth Circuit agreed with the Seventh and Ninth Circuits, which had similarly read *Hibbs* to rein in the comity doctrine, see *Levy* v. *Pappas*, 510 F. 3d 755 (CA7 2007); *Wilbur* v. *Locke*, 423 F. 3d 1101 (CA9 2005), and it disagreed with the Fourth Circuit, which had concluded that *Hibbs* left comity doctrine untouched, see *DIRECTV, Inc.* v. *Tolson*, 513 F. 3d 119 (2008). Noting that respond-

ents "challenge[d] only a few limited exemptions," and satisfied, therefore, that "[respondents'] success would not significantly intrude upon traditional matters of state taxation," the Sixth Circuit remanded the case for adjudication of the merits. 554 F. 3d, at 1102.

After unsuccessfully moving for rehearing en banc, App. to Pet. for Cert. 1a–2a, the Commissioner petitioned for certiorari. By then, the First Circuit had joined the Sixth, Seventh, and Ninth Circuits in holding that *Hibbs* sharply limited the scope of the comity bar. *Coors Brewing Co.* v. *Méndez-Torres*, 562 F. 3d 3 (2009). We granted the Commissioner's petition, 558 U. S. 989 (2009), to resolve the disagreement among the Circuits.

II

A

Comity considerations, the Commissioner dominantly urges, preclude the exercise of lower federal-court adjudicatory authority over this controversy, given that an adequate state-court forum is available to hear and decide respondents' constitutional claims. We agree.

The comity doctrine counsels lower federal courts to resist engagement in certain cases falling within their jurisdiction. The doctrine reflects

> "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in separate ways." *Fair Assessment*, 454 U. S., at 112 (quoting *Younger* v. *Harris*, 401 U. S. 37, 44 (1971)).

Comity's constraint has particular force when lower federal courts are asked to pass on the constitutionality of state taxation of commercial activity. For "[i]t is upon taxation that the several States chiefly rely to obtain the means to carry

on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible." *Dows* v. *Chicago*, 11 Wall. 108, 110 (1871).

"An examination of [our] decisions," this Court wrote more than a century ago, "shows that a proper reluctance to interfere by prevention with the fiscal operations of the state governments has caused [us] to refrain from so doing in all cases where the Federal rights of the persons could otherwise be preserved unimpaired." *Boise Artesian Hot & Cold Water Co.* v. *Boise City*, 213 U. S. 276, 282 (1909). Accord *Matthews* v. *Rodgers*, 284 U. S. 521, 525–526 (1932) (So long as the state remedy was "plain, adequate, and complete," the "scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that such relief should be denied in every case where the asserted federal right may be preserved without it.").[2]

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[2] Justice Brennan cogently explained, in practical terms, "[t]he special reasons justifying the policy of federal noninterference with state tax collection":

"The procedures for mass assessment and collection of state taxes and for administration and adjudication of taxpayers' disputes with tax officials are generally complex and necessarily designed to operate according to established rules. State tax agencies are organized to discharge their responsibilities in accordance with the state procedures. If federal declaratory relief were available to test state tax assessments, state tax administration might be thrown into disarray, and taxpayers might escape the ordinary procedural requirements imposed by state law. During the pendency of the federal suit the collection of revenue under the challenged law might be obstructed, with consequent damage to the State's budget, and perhaps a shift to the State of the risk of taxpayer insolvency. Moreover, federal constitutional issues are likely to turn on questions of state tax law, which, like issues of state regulatory law, are more properly heard in the state courts." *Perez* v. *Ledesma*, 401 U. S. 82, 128, n. 17 (1971) (opinion concurring in part and dissenting in part).

Statutes conferring federal jurisdiction, we have repeatedly cautioned, should be read with sensitivity to "federal-state relations" and "wise judicial administration." *Quackenbush* v. *Allstate Ins. Co.*, 517 U. S. 706, 716 (1996) (internal quotation marks omitted). But by 1937, in state tax cases, the federal courts had moved in a different direction: They "had become free and easy with injunctions." *Fair Assessment*, 454 U. S., at 129 (Brennan, J., concurring in judgment) (internal quotation marks omitted).[3] Congress passed the TIA to reverse this trend. *Id.*, at 109–110 (opinion of the Court).

Our post-Act decisions, however, confirm the continuing sway of comity considerations, independent of the Act. Plaintiffs in *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U. S. 293 (1943), for example, sought a federal judgment declaring Louisiana's unemployment compensation tax unconstitutional. Writing six years after the TIA's passage, we emphasized the Act's animating concerns: A "federal court of equity," we reminded, "may in an appropriate case refuse to give its special protection to private rights when the exercise of its jurisdiction would be prejudicial to the public interest, [and] should stay its hand in the public interest when it reasonably appears that private interests will not suffer." *Id.*, at 297–298 (citations omitted). In enacting the TIA, we noted, "Congress recognized and gave sanction to this practice." *Id.*, at 298. We could not have thought Congress intended to cabin the comity doctrine, for we went

[3] Two features of federal equity practice accounted for the courts' willingness to grant injunctive relief. First, the Court had held that, although "equity jurisdiction does not lie where there exists an adequate legal remedy[,] . . . the 'adequate legal remedy' must be one cognizable *in federal court.*" *Fair Assessment in Real Estate Assn., Inc.* v. *McNary*, 454 U. S. 100, 129, n. 15 (1981) (Brennan, J., concurring in judgment) (emphasis in original). Second, federal courts, "construing strictly the requirement that the remedy available at law be 'plain, adequate and complete,' had frequently concluded that the procedures provided by the State were not adequate." *Ibid.* (citation omitted).

on to instruct dismissal in *Great Lakes* on comity grounds without deciding whether the Act reached declaratory judgment actions. *Id.*, at 299, 301–302.[4]

Decades later, in *Fair Assessment*, we ruled, based on comity concerns, that 42 U. S. C. § 1983 does not permit federal courts to award damages in state taxation cases when state law provides an adequate remedy. 454 U. S., at 116. We clarified in *Fair Assessment* that "the principle of comity which predated the Act was not restricted by its passage." *Id.*, at 110. And in *National Private Truck Council, Inc.* v. *Oklahoma Tax Comm'n*, 515 U. S. 582, 590 (1995), we said, explicitly, that "the [TIA] may be best understood as but a partial codification of the federal reluctance to interfere with state taxation."

B

Although our precedents affirm that the comity doctrine is more embracive than the TIA, several Courts of Appeals, including the Sixth Circuit in the instant case, have comprehended *Hibbs* to restrict comity's compass. See *supra*, at 420–421. *Hibbs*, however, has a more modest reach.

Plaintiffs in *Hibbs* were Arizona taxpayers who challenged a state law authorizing tax credits for payments to organizations that disbursed scholarship grants to children attending private schools. 542 U. S., at 94–96. These organizations could fund attendance at institutions that provided religious instruction or gave admissions preference on the basis of religious affiliation. *Id.*, at 95. Ranking the credit program as state subsidization of religion, incompatible with the Establishment Clause, plaintiffs sought declaratory and injunctive relief and an order requiring the organizations to pay sums still in their possession into the State's general fund. *Id.*, at 96.

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[4] We later held that the Act indeed does proscribe suits for declaratory relief that would thwart state tax collection. *California* v. *Grace Brethren Church*, 457 U. S. 393, 411 (1982).

The Director of Arizona's Department of Revenue sought to escape suit in federal court by invoking the TIA. We held that the litigation fell outside the TIA's governance. Our prior decisions holding suits blocked by the TIA, we noted, were tied to the Act's "state-revenue-protective moorings." *Id.*, at 106. The Act, we explained, "restrain[ed] state taxpayers from instituting federal actions to contest their [own] liability for state taxes," *id.*, at 108, suits that, if successful, would deplete state coffers. But "third parties" like the *Hibbs* plaintiffs, we concluded, were not impeded by the TIA "from pursuing constitutional challenges to tax benefits in a federal forum." *Ibid.* The case, we stressed, was "not rationally distinguishable" from a procession of pathmarking civil-rights controversies in which federal courts had entertained challenges to state tax credits without conceiving of the TIA as a jurisdictional barrier. *Id.*, at 93–94, 110–112. See, *e. g.*, *Griffin* v. *School Bd. of Prince Edward Cty.*, 377 U. S. 218 (1964) (involving, *inter alia*, tax credits for contributions to private segregated schools).

Arizona's Revenue Director also invoked comity as cause for dismissing the action. We dispatched the Director's comity argument in a spare footnote that moved the Sixth Circuit here to reverse the District Court's comity-based dismissal. As earlier set out, see *supra*, at 420, the footnote stated: "[T]his Court has relied upon 'principles of comity' to preclude original federal-court jurisdiction only when plaintiffs have sought district-court aid in order to arrest or countermand state tax collection." 542 U. S., at 107, n. 9 (citation omitted) (citing *Fair Assessment*, 454 U. S., at 107–108; *Great Lakes*, 319 U. S., at 296–299).

Relying heavily on our footnote in *Hibbs*, respondents urge that "comity should no more bar this action than it did the action in *Hibbs*." Brief for Respondents 42. As we explain below, however, the two cases differ markedly in ways bearing on the comity calculus. We have had no prior occasion to consider, under the comity doctrine, a taxpayer's com-

plaint about allegedly discriminatory state taxation framed as a request to increase a competitor's tax burden. Now squarely presented with the question, we hold that comity precludes the exercise of original federal-court jurisdiction in cases of the kind presented here.

III

A

Respondents complain that they are taxed unevenly in comparison to LDCs and their customers. Under either an equal protection or dormant Commerce Clause theory, respondents' root objection is the same: State action, respondents contend, "selects [them] out for discriminatory treatment by subjecting [them] to taxes not imposed on others of the same class." *Hillsborough* v. *Cromwell*, 326 U. S. 620, 623 (1946) (equal protection); see *Dennis* v. *Higgins*, 498 U. S. 439, 447–448 (1991) (dormant Commerce Clause).

When economic legislation does not employ classifications subject to heightened scrutiny or impinge on fundamental rights,[5] courts generally view constitutional challenges with the skepticism due respect for legislative choices demands. See, *e. g.*, *Hodel* v. *Indiana*, 452 U. S. 314, 331–332 (1981); *Williamson* v. *Lee Optical of Okla., Inc.*, 348 U. S. 483, 488–489 (1955). And "in taxation, even more than in other fields, legislatures possess the greatest freedom in classification." *Madden* v. *Kentucky*, 309 U. S. 83, 88 (1940).

Of key importance, when unlawful discrimination infects tax classifications or other legislative prescriptions, the Constitution simply calls for *equal treatment.* How equality is accomplished—by extension or invalidation of the unequally distributed benefit or burden, or some other measure—is a

[5] Cf., *e. g.*, *Loving* v. *Virginia*, 388 U. S. 1 (1967); *United States* v. *Virginia*, 518 U. S. 515 (1996). On the federal courts' role in safeguarding human rights, see, *e. g.*, *Zwickler* v. *Koota*, 389 U. S. 241, 245–248 (1967); *McNeese* v. *Board of Ed. for Community Unit School Dist. 187*, 373 U. S. 668, 672–674, and n. 6 (1963).

matter on which the Constitution is silent. See *Heckler* v. *Mathews*, 465 U. S. 728, 740 (1984) ("[W]hen the right invoked is that to equal treatment, the appropriate remedy is a *mandate* of equal treatment, a result that can be accomplished" in more than one way. (quoting *Iowa-Des Moines Nat. Bank* v. *Bennett*, 284 U. S. 239, 247 (1931); internal quotation marks omitted)).

On finding unlawful discrimination, we have affirmed, courts may attempt, within the bounds of their institutional competence, to implement what the legislature would have willed had it been apprised of the constitutional infirmity. *Mathews*, 465 U. S., at 739, n. 5; *Califano* v. *Westcott*, 443 U. S. 76, 92–93 (1979); see *Stanton* v. *Stanton*, 421 U. S. 7, 17–18 (1975) (how State eliminates unconstitutional discrimination "plainly is an issue of state law"); cf. *United States* v. *Booker*, 543 U. S. 220, 246 (2005) ("legislative intent" determines cure for constitutional violation). The relief the complaining party requests does not circumscribe this inquiry. See *Westcott*, 443 U. S., at 96, n. 2 (Powell, J., concurring in part and dissenting in part) ("This issue should turn on the intent of [the legislature], not the interests of the parties."). With the State's legislative prerogative firmly in mind, this Court, upon finding impermissible discrimination in a State's allocation of benefits or burdens, generally remands the case, leaving the remedial choice in the hands of state authorities. See, *e. g.*, *Wengler* v. *Druggists Mut. Ins. Co.*, 446 U. S. 142, 152–153 (1980); *Orr* v. *Orr*, 440 U. S. 268, 283–284 (1979); *Stanton*, 421 U. S., at 17–18; *Skinner* v. *Oklahoma ex rel. Williamson*, 316 U. S. 535, 543 (1942). But see, *e. g.*, *Levy* v. *Louisiana*, 391 U. S. 68 (1968).

In particular, when this Court—on review of a state high court's decision—finds a tax measure constitutionally infirm, "it has been our practice," for reasons of "federal-state comity," "to abstain from deciding the remedial effects of such a holding." *American Trucking Assns., Inc.* v. *Smith*, 496

U. S. 167, 176 (1990) (plurality opinion).[6] A "State found to have imposed an impermissibly discriminatory tax retains flexibility in responding to this determination." *McKesson Corp.* v. *Division of Alcoholic Beverages and Tobacco, Fla. Dept. of Business Regulation*, 496 U. S. 18, 39–40 (1990). Our remand leaves the interim solution in state-court hands, subject to subsequent definitive disposition by the State's legislature.

If lower federal courts were to give audience to the merits of suits alleging uneven state tax burdens, however, recourse to state court for the interim remedial determination would be unavailable. That is so because federal tribunals lack authority to remand to the state court system an action initiated in federal court. Federal judges, moreover, are bound by the TIA; absent certain exceptions, see, *e. g.*, *Department of Employment* v. *United States*, 385 U. S. 355, 357–358 (1966), the Act precludes relief that would diminish state revenues, even if such relief is the remedy least disruptive of the state legislature's design.[7] These limitations on the remedial competence of lower federal courts counsel that they refrain from taking up cases of this genre, so long as state courts are equipped fairly to adjudicate them.[8]

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[6] See, *e. g.*, *Harper* v. *Virginia Dept. of Taxation*, 509 U. S. 86, 100–102 (1993); *McKesson Corp.* v. *Division of Alcoholic Beverages and Tobacco, Fla. Dept. of Business Regulation*, 496 U. S. 18, 51–52 (1990); *Davis* v. *Michigan Dept. of Treasury*, 489 U. S. 803, 818 (1989); *American Trucking Assns., Inc.* v. *Scheiner*, 483 U. S. 266, 297–298 (1987); *Tyler Pipe Industries, Inc.* v. *Washington State Dept. of Revenue*, 483 U. S. 232, 252–253 (1987); *Bacchus Imports, Ltd.* v. *Dias*, 468 U. S. 263, 276–277 (1984); *Exxon Corp.* v. *Eagerton*, 462 U. S. 176, 196–197 (1983); *Louis K. Liggett Co.* v. *Lee*, 288 U. S. 517, 540–541 (1933).

[7] State courts also have greater leeway to avoid constitutional holdings by adopting "narrowing constructions that might obviate the constitutional problem and intelligently mediate federal constitutional concerns and state interests." *Moore* v. *Sims*, 442 U. S. 415, 429–430 (1979).

[8] Any substantial federal question, of course, "could be reviewed when the case [comes to this Court] through the hierarchy of state courts." *McNeese*, 373 U. S., at 673.

B

Comity considerations, as the District Court determined, warrant dismissal of respondents' suit. Assuming, *arguendo*, that respondents could prevail on the merits of the suit,[9] the most obvious way to achieve parity would be to reduce respondents' tax liability. Respondents did not seek such relief, for the TIA stands in the way of any decree that would "enjoin . . . collection of [a] tax under State law." 28 U. S. C. § 1341.[10] A more ambitious solution would reshape the relevant provisions of Ohio's tax code. Were a federal court to essay such relief, however, the court would engage in the very interference in state taxation the comity doctrine aims to avoid. Cf. *State Railroad Tax Cases*, 92 U. S. 575, 614–615 (1876). Respondents' requested remedy, an order invalidating the exemptions enjoyed by LDCs, App. 20–21, may be far from what the Ohio Legislature would have willed. See *supra*, at 427. In short, if the Ohio scheme is indeed unconstitutional, surely the Ohio courts are better positioned to determine—unless and until the Ohio Legislature weighs in—how to comply with the mandate of equal treatment. See *Davis* v. *Michigan Dept. of Treasury*, 489 U. S. 803, 817–818 (1989).[11]

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[9] But see *General Motors Corp.* v. *Tracy*, 519 U. S. 278, 279–280 (1997) (determining, at a time IMs could not compete with LDCs for the Ohio residential "captive" market, that IMs and LDCs were not "similarly situated"; and rejecting industrial IM customer's dormant Commerce Clause and equal protection challenges to LDCs' exemption from sales and use taxes).

[10] Previous language restricting the district courts' "jurisdiction" was removed in the 1948 revision of Title 28. Compare 28 U. S. C. § 41(1) (1940 ed.) with § 1341, 62 Stat. 932. This Court and others have continued to regard the Act as jurisdictional. See, *e. g.*, *post*, at 433 (THOMAS, J., concurring in judgment).

[11] Respondents note that "[o]nce the district court grants the minimal relief requested—to disallow the exemptions—it will be up to the Ohio General Assembly to balance its own interests and determine how best to recast the tax laws, within constitutional restraints." Brief for Respondents 41. But the legislature may not be convened on the spot, and the

As earlier noted, our unelaborated footnote on comity in *Hibbs*, see *supra*, at 425, led the Sixth Circuit to conclude that we had diminished the force of that doctrine and made it inapplicable here. We intended no such consequential ruling. *Hibbs* was hardly a run-of-the-mine tax case. It was essentially an attack on the allocation of state resources for allegedly unconstitutional purposes. In *Hibbs*, the charge was state aid in alleged violation of the Establishment Clause; in other cases of the same genre, the attack was on state allocations to maintain racially segregated schools. See 542 U. S., at 93–94, 110–112. The plaintiffs in *Hibbs* were outsiders to the tax expenditure, "third parties" whose own tax liability was not a relevant factor. In this case, by contrast, the very premise of respondents' suit is that they are taxed differently from LDCs. Unlike the *Hibbs* plaintiffs, respondents do object to their own tax situation, measured by the allegedly more favorable treatment accorded LDCs.

Hibbs held that the TIA did not preclude a federal challenge by a third party who objected to a tax credit received by others, but in no way objected to her own liability under any revenue-raising tax provision. In context, we clarify, the *Hibbs* footnote comment on comity is most sensibly read to affirm that, just as the case was a poor fit under the TIA, so it was a poor fit for comity. The Court, in other words, did not deploy the footnote to recast the comity doctrine; it intended the note to convey only that the Establishment Clause-grounded case cleared both the TIA and comity hurdles.

Respondents steadfastly maintain that this case is fit for federal-court adjudication because of the simplicity of the relief they seek, *i. e.*, invalidation of exemptions accorded the

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blunt interim relief respondents ask the District Court to decree "may [immediately] derange the operations of government, and thereby cause serious detriment to the public." *Dows* v. *Chicago*, 11 Wall. 108, 110 (1871).

LDCs. But as we just explained, even if respondents' Commerce Clause and equal protection claims had merit, respondents would have no entitlement to their preferred remedy. See *supra*, at 427. In *Hibbs*, however, if the District Court found the Arizona tax credit impermissible under the Establishment Clause, only one remedy would redress the plaintiffs' grievance: invalidation of the credit, which inevitably would increase the State's tax receipts. Notably, redress in state court similarly would be limited to an order ending the allegedly impermissible state support for parochial schools.[12] Because state courts would have no greater leeway than federal courts to cure the alleged violation, nothing would be lost in the currency of comity or state autonomy by permitting the *Hibbs* suit to proceed in a federal forum.

Comity, in sum, serves to ensure that "the 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." *Younger*, 401 U. S., at 44. A confluence of factors in this case, absent in *Hibbs*, leads us to conclude that the comity doctrine controls here. First, respondents seek federal-court review of commercial matters over which Ohio enjoys wide regulatory latitude; their suit does not involve any fundamental right or classification that attracts heightened judicial scrutiny. Second, while respondents portray themselves as third-party challengers to an allegedly unconstitutional tax scheme, they are in fact seeking federal-court aid in an endeavor to improve their competitive position. Third, the Ohio courts are better positioned than their federal counterparts to correct any viola-

[12] No refund suit (or other taxpayer mechanism) was open to the plaintiffs in *Hibbs*, who were financially disinterested "third parties"; they did not, therefore, improperly bypass any state procedure. Respondents here, however, could have asserted their federal rights by seeking a reduction in their tax bill in an Ohio refund suit.

tion because they are more familiar with state legislative preferences and because the TIA does not constrain their remedial options. Individually, these considerations may not compel forbearance on the part of federal district courts; in combination, however, they demand deference to the state adjudicative process.

C

The Sixth Circuit expressed concern that application of the comity doctrine here would render the TIA "effectively superfluous." 554 F. 3d, at 1099; see *id.*, at 1102. This concern overlooks Congress' point in enacting the TIA. The Act was passed to plug two large loopholes courts had opened in applying the comity doctrine. See *supra*, at 423, and n. 3. By closing these loopholes, Congress secured the doctrine against diminishment. Comity, we further note, is a prudential doctrine. "If the State voluntarily chooses to submit to a federal forum, principles of comity do not demand that the federal court force the case back into the State's own system." *Ohio Bureau of Employment Servs.* v. *Hodory*, 431 U. S. 471, 480 (1977).

IV

Because we conclude that the comity doctrine justifies dismissal of respondents' federal-court action, we need not decide whether the TIA would itself block the suit. See *Great Lakes*, 319 U. S., at 299, 301 (reserving judgment on TIA's application where comity precluded suit). See also *Sinochem Int'l Co.* v. *Malaysia Int'l Shipping Corp.*, 549 U. S. 422, 431 (2007) (federal court has flexibility to choose among threshold grounds for dismissal).[13]

[13] The District Court and Court of Appeals concluded that our decision in *Hibbs* placed the controversy outside the TIA's domain. That conclusion, we note, bears reassessment in light of this opinion's discussion of the significant differences between *Hibbs* and this case.

* * *

For the reasons stated, the Sixth Circuit's judgment is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE KENNEDY, concurring.

The Court's rationale in *Hibbs* v. *Winn*, 542 U. S. 88 (2004), seems to me still doubtful. Nothing in the Court's opinion today expands *Hibbs*' holding further, however, and on that understanding I join the opinion of the Court.

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

Although I, too, remain skeptical of the Court's decision in *Hibbs* v. *Winn*, 542 U. S. 88 (2004), see *ante* this page (KENNEDY, J., concurring), I agree that it is not necessary for us to revisit that decision to hold that this case belongs in state court. As the Court suggests, *Hibbs* permits not just the application of comity principles to the litigation here, but also application of the Tax Injunction Act (TIA or Act), 28 U. S. C. § 1341. See *ante*, at 432. I concur only in the judgment because where, as here, the same analysis supports both jurisdictional and nonjurisdictional grounds for dismissal (the TIA imposes a jurisdictional bar, see, *e. g.*, *Hibbs*, *supra*, at 104), the "proper course" under our precedents is to dismiss for lack of jurisdiction. *Sinochem Int'l Co.* v. *Malaysia Int'l Shipping Corp.*, 549 U. S. 422, 435–436 (2007).

Congress enacted the TIA's prohibition on federal jurisdiction over certain cases involving state tax issues because federal courts had proved unable to exercise jurisdiction over such cases in the restrained manner that comity requires. See *ante*, at 423. As the Court explains, Congress' decision to prohibit federal jurisdiction over cases within the Act's scope did not disturb that jurisdiction, or the comity

principles that guide its exercise, in cases outside the Act's purview. See *ante*, at 423–424; 429–432. I therefore agree with the Court that nothing in the Act or in *Hibbs* affects the application of comity principles to cases not covered by the Act. I disagree that this conclusion moots the need for us to decide "whether the TIA would itself block th[is] suit." *Ante*, at 432.

The Court posits that because comity is available as a ground for dismissal even where the Act is not, the Act's application to this case is irrelevant if comity would also support sending the case to state court. See *ibid.* The Court rests this analysis on our recent holding in *Sinochem* that a court *may* dismiss a case on a nonmerits ground such as comity without first resolving an accompanying jurisdictional issue. See *ante*, at 432 (citing 549 U. S., at 431). The Court's reliance on *Sinochem* is misplaced, however, because it confuses the fact that a court *may* do that with whether, and when, it *should*. As *Sinochem* itself explains, courts should *not* dismiss cases on nonjurisdictional grounds where "jurisdiction . . . 'involve[s] no arduous inquiry' " and deciding it would not substantially undermine "judicial economy." 549 U. S., at 436 (quoting *Ruhrgas AG* v. *Marathon Oil Co.*, 526 U. S. 574, 587–588 (1999)). In such circumstances, *Sinochem* reiterates the settled rule that "the proper course" is to dismiss for lack of jurisdiction. 549 U. S., at 436. That is the proper course here.

The TIA prohibits federal courts from exercising jurisdiction over any action that would "suspend or restrain the assessment, levy or collection of [a] tax under State law." § 1341. As the Court appears to agree, see *ante*, at 432, n. 13, this is such a case even under the crabbed construction of the Act in *Hibbs*, which the Court accurately describes as holding only that the Act does "not preclude a federal challenge by a third party who object[s] to a tax credit received by others, but in no way object[s] to her own liability under any revenue-raising tax provision," *ante*, at 430 (emphasiz-

ing that the "plaintiffs in *Hibbs* were outsiders to the tax expenditure, 'third parties' whose own tax liability was not a relevant factor"). This is not such a case, because the respondents here are in no sense "outsiders" to the revenue-raising state tax regime they ask the federal courts to restrain. *Ibid.;* see also *Hibbs*, *supra*, at 104. Respondents compete with entities who receive tax exemptions under that regime in providing services whose cost is affected by the exemptions. Respondents thus *do* object to their own liability in a very real and economically significant way: The liability the state tax regime imposes on them but not on their competitors makes it more difficult for respondents to match or beat their competitors' prices. The fact that they raise this objection through the expedient of contesting their competitors' exemptions is plainly not enough to qualify them as *Hibbs*-like "outsiders" to the state revenue-raising scheme they wish to enjoin. If it were, application of the Act's jurisdictional bar would depend on little more than a pleading game. The Act would bar a federal suit challenging a state tax scheme that requires the challenger to pay more taxes than his competitor if the challenger styles the suit as an objection to his own tax liability, but would not bar the suit if he styles it as an objection to the competitor's exemption.

Because the Court appears to agree that even *Hibbs* does not endorse such a narrow view of the Act's jurisdictional bar, see *ante*, at 430–432, 432, n. 13, the "proper course" is to dismiss this suit under the statute and not reach the comity principles that the Court correctly holds independently support the same result, *Sinochem*, *supra*, at 436. Here, unlike in *Sinochem*, there is no economy to deciding the case on the nonjurisdictional ground: The same analysis that supports dismissal for comity reasons subjects this case to the Act's jurisdictional prohibition, even as construed in *Hibbs*. Compare *ante*, at 421–433, with *Sinochem*, *supra*, at 435–436 (approving dismissal of a suit on *forum non conveniens* grounds because dismissal on personal jurisdiction grounds would

have required the "expense and delay" of a minitrial on forum contacts). Given this, I see only one explanation for the Court's decision to dismiss on a "prudential" ground (comity), *ante*, at 432–433, rather than a mandatory one (jurisdiction): The Court wishes to leave the door open to doing in future cases what it did in *Hibbs*, namely, retain federal jurisdiction over constitutional claims that the Court simply does not believe Congress should have entrusted to state judges under the Act, see 542 U. S., at 113–128 (KENNEDY, J., dissenting).

That is not a legitimate approach to this important area of the law, see *ibid.*, and the Court's assertion that our civil rights precedents require it does not withstand scrutiny. If it is indeed true (which it may have been in the civil rights cases) that federal jurisdiction is necessary to ensure a fair forum in which to litigate an allegedly unconstitutional state tax scheme, the Act itself permits federal courts to retain jurisdiction on the ground that "a plain, speedy and efficient remedy" cannot be had in state court. § 1341. But where, as here and in *Hibbs*, such a remedy can be had in state court, the Court should apply the Act as written. See 542 U. S., at 113–128 (KENNEDY, J., dissenting).

Because I believe the Act forbids the approach to federal jurisdiction over state tax issues that the Court adopted in *Hibbs*, I would not decide this case in a way that leaves the door open to it even if the Court could find a doorstop that accords with, rather than upends, the settled principle that judges presented with multiple nonmerits grounds for dismissal should dismiss on jurisdictional grounds first. But the tension the Court's decision creates with this settled principle should be enough to convince even those who do not share my view of the TIA that the proper course here is to dismiss this case for lack of jurisdiction because *Hibbs*' construction of the Act applies at most to the type of true third-party suit that *Hibbs* describes, and thus does not save this case from the statute's jurisdictional bar.

JUSTICE ALITO, concurring in the judgment.

I agree with the Court that principles of comity bar the present action. I am doubtful about the Court's efforts to distinguish *Hibbs* v. *Winn*, 542 U. S. 88 (2004), but whether today's holding undermines *Hibbs*' foundations is a question that can be left for another day.

Syllabus

CARR *v.* UNITED STATES

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

No. 08–1301. Argued February 24, 2010—Decided June 1, 2010

Enacted in 2006, the Sex Offender Registration and Notification Act (SORNA) makes it a federal crime for, *inter alia*, any person (1) who "is required to register under [SORNA]," and (2) who "travels in interstate or foreign commerce," to (3) "knowingly fai[l] to register or update a registration," 18 U. S. C. § 2250(a). Before SORNA's enactment, petitioner Carr, a registered sex offender in Alabama, relocated to Indiana without complying with the latter State's registration requirements. Carr was indicted under § 2250 post-SORNA. The Federal District Court denied Carr's motion to dismiss, which asserted that the § 2250 prosecution would violate the Constitution's *Ex Post Facto* Clause because he had traveled to Indiana before SORNA's effective date. Carr then pleaded guilty and was sentenced to prison. Affirming the conviction, the Seventh Circuit held that § 2250 does not require that a defendant's travel postdate SORNA and that reliance on a defendant's pre-SORNA travel poses no *ex post facto* problem so long as the defendant had a reasonable time to register post-SORNA but failed to do so, as had Carr.

Held: Section 2250 does not apply to sex offenders whose interstate travel occurred before SORNA's effective date. Pp. 445–458.

(a) The Court rejects the Government's view that § 2250(a) requires a sex-offense conviction, subsequent interstate travel, and then a failure to register, and that only the last of these events must occur after SORNA took effect. The Court instead accepts Carr's interpretation that the statute does not impose liability unless a person, after becoming subject to SORNA's registration requirements, travels across state lines and then fails to register. That interpretation better accords with § 2250(a)'s text, the first element of which can only be satisfied when a person "is required to register under [SORNA]." § 2250(a)(1). That § 2250 sets forth the travel requirement in the present tense ("travels") rather than in the past or present perfect ("traveled" or "has traveled") reinforces this conclusion. See, *e. g.*, *United States* v. *Wilson*, 503 U. S. 329, 333. And because the Dictionary Act's provision that statutory "words used in the present tense include the future as well as the present," 1 U. S. C. § 1, implies that the present tense generally does not include the past, regulating a person who "travels" is not readily under-

stood to encompass a person whose only travel occurred before the statute took effect. Indeed, there appears to be no instance in which this Court has construed a present-tense verb in a criminal law to reach preenactment conduct. The statutory context also supports a forward-looking construction of "travels." First, the word "travels" is followed in § 2250(a)(2)(B) by a series of other present-tense verbs—"enters or leaves, or resides." A statute's "undeviating use of the present tense" is a "striking indic[ator]" of its "prospective orientation." *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Foundation, Inc.*, 484 U. S. 49, 59. Second, the other elements of a § 2250 violation are similarly set forth in the present tense: Sections 2250(a)(1) and (a)(3) refer, respectively, to any person who "*is* required to register under [SORNA]" and who "knowingly *fails* to register or update a registration." (Emphasis added.) Had Congress intended preenactment conduct to satisfy § 2250's first two requirements but not the third, it presumably would have varied the verb tenses, as it has in numerous other federal statutes. Pp. 445–450.

(b) The Government's two principal arguments for construing the statute to cover pre-SORNA travel are unpersuasive. Pp. 451–458.

(1) The claim that such a reading avoids an "anomaly" in the statute's coverage of federal versus state sex offenders is rejected. Section 2250 imposes criminal liability on two categories of persons who fail to adhere to SORNA's registration requirements: any person who is a sex offender "by reason of a conviction under Federal law . . . ," § 2250(a)(2)(A), and any other person required to register under SORNA who "travels in interstate or foreign commerce," § 2250(a)(2)(B). The Government's assertion that § 2250(a)(2)'s jurisdictional reach should have comparable breadth as applied to both federal and state sex offenders is little more than *ipse dixit*. 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, who typically would have spent time under federal criminal supervision. It is similarly reasonable for Congress to have given the States primary responsibility for supervising and ensuring compliance among state sex offenders and to have subjected such offenders to federal criminal liability only when, after SORNA's enactment, they use interstate commerce channels to evade a State's reach. The Seventh Circuit erred in analogizing § 2250 to 18 U. S. C. § 922(g), which prohibits convicted felons from "possess[ing] in . . . commerc[e] any firearm or ammunition." According to the lower court, § 2250(a), like § 922(g), uses movement in interstate commerce as a jurisdictional element to establish a constitutional predicate for the statute, not to create a temporal requirement. However, the proper analogy here is not between the

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travel of a sex offender and the movement of a firearm, but between the sex offender who "travels" and the convicted felon who "possesses." The act of travel by a convicted sex offender may serve as a jurisdictional predicate for § 2250, but it is also, like the act of possession, the very conduct at which Congress took aim. Pp. 451–454.

(2) Also unavailing is the Government's invocation of one of SORNA's purposes, to locate sex offenders who failed to abide by their registration obligations. The Government's argument confuses SORNA's general goal with § 2250's specific purpose. Section 2250 is not a stand-alone response to the problem of missing sex offenders; it is embedded in a broader statutory scheme enacted to address deficiencies in prior law that had enabled sex offenders to slip through the cracks. By facilitating the collection of sex-offender information and its dissemination among jurisdictions, these other provisions, not § 2250, stand at the center of Congress' effort to account for missing sex offenders. While subjecting pre-SORNA travelers to punishment under § 2250 may well be consistent with the aim of finding missing sex offenders, a contrary construction in no way frustrates that broad goal. Taking account of SORNA's overall structure, there is little reason to doubt that Congress intended § 2250 to do exactly what it says: to subject to federal prosecution sex offenders who elude SORNA's registration requirements by traveling in interstate commerce. Pp. 454–456.

(3) None of the legislative materials the Government cites as evidence of SORNA's purpose calls this reading into question. To the contrary, the House Judiciary Committee's Report suggests not only that a prohibition on postenactment travel is consonant with Congress' goals, but also that it is the rule Congress in fact chose to adopt. Pp. 457–458.

(c) Because § 2250 liability cannot be predicated on pre-SORNA travel, the Court need not address whether the statute violates the *Ex Post Facto* Clause. P. 458.

551 F. 3d 578, reversed and remanded.

SOTOMAYOR, J., delivered the opinion of the Court, in which ROBERTS, C. J., and STEVENS, KENNEDY, and BREYER, JJ., joined, and in which SCALIA, J., joined except for Part III–C. SCALIA, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 458. ALITO, J., filed a dissenting opinion, in which THOMAS and GINSBURG, JJ., joined, *post*, p. 459.

Charles A. Rothfeld argued the cause for petitioner. With him on the briefs were *Andrew J. Pincus*, *Dan M. Kahan*, *Thomas W. Merrill*, and *Scott L. Shuchart.*

Curtis E. Gannon argued the cause for the United States. With him on the brief were *Solicitor General Kagan, Assistant Attorney General Breuer, Deputy Solicitor General Dreeben,* and *Richard A. Friedman.**

JUSTICE SOTOMAYOR delivered the opinion of the Court.

Since 1994, federal law has required States, as a condition for the receipt of certain law enforcement funds, to maintain federally compliant systems for sex-offender registration and community notification. In an effort to make these state schemes more comprehensive, uniform, and effective, Congress in 2006 enacted the Sex Offender Registration and Notification Act (SORNA or Act) as part of the Adam Walsh Child Protection and Safety Act, Pub. L. 109–248, Tit. I, 120 Stat. 590. Among its provisions, the Act established a federal criminal offense covering, *inter alia,* any person who

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*Briefs of *amici curiae* urging reversal were filed for Law Professors by *Amy L. Neuhardt* and *Douglas A. Berman, pro se;* and for the National Association of Criminal Defense Lawyers by *Jonathan L. Marcus* and *Barbara E. Bergman.*

A brief of *amici curiae* urging affirmance was filed for the State of Kansas et al. by *Steve Six,* Attorney General of Kansas, *Stephen R. McAllister,* Solicitor General, and *Kristafer R. Ailslieger,* Deputy Solicitor General, by *Kevin T. Kane,* Chief State's Attorney of Connecticut, and by the Attorneys General for their respective States as follows: *Troy King* of Alabama, *Terry Goddard* of Arizona, *Dustin McDaniel* of Arkansas, *John W. Suthers* of Colorado, *Joseph R. Biden III* of Delaware, *Bill McCollum* of Florida, *Thurbert E. Baker* of Georgia, *Mark J. Bennett* of Hawaii, *Lawrence G. Wasden* of Idaho, *Lisa Madigan* of Illinois, *Tom Miller* of Iowa, *Jack Conway* of Kentucky, *James D. "Buddy" Caldwell* of Louisiana, *Janet T. Mills* of Maine, *Douglas F. Gansler* of Maryland, *Martha Coakley* of Massachusetts, *Michael A. Cox* of Michigan, *Lori Swanson* of Minnesota, *Chris Koster* of Missouri, *Steve Bullock* of Montana, *Jon Bruning* of Nebraska, *Michael A. Delaney* of New Hampshire, *Gary K. King* of New Mexico, *Wayne Stenehjem* of North Dakota, *Richard Cordray* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *Thomas W. Corbett, Jr.,* of Pennsylvania, *Henry D. McMaster* of South Carolina, *Robert E. Cooper, Jr.,* of Tennessee, *Greg Abbott* of Texas, *Mark L. Shurtleff* of Utah, *Robert M. McKenna* of Washington, and *Bruce A. Salzburg* of Wyoming.

(1) "is required to register under [SORNA]," (2) "travels in interstate or foreign commerce," and (3) "knowingly fails to register or update a registration." 18 U. S. C. § 2250(a). At issue in this case is whether § 2250 applies to sex offenders whose interstate travel occurred prior to SORNA's effective date and, if so, whether the statute runs afoul of the Constitution's prohibition on *ex post facto* laws. See Art. I, § 9, cl. 3. Liability under § 2250, we hold, cannot be predicated on pre-SORNA travel. We therefore do not address the *ex post facto* question.

I

In May 2004, petitioner Thomas Carr pleaded guilty in Alabama state court to first-degree sexual abuse. He was sentenced to 15 years' imprisonment, with all but 2 years suspended. Receiving credit for time previously served, Carr was released on probation on July 3, 2004, and he registered as a sex offender as required by Alabama law.

In late 2004 or early 2005, prior to SORNA's enactment, Carr relocated from Alabama to Indiana. He did not comply with Indiana's sex-offender registration requirements. In July 2007, Carr came to the attention of law enforcement in Fort Wayne, Indiana, following his involvement in a fight.

On August 22, 2007, federal prosecutors filed an indictment in the United States District Court for the Northern District of Indiana charging Carr with failing to register in violation of § 2250. Carr moved to dismiss the indictment, asserting that because he traveled to Indiana prior to SORNA's effective date, it would violate the *Ex Post Facto* Clause to prosecute him under § 2250. The District Court denied Carr's motion, and Carr entered a conditional guilty plea, preserving his right to appeal. He received a 30-month prison sentence.

The United States Court of Appeals for the Seventh Circuit consolidated Carr's appeal with that of a similarly situated defendant, who, in addition to raising an *ex post facto*

claim, asserted that § 2250, by its terms, does not apply to persons whose interstate travel preceded SORNA's enactment. Beginning with the statutory argument, the Court of Appeals held that § 2250 "does not require that the defendant's travel postdate the Act." *United States* v. *Dixon*, 551 F. 3d 578, 582 (2008). The court relied principally on its understanding of SORNA's underlying purpose:

> "The evil at which [the Act] is aimed is that convicted sex offenders registered in one state might move to another state, fail to register there, and thus leave the public unprotected. The concern is as acute in a case in which the offender moved before the Act was passed as in one in which he moved afterward." *Ibid.* (citation omitted).

The court drew an analogy to 18 U. S. C. § 922(g), which prohibits convicted felons from "possess[ing] in or affecting commerc[e] any firearm or ammunition." "The danger posed by such a felon is unaffected by when the gun crossed state lines . . . , and so it need not have crossed after the statute was passed." 551 F. 3d, at 582 (citing *Scarborough* v. *United States*, 431 U. S. 563 (1977)). According to the court, § 2250(a), like § 922(g), uses movement in interstate commerce as a jurisdictional element "to establish a constitutional predicate for the statute . . . rather than to create a temporal requirement." 551 F. 3d, at 583.

Reading § 2250 to encompass pre-SORNA travel, the Seventh Circuit recognized, created a conflict with the Tenth Circuit's decision in *United States* v. *Husted*, 545 F. 3d 1240 (2008). In holding that § 2250's coverage "is limited to those individuals who travel in interstate commerce after the Act's effective date," the Tenth Circuit emphasized "Congress's use of the present tense form of the verb 'to travel' . . . , which according to ordinary English grammar, does not refer to travel that has already occurred." *Id.*, at 1243–1244.

Rejecting this analysis, the Seventh Circuit characterized Congress' choice of tenses as "'not very revealing.'" 551 F. 3d, at 583 (quoting *Scarborough*, 431 U. S., at 571).

Having dispensed with the statutory question, the Seventh Circuit considered the claim of Carr and his co-appellant that predicating a § 2250 prosecution on pre-SORNA travel violates the *Ex Post Facto* Clause. Reliance on a defendant's pre-SORNA travel, the court concluded, poses no *ex post facto* problem so long as the defendant had "reasonable time" to register after SORNA took effect but failed to do so. 551 F. 3d, at 585. Noting that Carr remained unregistered five months after SORNA became applicable to him, the Seventh Circuit affirmed his conviction. *Id.*, at 586–587. The court reversed the conviction of Carr's co-appellant, finding that he had not been given a sufficient grace period to register.

In view of the division among the Circuits as to the meaning of § 2250's "travel" requirement,[1] we granted certiorari, 557 U. S. 965 (2009), to decide the statute's applicability to pre-SORNA travel and, if necessary, to consider the statute's compliance with the *Ex Post Facto* Clause.[2]

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[1] While the Seventh and Tenth Circuits have confronted the question directly, other Circuits have also touched on it. Aligning itself with the Seventh Circuit, the Eleventh Circuit has analogized 18 U. S. C. § 2250(a) to the felon-in-possession statute, § 922(g), and applied it to a sex offender who traveled before SORNA became applicable to him. *United States* v. *Dumont*, 555 F. 3d 1288, 1291–1292 (2009) *(per curiam)*. In contrast, the Eighth Circuit has stated in dictum that § 2250(a) "punishes convicted sex offenders who travel in interstate commerce *after the enactment of SORNA*." *United States* v. *May*, 535 F. 3d 912, 920 (2008) (emphasis added).

[2] There is a separate conflict among the Courts of Appeals as to when SORNA's registration requirements became applicable to persons convicted of sex offenses prior to the statute's enactment. Several Circuits, including the Seventh, have taken the position that the Act did not apply to such sex offenders until the Attorney General provided for their inclusion by issuing an interim regulation, 72 Fed. Reg. 8897, on February 28, 2007 (codified at 28 CFR § 72.3). See, *e. g.*, *United States* v. *Hatcher*, 560 F. 3d 222, 226–229 (CA4 2009); *United States* v. *Cain*, 583 F. 3d 408, 414–

II

As relevant here, § 2250 provides:

> "(a) In General.—Whoever—
>
> "(1) is required to register under the Sex Offender Registration and Notification Act;
>
> "(2)(A) is a sex offender as defined for the purposes of the Sex Offender Registration and Notification Act by reason of a conviction under Federal law (including the Uniform Code of Military Justice), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States; or
>
> "(B) travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country; and
>
> "(3) knowingly fails to register or update a registration as required by the Sex Offender Registration and Notification Act;
>
> "shall be fined under this title or imprisoned not more than 10 years, or both."

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419 (CA6 2009); *United States* v. *Dixon*, 551 F. 3d 578, 582 (CA7 2008) (case below); *United States* v. *Madera*, 528 F. 3d 852, 857–859 (CA11 2008) *(per curiam)*. Other Circuits have held that persons with pre-SORNA sex-offense convictions became subject to the Act's registration requirements upon the statute's enactment in July 2006. See, *e. g.*, *May*, 535 F. 3d, at 915–919; *United States* v. *Hinckley*, 550 F. 3d 926, 929–935 (CA10 2008). Because Carr traveled from Alabama to Indiana before both the enactment of SORNA and the Attorney General's regulation, we have no occasion to consider whether a pre-SORNA sex offender whose travel and failure to register occurred between July 2006 and February 2007 is subject to liability under § 2250, and we express no view on that question. We similarly express no view as to whether § 72.3 was properly promulgated—a question that has also divided the Circuits. Compare *Cain*, 583 F. 3d, at 419–424 (holding that the Attorney General lacked good cause for issuing the interim regulation without adhering to the notice-and-comment and publication requirements of the Administrative Procedure Act (APA)), with *United States* v. *Dean*, 604 F. 3d 1275, 1278–1282 (CA11 2010) (finding no APA violation); *United States* v. *Gould*, 568 F. 3d 459, 469–470 (CA4 2009) (same).

For a defendant to violate this provision, Carr and the Government agree, the statute's three elements must "be satisfied in sequence, culminating in a post-SORNA failure to register." Brief for United States 13; see also Reply Brief for Petitioner 4, 7, n. 6. A sequential reading, the parties recognize, helps to ensure a nexus between a defendant's interstate travel and his failure to register as a sex offender. Persons convicted of sex offenses under state law who fail to register in their State of conviction would otherwise be subject to federal prosecution under § 2250 even if they had not left the State after being convicted—an illogical result given the absence of any obvious federal interest in punishing such state offenders.[3]

While both parties accept that the elements of § 2250 should be read sequentially, they disagree on the event that sets the sequence in motion. In the Government's view, the statute is triggered by a sex-offense conviction, which must be followed by interstate travel, and then a failure to register under SORNA. Only the last of these events, the Government maintains, must occur after SORNA took effect; the predicate conviction and the travel may both have predated the statute's enactment. Carr, in contrast, asserts that the statutory sequence begins when a person becomes subject to SORNA's registration requirements. The person must then travel in interstate commerce and thereafter fail to register. All of these events, Carr avers, necessarily postdate SORNA's enactment because a sex offender could not have been required to register under SORNA until SORNA became the law.

Carr's interpretation better accords with the statutory text. By its terms, the first element of § 2250(a) can only be satisfied when a person "is required to register *under the Sex Offender Registration and Notification Act.*"

[3] For persons convicted of sex offenses under federal or Indian tribal law, interstate travel is not a prerequisite to § 2250 liability. See § 2250(a)(2)(A).

§ 2250(a)(1) (emphasis added). In an attempt to reconcile its preferred construction with the words of the statute, the Government insists that this language is merely "a shorthand way of identifying those persons who have a [sex-offense] conviction in the classes identified by SORNA." Brief for United States 19–20. To reach this conclusion, the Government observes that another provision of SORNA, 42 U. S. C. § 16913(a), states that the Act's registration requirements apply to "sex offender[s]." A "sex offender" is elsewhere defined as "an individual who was convicted of a sex offense." § 16911(1). Thus, as the Government would have it, Congress used 12 words and two implied cross-references to establish that the first element of § 2250(a) is that a person has been convicted of a sex offense. Such contortions can scarcely be called "shorthand." It is far more sensible to conclude that Congress meant the first precondition to § 2250 liability to be the one it listed first: a "require[ment] to register under [SORNA]." Once a person becomes subject to SORNA's registration requirements, which can occur only after the statute's effective date, that person can be convicted under § 2250 if he thereafter travels and then fails to register.[4]

That § 2250 sets forth the travel requirement in the present tense ("travels") rather than in the past or present per-

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[4] Offering a variation on the Government's argument, the dissent contends that, "[i]n accordance with current drafting conventions, § 2250(a) speaks, not as of the time when the law went into effect, but as of the time when the first act necessary for conviction is committed." *Post*, at 464–465 (opinion of ALITO, J.). This occurs, the dissent maintains, "when an individual is convicted of a qualifying sex offense, for it is that act that triggers the requirement to register under SORNA." *Post*, at 465. The dissent's account cannot be squared with the statutory text. "[T]he first act necessary for conviction" under § 2250(a) is not a predicate sex-offense conviction. It is a requirement "to register under [SORNA]." § 2250(a)(1). Thus, even if the dissent is correct that legislative drafters do not invariably use the moment of enactment to mark the dividing line between covered and uncovered acts, they have clearly done so here.

fect ("traveled" or "has traveled") reinforces the conclusion that preenactment travel falls outside the statute's compass. Consistent with normal usage, we have frequently looked to Congress' choice of verb tense to ascertain a statute's temporal reach. See, *e. g.*, *United States* v. *Wilson*, 503 U. S. 329, 333 (1992) ("Congress' use of a verb tense is significant in construing statutes"); *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Foundation, Inc.*, 484 U. S. 49, 57 (1987) ("Congress could have phrased its requirement in language that looked to the past . . . , but it did not choose this readily available option"); *Barrett* v. *United States*, 423 U. S. 212, 216 (1976) (observing that Congress used the present perfect tense to "denot[e] an act that has been completed"). The Dictionary Act also ascribes significance to verb tense. It provides that, "[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise[,] . . . words used in the present tense include the future as well as the present." 1 U. S. C. § 1. By implication, then, the Dictionary Act instructs that the present tense generally does not include the past. Accordingly, a statute that regulates a person who "travels" is not readily understood to encompass a person whose only travel occurred before the statute took effect. Indeed, neither the Government nor the dissent identifies any instance in which this Court has construed a present-tense verb in a criminal law to reach preenactment conduct.[5]

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[5] The Court of Appeals quoted a Ninth Circuit decision for the proposition that "'the present tense is commonly used to refer to past, present, and future all at the same time.'" 551 F. 3d, at 583 (quoting *Coalition for Clean Air* v. *Southern Cal. Edison Co.*, 971 F. 2d 219, 225 (1992)). Neither court offered examples of such usage. Perhaps, as the Dictionary Act itself recognizes, there may be instances in which "context" supports this sort of omnitemporality, but it is not the typical understanding of the present tense in either normal discourse or statutory construction. Taken in context, the word "travels" as it appears in § 2250 is indistinguishable from the present-tense verbs that appear in myriad other criminal statutes to proscribe conduct on a prospective basis. Examining a

In this instance, the statutory context strongly supports a forward-looking construction of "travels." First, the word "travels" is followed in § 2250(a)(2)(B) by a series of other present-tense verbs—"*enters* or *leaves*, or *resides* in, Indian country." (Emphasis added.) This Court has previously described a statute's "undeviating use of the present tense" as a "striking indic[ator]" of its "prospective orientation." *Gwaltney*, 484 U. S., at 59. The Seventh Circuit thought otherwise, reasoning that it would "mak[e] no sense" for "a sex offender who has resided in Indian country since long before the Act was passed [to be] subject to the Act but not someone who crossed state lines before the Act was passed." 551 F. 3d, at 583. As a textual matter, however, it is the Seventh Circuit's approach that makes little sense: If "travels" means "traveled" (*i. e.*, a person "travels" if he crossed state lines *before* SORNA's enactment), then the only way to avoid an incongruity among neighboring verbs would be to construe the phrase "resides i[n] Indian country" to encompass persons who once resided in Indian country but who left before SORNA's enactment and have not since returned—an implausible reading that neither the Seventh Circuit, nor the Government, nor the dissent endorses.

Second, the other elements of a § 2250 violation are similarly set forth in the present tense. Sections 2250(a)(1) and (a)(3) refer, respectively, to any person who "*is* required to register under [SORNA]" and who "knowingly *fails* to register or update a registration as required by [SORNA]." (Emphasis added.) The Government accepts that this last

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criminal law with a travel element similar to the one at issue here, the Ninth Circuit itself recently agreed that "the present tense verb 'travels,' most sensibly read, does not refer to travel that occurred in the past—that is, before the enactment of the statute." *United States* v. *Jackson*, 480 F. 3d 1014, 1019 (2007) (interpreting 18 U. S. C. § 2423(c), which imposes criminal penalties on "[a]ny United States citizen . . . who travels in foreign commerce, and engages in any illicit sexual conduct with another person").

element—a knowing failure to register or update a registration—must postdate SORNA's enactment. Had Congress intended preenactment conduct to satisfy the first two requirements of § 2250 but not the third, it presumably would have varied the verb tenses to convey this meaning. Indeed, numerous federal statutes use the past-perfect tense to describe one or more elements of a criminal offense when coverage of preenactment events is intended. See, *e. g.*, 18 U. S. C. § 249(a)(2)(B)(iii) (2006 ed., Supp. III) (proscribing hate crimes in which "the defendant employs a firearm, dangerous weapon, explosive or incendiary device, or other weapon that *has traveled* in interstate or foreign commerce" (emphasis added)); § 922(g)(9) (2006 ed.) (proscribing firearm possession or transport by any person "who *has been convicted*" of a felony or a misdemeanor crime of domestic violence (emphasis added)); § 2252(a)(2) (2006 ed., Supp. II) (making it unlawful for any person to receive or distribute a visual depiction of a minor engaging in sexually explicit conduct that "*has been mailed*, or *has been shipped or transported* in or affecting interstate or foreign commerce" (emphasis added)). The absence of similar phrasing here provides powerful evidence that § 2250 targets only postenactment travel.[6]

[6] The dissent identifies several "SORNA provisions that plainly use the present tense to refer to events that . . . may have occurred before SORNA took effect." *Post*, at 467. All of these examples appear in 42 U. S. C. § 16911, a definitional section that merely elucidates the meaning of certain statutory terms and proscribes no conduct. All but two of the provisions, moreover, rely on the term "sex offender," which § 16911(1) defines to mean "an individual who *was convicted* of a sex offense." (Emphasis added.) The remaining provisions are § 16911(7), which simply uses "involves" rather than "involved" to define whether a prior conviction qualifies as a "specified offense against a minor," and § 16911(8), which makes plain that its present-tense reference to an offender's age refers to age "at the time of the offense." These examples thus provide scant support for the proposition that § 2250 uses "travels" to refer to pre-SORNA travel. Given the well-established presumption against retroactivity and, in the criminal context, the constitutional bar on *ex post facto* laws, it cannot be

III

Echoing the Seventh Circuit's assessment that Congress' use of present-tense verbs in § 2250 is "not very revealing," Brief for United States 17, the Government offers two principal arguments for construing the statute to cover pre-SORNA travel: First, such a reading avoids an "anomaly" in the statute's coverage of federal versus state sex offenders; and second, it "better effectuates the statutory purpose," *id.*, at 22 (capitalization omitted). Neither argument persuades us to adopt the Government's strained reading of the statutory text.

A

Section 2250 imposes criminal liability on two categories of persons who fail to adhere to SORNA's registration requirements: any person who is a sex offender "by reason of a conviction under Federal law . . . , the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States," § 2250(a)(2)(A), and any other person required to register under SORNA who "travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country," § 2250(a)(2)(B). According to the Government, these categories correspond to "two alternate sources of power to achieve Congress's aim of broadly registering sex offenders." *Id.*, at 22. Placing pre-SORNA travelers within the statute's coverage, the Government maintains, "ensures that the jurisdictional reach of Section 2250(a)(2) has a comparable breadth as applied to both federal and state sex offenders." *Id.*, at 21.

The Government's pronouncement that § 2250 should have an "equally broad sweep" with respect to federal and state

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the case that a statutory prohibition set forth in the present tense applies by default to acts completed before the statute's enactment. See *Johnson* v. *United States*, 529 U. S. 694, 701 (2000) ("Absent a clear statement of that intent, we do not give retroactive effect to statutes burdening private interests").

offenders, *id.*, at 22, is little more than *ipse dixit.* Had Congress intended to subject any unregistered state sex offender who has ever traveled in interstate commerce to federal prosecution under § 2250, it easily could have adopted language to that effect. That it declined to do so indicates that Congress instead chose to handle federal and state sex offenders differently. There is nothing "anomal[ous]" about such a choice. To the contrary, 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. It is similarly reasonable for Congress to have given the States primary responsibility for supervising and ensuring compliance among state sex offenders and to have subjected such offenders to federal criminal liability only when, after SORNA's enactment, they use the channels of interstate commerce in evading a State's reach.

In this regard, it is notable that the federal sex-offender registration laws have, from their inception, expressly relied on state-level enforcement. Indeed, when it initially set national standards for state sex-offender registration programs in 1994, Congress did not include any federal criminal liability. Congress instead conditioned certain federal funds on States' adoption of "criminal penalties" on any person "required to register under a State program . . . who knowingly fails to so register and keep such registration current." Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, Pub. L. 103–322, Tit. XVII, § 170101(c), 108 Stat. 2041, 42 U. S. C. § 14071(d). Two years later, Congress supplemented state enforcement mechanisms by subjecting to federal prosecution any covered sex offender who "changes address to a State other than the State in which the person resided at the time of the immediately preceding registration" and "knowingly fails to" register as required. Pam Lychner Sexual Offender Tracking and

Identification Act of 1996, Pub. L. 104–236, § 2, 110 Stat. 3095, 3096, 42 U. S. C. §§ 14072(g)(3), (i).[7] The prospective orientation of this provision is apparent. No statutory gap necessitated coverage of unregistered offenders who "change[d] address" before the statute's enactment; the prosecution of such persons remained the province of the States.

In enacting SORNA, Congress preserved this basic allocation of enforcement responsibilities. To strengthen state enforcement of registration requirements, Congress established, as a funding condition, that "[e]ach jurisdiction, other than a Federally recognized Indian tribe, shall provide a criminal penalty that includes a maximum term of imprisonment that is greater than 1 year for the failure of a sex offender to comply with the requirements of this subchapter." § 16913(e).[8] Meanwhile, Congress in § 2250 exposed to federal criminal liability, with penalties of up to 10 years' imprisonment, persons required to register under SORNA over whom the Federal Government has a direct supervisory interest or who threaten the efficacy of the statutory scheme by traveling in interstate commerce.

Understanding the act of travel as an aspect of the harm Congress sought to punish serves to distinguish § 2250 from the felon-in-possession statute to which the Seventh Circuit analogized. See 551 F. 3d, at 582–583. In *Scarborough*, this Court held that a prior version of the statute, which imposed criminal liability on any convicted felon who "'pos-

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[7] Pre-SORNA law also exposed to federal criminal liability any person whose State "ha[d] not established a minimally sufficient sexual offender registration program" and who was thus required to register with the Federal Bureau of Investigation (FBI). See 42 U. S. C. §§ 14072(c), (g)(2), (i). SORNA does not include a similar FBI registration requirement, presumably because, by the time of the statute's enactment, "every State . . . had enacted some" type of registration system. *Smith* v. *Doe*, 538 U. S. 84, 90 (2003).

[8] The law in Indiana, Carr's State of residence, makes the failure to register a class D felony, which carries a prison term of up to three years' imprisonment. Ind. Code §§ 11–8–8–17(a), 35–50–2–7(a) (2009).

sesses . . . in commerce or affecting commerce . . . any firearm,' " 431 U. S., at 564 (quoting 18 U. S. C. App. § 1202(a) (1970 ed.)), did not require the Government to prove postenactment movement of the firearm across state lines. According to the Court, Congress had given "no indication of any concern with either the movement of the gun or the possessor or with the time of acquisition." 431 U. S., at 572. Its aim was simply "to keep guns out of the hands of" convicted felons, *ibid.*, and, by using the phrase "in commerce or affecting commerce," it invoked the full breadth of its Commerce Clause authority to achieve that end. No one in *Scarborough* disputed, however, that the act of possession had to occur postenactment; a felon who "possess[ed]" a firearm only preenactment was plainly outside the statute's sweep. In this case, the proper analogy is not, as the Seventh Circuit suggested, between the travel of a sex offender and the movement of a firearm; it is between the sex offender who "travels" and the convicted felon who "possesses." The act of travel by a convicted sex offender may serve as a jurisdictional predicate for § 2250, but it is also, like the act of possession, the very conduct at which Congress took aim.

B

In a final effort to justify its position, the Government invokes one of SORNA's underlying purposes: to locate sex offenders who had failed to abide by their registration obligations. SORNA, the Government observes, was motivated at least in part by Congress' concern about these "missing" sex offenders—a problem the House Committee on the Judiciary expressly linked to interstate travel: "The most significant enforcement issue in the sex offender program is that over 100,000 sex offenders, or nearly one-fifth in the Nation[,] are 'missing,' meaning they have not complied with sex offender registration requirements. This typically occurs when the sex offender moves from one State to another." H. R. Rep. No. 109–218, pt. 1, p. 26 (2005). The

goal of tracking down missing sex offenders, the Government maintains, "is surely better served by making Section 2250 applicable to them in their new States of residence immediately than by waiting for them to travel in interstate commerce and fail to register yet again." Brief for United States 23–24. The Court of Appeals expressed a similar view. See 551 F. 3d, at 582.[9]

The Government's argument confuses a general goal of SORNA with the specific purpose of § 2250. Section 2250 is not a stand-alone response to the problem of missing sex offenders; it is embedded in a broader statutory scheme enacted to address the deficiencies in prior law that had enabled sex offenders to slip through the cracks. See 42 U. S. C. § 16901 ("Congress in this chapter establishes a comprehensive national system for the registration of [sex] offenders"). Among its many provisions, SORNA instructs States to maintain sex-offender registries that compile an

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[9] Also making this point, the dissent maintains that "[i]nterpreting § 2250(a)(2)(B) to reach only postenactment travel severely impairs § 2250(a)'s effectiveness" by "plac[ing] beyond the reach of the federal criminal laws" "the many sex offenders who had managed to avoid preexisting registration regimes." *Post*, at 471. The dissent sees "no apparent reason why Congress would have wanted to impose such a requirement." *Ibid.* Yet the dissent approves an even greater impairment. Addressing a dispute we leave unresolved, see n. 2, *supra*, the dissent would hold that, in enacting SORNA, "Congress remained neutral on the question whether the Act reaches those with pre-SORNA sex-offense convictions." *Post*, at 467. The dissent's view, in other words, is that SORNA does not apply of its own force to *any* sex offenders convicted prior to the statute's enactment—a reading wholly inconsistent with the dissent's description of SORNA as "a response to a dangerous gap in the then-existing sex-offender-registration laws." *Post*, at 470. If, as the dissent accepts, Congress left open the possibility that *no* preenactment offenders would face liability under § 2250, then it is certainly not unreasonable to conclude that Congress limited the statute's coverage to offenders who travel after its enactment. Indeed, it is strange to think that Congress might have enacted a statute that declined to cover pre-SORNA offenders but nevertheless covered pre-SORNA travel.

array of information about sex offenders, § 16914; to make this information publicly available online, § 16918; to share the information with other jurisdictions and with the Attorney General for inclusion in a comprehensive national sex-offender registry, §§ 16919–16921; and to "provide a criminal penalty that includes a maximum term of imprisonment that is greater than 1 year for the failure of a sex offender to comply with the requirements of this subchapter," § 16913(e). Sex offenders, in turn, are required to "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," § 16913(a), and to appear in person periodically to "allow the jurisdiction to take a current photograph, and verify the information in each registry in which that offender is required to be registered," § 16916. By facilitating the collection of sex-offender information and its dissemination among jurisdictions, these provisions, not § 2250, stand at the center of Congress' effort to account for missing sex offenders.

Knowing that Congress aimed to reduce the number of noncompliant sex offenders thus tells us little about the specific policy choice Congress made in enacting § 2250. While subjecting pre-SORNA travelers to punishment under § 2250 may well be consistent with the aim of finding missing sex offenders, a contrary construction in no way frustrates that broad goal. Taking account of SORNA's overall structure, we have little reason to doubt that Congress intended § 2250 to do exactly what it says: to subject to federal prosecution sex offenders who elude SORNA's registration requirements by traveling in interstate commerce. Cf. *Mertens* v. *Hewitt Associates*, 508 U. S. 248, 261 (1993) ("[V]ague notions of a statute's 'basic purpose' are . . . inadequate to overcome the words of its text regarding the *specific* issue under consideration").

C

None of the legislative materials the Government cites as evidence of SORNA's purpose calls this reading into question. To the contrary, the Report of the House Judiciary Committee suggests not only that a prohibition on postenactment travel is consonant with Congress' goals, but also that it is the rule Congress in fact chose to adopt. As the Government acknowledges, the bill under consideration by the Committee contained a version of § 2250 that "would not have reached pre-enactment interstate travel." Brief for United States 24, n. 9. This earlier version imposed federal criminal penalties on any person who "receives a notice from an official that such person is required to register under [SORNA] and . . . thereafter travels in interstate or foreign commerce, or enters or leaves Indian country." H. R. Rep. No. 109–218, pt. 1, at 9; see also *id.*, at 26 ("[S]ex offenders will now face Federal prosecution . . . if they cross a State line and fail to comply with the sex offender registration and notification requirements contained in the legislation"). Yet this did not stop the Committee from describing its legislation as a solution to the problem of missing sex offenders. See *id.*, at 23–24, 26, 45–46. The Government identifies nothing in the legislative record to suggest that, in modifying this language during the course of the legislative process, Congress intended to alter the statute's temporal sweep.[10] At the very least, the close correspondence between the Committee's discussion of missing sex offenders and its recognition of the travel element's prospective application would seem to confirm that reading § 2250 to reach only postenactment travel does not contravene SORNA's underlying

[10] Among other changes, Congress eliminated the language that conditioned liability on proof of notice, and it removed the word "thereafter," presumably as redundant in light of the sequential structure of the enacted statute.

purposes, let alone result in an absurdity that would compel us to disregard the statutory text. Cf. *Arlington Central School Dist. Bd. of Ed.* v. *Murphy*, 548 U. S. 291, 296 (2006) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the statutory language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms" (internal quotation marks and citation omitted)).

* * *

Having concluded that § 2250 does not extend to preenactment travel, we need not consider whether such a construction would present difficulties under the Constitution's *Ex Post Facto* Clause. The judgment of the United States Court of Appeals for the Seventh Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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

I join the Court's opinion except for Part III–C. I do not join that part because only the text Congress voted on, and not unapproved statements made or comments written during its drafting and enactment process, is an authoritative indicator of the law. But even if those preenactment materials were relevant, it would be unnecessary to address them here. The Court's thorough discussion of text, context, and structure, *ante,* at 445–456, demonstrates that the meaning of 18 U. S. C. § 2250(a) is plain. As the Court acknowledges, *ante* this page, but does not heed, we must not say more:

> "We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first

> canon is also the last: judicial inquiry is complete." *Connecticut Nat. Bank* v. *Germain*, 503 U. S. 249, 253–254 (1992) (citations and internal quotation marks omitted).

JUSTICE ALITO, with whom JUSTICE THOMAS and JUSTICE GINSBURG join, dissenting.

The Court's decision misinterprets and hobbles 18 U. S. C. § 2250(a), a provision of the Sex Offender Registration and Notification Act (SORNA or Act) that is designed to prevent dangerous sex offenders from evading registration requirements. SORNA requires convicted sex offenders to register, and to keep their registrations current, in each jurisdiction where they live, work, and go to school, 42 U. S. C. § 16913, and the provision at issue here, 18 U. S. C. § 2250(a), makes it a crime for a convicted sex offender who moves in interstate commerce[1] to fail to abide by the Act's registration requirements. The question that we must decide is whether § 2250(a) applies only to those sex offenders who travel in interstate commerce after SORNA became law or whether the statute also reaches sex offenders, like petitioner, who were convicted[2] and traveled before SORNA

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[1] Section 2250(a) also applies to persons with federal sex-offense convictions, those who travel in foreign commerce, and those who enter, leave, or reside in Indian country. For convenience, I will refer in this opinion solely to interstate travel.

[2] The Court holds only that § 2250(a)(2)(B) does not apply to a person who moved in interstate commerce before SORNA took effect. The Court does not address the separate question whether § 2250(a) may validly be applied to a person who was convicted of a qualifying offense before SORNA was enacted. Congress delegated to the Attorney General the authority to decide whether the Act's registration requirements—and thus § 2250(a)'s criminal penalties—should apply to persons in the latter category, 42 U. S. C. § 16913(d), and the Attorney General has promulgated a regulation providing that they do, 72 Fed. Reg. 8897 (2007) (codified at 28 CFR § 72.3 (2009)). Because the Court does not address the validity of this regulation, I proceed on the assumption that 18 U. S. C. § 2250(a) reaches persons with pre-SORNA sex-offense convictions.

took effect but violated the registration requirement after that date.

The Court's answer is that § 2250(a) applies only to sex offenders who moved from State to State after SORNA became law. The Court reaches this conclusion for two reasons: (1) the verb tense used in § 2250(a)(2)(B); and (2) the sequence in which the elements of the offense are listed.

As I will attempt to show, the Court's textual arguments are thoroughly unsound. And the conclusion that the Court reaches makes no sense. To appreciate the folly of the Court's interpretation, consider the following two cases.

The first involves a situation in which, for present purposes, I assume that § 2250(a) applies.[3] A man convicted in State A for sexual abuse is released from custody in that State and then, after the enactment of SORNA, moves to State B and fails to register as required by State B law. Section 2250(a) makes this offender's failure to register in State B a federal crime because his interstate movement frustrates SORNA's registration requirements. Because this offender is convicted and then released from custody in State A, the State A authorities know of his presence in their State and are thus in a position to try to ensure that he remains registered. At the time of his release, they can ascertain where he intends to live, and they can make sure that he registers as required by state law. Thereafter, they can periodically check the address at which he is registered to confirm that he still resides there. And even if he moves without warning to some other address in the State, they can try to track him down. Once this offender leaves State A, however, the authorities in that State are severely limited in their ability to monitor his movements. And because the State B authorities have no notice of his entry into their State, they are at a great disadvantage in trying to enforce State B's registration law. Congress enacted

[3] See n. 2, *supra.*

§ 2250(a) in order to punish and deter interstate movement that seriously undermines the enforcement of sex-offender-registration laws.

The second case is the same as the first in all respects except that the sex offender travels from State A to State B before SORNA's enactment. In other words, the sex offender is convicted and later released in State A; prior to SORNA's enactment, he moves to State B; and then, after SORNA takes effect, he fails to register in State B, as SORNA requires.

Is there any reason why Congress might have wanted to treat the second case any differently from the first? In both cases, a sex offender's interstate movement frustrates enforcement of SORNA's registration requirements. In both cases, as a result of that interstate travel, the sex offender's new neighbors in State B are unaware of the presence of a potentially dangerous person in their community, and the State B law enforcement authorities are hampered in their ability to protect the public. The second case is the case now before the Court, and the Court offers no plausible explanation why Congress might have wanted to treat this case any differently from the first.

If the text of § 2250(a) commanded this result, we would, of course, be obligated to heed that command. But the text of § 2250(a) dictates no such thing. On the contrary, when properly read, it reaches both cases.

Section 2250(a) provides in pertinent part as follows:

> "Whoever—
>
> "(1) is required to register under the Sex Offender Registration and Notification Act . . .
>
> "(2) . . . (B) *travels in interstate or foreign commerce* . . . ; and
>
> "(3) knowingly fails to register or update a registration as required by the Sex Offender Registration and Notification Act;

> "shall be fined under this title or imprisoned not more than 10 years, or both." (Emphasis added.)

As I read this language, neither the use of the present tense in paragraph (2)(B) nor the sequence in which the elements are listed provides any basis for limiting the provision to those sex offenders who move from one State to another after SORNA's enactment.

I

A

The dominant theme of petitioner's argument is that the use of the present tense in § 2250(a)(2)(B) ("travels in interstate . . . commerce") indisputably means that an offender's interstate travel must occur after SORNA took effect. "There is no mystery about the meaning of the word 'travels,'" petitioner tells us. Brief for Petitioner 15. "[I]n ordinary usage it refers to current or future travel." *Ibid.* According to petitioner, our "inquiry in this case should go no further than the plain language of § 2250(a)(2)(B), which applies to a person who 'travels' in interstate commerce. Congress's use of the present tense is unambiguous, and the statutory language accordingly should be the end of the matter." *Id.*, at 16–17; see also *id.*, at 17 (use of the present tense "travels" is "dispositive"); *id.*, at 18 ("[T]he use of the present tense in the statute should be decisive"); *id.*, at 21 (use of the present tense "is enough to dispose of this case").

B

A bad argument does not improve with repetition. And petitioner's argument fails because it begs the relevant question. Petitioner belabors the obvious—that the present tense is not used to refer to events that occurred in the past—but studiously avoids the critical question: At what point in time does § 2250(a) speak? Does it speak as of the time when SORNA took effect? Or does it speak as of the

time when the proscribed conduct occurs? Without knowing the point in time at which the law speaks, it is impossible to tell what is past and what is present or future.

The unspoken premise of petitioner's argument is that § 2250(a) speaks as of the time when it became law. And if that premise is accepted, it follows that the use of the present tense in § 2250(a)(2)(B) means that the requisite interstate travel must occur after, not before, SORNA took effect. Petitioner's premise, however, flies in the face of the widely accepted modern legislative drafting convention that a law should *not* be read to speak as of the date of enactment. The United States Senate Legislative Drafting Manual directly addresses this point: "A legislative provision speaks as of any date on which it is read *(rather than as of when drafted, enacted, or put into effect)*." Senate Office of the Legislative Counsel, Legislative Drafting Manual § 103(a), p. 4 (1997) (emphasis added). The House Manual makes the same point:

> "Your draft should be a movable feast—that is, it speaks as of whatever time it is being read *(rather than as of when drafted, enacted, or put into effect)*." House Legislative Counsel's Manual on Drafting Style, HLC No. 104–1, § 102(c), p. 2 (1995).

In accordance with this convention, modern legislative drafting manuals teach that, except in unusual circumstances, all laws, including penal statutes, should be written in the present tense. The Senate Manual, *supra*, § 103(a), at 4, states: "Always use the present tense unless the provision addresses only the past, the future, or a sequence of events that requires use of a different tense." Similarly, the House Manual, *supra*, § 102(c), at 2, advises: "STAY IN THE PRESENT.—Whenever possible, use the present tense (rather than the past or future)." Numerous state legislative drafting manuals and other similar handbooks hammer home this same point. See, *e. g.*, Colorado Legislative

Drafting Manual, p. 5–15 (2009), online at http://www.state.co.us/gov_dir/leg_dir/olls/LDM/OLLS_Drafting_Manual.pdf (all Internet materials as visited May 26, 2010, and available in Clerk of Court's case file) ("Provisions should generally be stated in the present tense"); Hawaii Legislative Drafting Manual 21 (K. Takayama rev. 9th ed. 2007 reprint), online at http://www.state.hi.us/lrb/rpts96/dftman.pdf ("Use the present tense and indicative mood"); Legislative Research Comm'n, Bill Drafting Manual for the Kentucky General Assembly § 304, p. 19 (rev. 14th ed. 2004) ("Use the present tense and the indicative mood"); Maine Legislative Drafting Manual 78 (rev. 2009) ("Laws are meant to be of continuing application and should be written in the present tense"); Massachusetts General Court, Legislative Research and Drafting Manual 16 (5th ed. 2010) ("Use the present tense and the indicative mood"); New Mexico Legislative Council Service, Legislative Drafting Manual 105 (2004 update) ("Statutes are written in the present tense, not the future tense"); Texas Legislative Council Drafting Manual § 7.35, p. 111 (2008) ("Use present tense whenever possible"); West Virginia Legislature Bill Drafting Manual 22 (rev. 2006), online at http://www.legis.state.wv.us/joint/Bill_Drafting/Drafting_Manual.pdf ("Avoid future tense (will be paid) and future perfect tense (will have been paid). Use present tense (is paid)"); see also Ohio Legislative Service Comm'n, Rule Drafting Manual 47 (4th ed. 2006), online at http://www.lsc.state.oh.us/rules/rdm06_06.pdf ("Use present tense. The majority of rules have a continuing effect in that they apply over time. They speak at the time of reading, not merely at the time of their adoption. The present tense therefore includes the future tense").

Once it is recognized that § 2250(a) should not be read as speaking as of the date when SORNA went into effect, petitioner's argument about the use of the present tense collapses. In accordance with current drafting conventions, § 2250(a) speaks, not as of the time when the law went into

effect, but as of the time when the first act necessary for conviction is committed. In the case of § 2250(a), that occurs when an individual is convicted of a qualifying sex offense, for it is that act that triggers the requirement to register under SORNA.[4] For present purposes, we must proceed on the assumption that this event may have occurred before SORNA was enacted. Viewed as of the time when such a pre-SORNA conviction takes place, every subsequent act, including movement from State to State, occurs in the future and is thus properly described using the present tense. Accordingly, § 2250(a)(2)(B)'s use of the present tense ("travels") supports the application of the statute to a sex offender, like petitioner, who moved from State to State after conviction but before SORNA went into effect.[5]

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[4] Under 42 U. S. C. § 16913, a "sex offender" is required to register, and the term "sex offender" is defined as a person who was convicted of a "sex offense." § 16911(1). The Court relies on the artificial argument that the first act necessary for conviction under 18 U. S. C. § 2250(a) is the failure to register, *ante*, at 446–447, and n. 4, but in real-world terms the first necessary act is plainly the commission of a qualifying offense.

[5] Contrary to the Court's interpretation, see *ante*, at 448–449, *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Foundation, Inc.*, 484 U. S. 49 (1987), does not support petitioner's argument. *Gwaltney* involved a civil action brought under § 505 of the Clean Water Act, 33 U. S. C. § 1365(a), which authorizes suit against any person "alleged to be in violation" of a National Pollutant Discharge Elimination System permit. In *Gwaltney*, the permit holder had violated its permit between 1981 and 1984, but the permit holder claimed that it had ceased all violations by the time the suit was filed. 484 U. S., at 53–55. This Court held that the phrase "alleged to be in violation" showed that the provision was meant to apply only where an ongoing violation is alleged. *Id.*, at 59.

The provision at issue in *Gwaltney* differs from § 2250(a) in that it specifies the relevant temporal point of reference, namely, the point in time when the allegation of an ongoing violation is made. Section 2250(a) contains no similar specification. Moreover, the *Gwaltney* Court did not read the provision at issue there as speaking at the time when the provision was enacted. As noted above, however, the silent premise of petitioner's argument is that § 2250(a) must be read as speaking as of the time of SORNA's enactment.

C

Petitioner's present-tense argument is particularly perverse in light of the context in which § 2250(a) was adopted. When SORNA was enacted, Congress elected not to decide for itself whether the Act's registration requirements—and thus § 2250(a)'s criminal penalties—would apply to persons who had been convicted of qualifying sex offenses before SORNA took effect. Instead, Congress delegated to the Attorney General the authority to decide that question. See § 113(d), 120 Stat. 594, 42 U. S. C. § 16913(d) ("The Attorney General shall have the authority to specify the applicability of the requirements of [Title I of SORNA] to sex offenders convicted before the enactment of this Act").[6] Pursuant to this delegation, the Attorney General in 2007 issued an interim rule providing that SORNA applies to preenactment convictions. 72 Fed. Reg. 8897 (codified at 28 CFR § 72.3).[7]

[6] To be sure, at least two Courts of Appeals have held that SORNA's registration requirements apply by the Act's own terms to those individuals with sex-offense convictions that predate SORNA's enactment. See *United States* v. *Hinckley*, 550 F. 3d 926, 929–935 (CA10 2008); *United States* v. *May*, 535 F. 3d 912, 918–919 (CA8 2008). Other Courts of Appeals, however, have disagreed, reasoning that SORNA's explicit grant of authority to the Attorney General to determine the Act's applicability to offenders with pre-SORNA convictions implies that the Act would not apply to those sex offenders absent the Attorney General's regulation. See, *e. g.*, *United States* v. *Cain*, 583 F. 3d 408, 414–415, 419 (CA6 2009); *United States* v. *Hatcher*, 560 F. 3d 222, 226–229 (CA4 2009); *United States* v. *Dixon*, 551 F. 3d 578, 585 (CA7 2008) (case below); *United States* v. *Madera*, 528 F. 3d 852, 856–859 (CA11 2008) *(per curiam)*. Those Courts of Appeals in the latter group, in my view, have the better of the argument. Section 113(d) of SORNA delegates to the Attorney General the "authority to specify the applicability of the requirements of [Title I of SORNA] to sex offenders convicted before the enactment of [the] Act." 120 Stat. 594, 42 U. S. C. § 16913(d). The clear negative implication of that delegation is that, without such a determination by the Attorney General, the Act would not apply to those with pre-SORNA sex-offense convictions.

[7] Although not controlling, it is worth noting that one of the two examples the Attorney General included in his February 2007 rule contemplated that pre-SORNA travel would be sufficient to satisfy

Petitioner contends that, if Congress had wanted to make § 2250(a) applicable to sex offenders who traveled in interstate commerce before SORNA took effect, Congress could have referred in § 2250(a)(2)(B) to a person who "traveled," "has traveled," or, at the time of the statute's enactment, "had traveled" in interstate commerce. Brief for Petitioner 19 (internal quotation marks omitted). Any such phrasing, however, would have strongly suggested that § 2250(a) reaches persons with pre-SORNA sex-offense convictions—the very question that Congress chose not to decide but instead to leave for the Attorney General.

A brief explanation is needed to make clear why wording § 2250(a)(2)(B) in the past tense (or the present perfect or past perfect tense) would have had such an effect. The Court and I agree that § 2250(a) applies only to persons who travel in interstate commerce after they are convicted of a qualifying sex offense. See *ante*, at 446; *infra*, at 469. Therefore, if § 2250(a) had been phrased in the past tense (or the present perfect or past perfect tense), it would seem necessarily to follow that the provision reaches pre-SORNA convictions. By using the present tense, Congress remained neutral on the question whether the Act reaches those with pre-SORNA sex-offense convictions and left that question open for the Attorney General.

The conclusion that § 2250(a)(2)(B) embraces pre-SORNA travel is reinforced by the presence of quite a few other SORNA provisions that plainly use the present tense to refer to events that, as a result of the Attorney General's regulation, may have occurred before SORNA took effect. For example, an individual may qualify as a "tier II sex offender" under the Act if, among other things, his sex offense "*involves* . . . (i) use of a minor in a sexual performance; (ii) solicitation of a minor to practice prostitution; or (iii) production or distribution of child pornography." 42 U. S. C.

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§ 2250(a)(2)(B)'s interstate-travel requirement. See 28 CFR § 72.3 (Example 2).

§ 16911(3)(B) (emphasis added); see also § 16911(4)(B) (offense "*involves* kidnapping of a minor" (emphasis added)); § 16911(7) (offense "involves" certain specified conduct). Similarly, a sex offender can qualify as a "tier II sex offender" if his sex offense "*occurs* after the offender *becomes* a tier I sex offender." § 16911(3)(C) (emphasis added); see also § 16911(4)(C) (offense "*occurs* after the offender *becomes* a tier II sex offender" (emphasis added)). A juvenile adjudication, moreover, may qualify as a conviction for purposes of the Act only if, among other things, the "offender *is* 14 years of age or older at the time of the offense." § 16911(8) (emphasis added).[8]

Congress cast all of these provisions in the present tense, but now that the Attorney General has made SORNA applicable to individuals with pre-SORNA sex-offense convictions, all of these provisions must necessarily be interpreted as embracing preenactment conduct.

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[8] That many of these provisions rely on § 16911(1)'s definition of the term "sex offender" changes nothing. See *ante*, at 450–451, n. 6. Had the Attorney General not exercised his discretion to make SORNA's registration requirements applicable to those with pre-SORNA sex-offense convictions, all of these provisions would have applied to only postenactment conduct—notwithstanding § 16911(1)'s reference to "an individual who *was convicted* of a sex offense." (Emphasis added.) But now that the Attorney General has so exercised his discretion, all of these present-tense-phrased provisions necessarily must be interpreted as reaching preenactment conduct. The same conclusion should follow with respect to 18 U. S. C. § 2250(a)(2)(B).

Additionally, I do not suggest that the "default" rule is that provisions written in the present tense apply to past conduct. To the contrary, I had thought it an uncontroversial proposition of statutory interpretation that statutes must be interpreted in context. See, *e. g.*, *United States Nat. Bank of Ore.* v. *Independent Ins. Agents of America, Inc.*, 508 U. S. 439, 455 (1993); see also 1 U. S. C. § 1. And when § 2250(a) is read with an eye to the context in which SORNA was enacted, it becomes quite clear that § 2250(a)(2)(B) should be interpreted as reaching preenactment travel. Giving effect to those contextual indicators, moreover, does not offend the presumption against retroactivity or the *Ex Post Facto* Clause. See n. 10, *infra*.

II

The Court's second reason for holding that 18 U. S. C. § 2250(a) reaches only post-SORNA travel is based on the sequence in which the elements of § 2250(a) are listed. The Court concludes (and I agree) that the first listed element (subsection (a)(1) ("is required to register under the Sex Offender Registration and Notification Act")) cannot have been violated until the Act took effect. The Court then reasons that the third listed element (subsection (a)(2)(B) ("travels in interstate . . . commerce")) must be violated after the first. See *ante*, at 446. The Court explains: "Persons convicted of sex offenses under state law who fail to register in their State of conviction would otherwise be subject to federal prosecution under § 2250 even if they had not left the State after being convicted—an illogical result given the absence of any obvious federal interest in punishing such state offenders." *Ibid.* In other words, the Court reasons that it would be illogical to interpret the statute as reaching a person who first moves from State A to State B, then commits and is convicted of a qualifying sex offense in State B, and subsequently, upon release from custody in State B, fails to register as required under the law of that State.

I agree with the Court that there is a good argument that § 2250(a) should not be read to apply to such a case, where there is little if any connection between the offender's prior interstate movement and his subsequent failure to register. In the two hypothetical cases discussed at the beginning of this opinion, the offender's interstate movement seriously frustrated the ability of the law enforcement authorities in his new State (State B) to enforce its registration requirements. By contrast, where an offender's interstate movement predates his sex offense and conviction, his interstate movement has little if any effect on the ability of the law enforcement authorities in State B to enforce that State's laws. When a sex offender is released from custody in State B, the ability of the State B authorities to enforce that

State's registration laws would appear to be the same regardless of whether that offender had lived his entire life in that State or had moved to the State prior to committing the offense for which he was convicted. Accordingly, it can be argued that Congress cannot have meant to reach this situation. As the Seventh Circuit put it, "[s]ince the statutory aim is to prevent a convicted sex offender from circumventing registration by leaving the state in which he is registered, it can be argued that the travel must postdate the conviction." *United States* v. *Dixon*, 551 F. 3d 578, 582 (2008). It can also be argued that a broader construction would mean that Congress exceeded its authority under the Commerce Clause. See Brief for National Association of Criminal Defense Lawyers as *Amicus Curiae* 16–17.

What the Court's argument shows, however, is not that the interstate travel required by § 2250(a) must come *after SORNA's enactment.* Rather, what the Court's argument suggests is that the interstate travel must come *after the sex-offense conviction.* And because, under the regulation promulgated by the Attorney General, § 2250(a) reaches pre-SORNA convictions, this argument does not support the Court's conclusion that the interstate travel needed under § 2250(a) must have occurred after SORNA was enacted.

III

When an interpretation of a statutory text leads to a result that makes no sense, a court should at a minimum go back and verify that the textual analysis is correct. Here, not only are the Court's textual arguments unsound for the reasons explained above, but the indefensible results produced by the Court's interpretation should have led the Court to doublecheck its textual analysis.

SORNA was a response to a dangerous gap in the then-existing sex-offender-registration laws. In the years prior to SORNA's enactment, the Nation had been shocked by cases in which children had been raped and murdered by

persons who, unbeknownst to their neighbors or the police, were convicted sex offenders. In response, Congress and state legislatures passed laws requiring the registration of sex offenders. See *Smith* v. *Doe*, 538 U. S. 84, 89–90 (2003); Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, Tit. 17, 108 Stat. 2038; Megan's Law, 110 Stat. 1345. Despite those efforts, by 2006 an estimated 100,000 convicted sex offenders—nearly one-fifth of the Nation's total sex-offender population—remained unregistered. H. R. Rep. No. 109–218, pt. 1, p. 26 (2005). The principal problem, a House Report determined, was that sex offenders commonly moved from one State to another and then failed to register in their new State of residence. *Ibid.* In other words, interstate travel was dangerously undermining the effectiveness of state sex-offender-registration laws.

Interpreting § 2250(a)(2)(B) to reach only postenactment travel severely impairs § 2250(a)'s effectiveness. As interpreted by the Court, § 2250(a) applies to a pre-SORNA sex offender only if that offender traveled in interstate commerce at some point *after* SORNA's enactment. As the examples discussed at the beginning of this opinion illustrate, however, there is no apparent reason why Congress would have wanted to impose such a requirement. To the contrary, under the Court's interpretation, the many sex offenders who had managed to avoid pre-existing registration regimes, mainly by moving from one State to another before SORNA's enactment, are placed beyond the reach of the federal criminal laws. It surely better serves the enforcement of SORNA's registration requirements to apply § 2250(a) to all pre-SORNA sex offenders, regardless of whether their interstate travel occurred before or after the statute's enactment.

The Court provides only a weak defense of the result its analysis produces. The Court suggests that enhanced information collection and sharing and state enforcement of registration laws were the sole weapons that Congress chose to

wield in order to deal with those convicted sex offenders whose whereabouts were unknown when SORNA was passed. See *ante*, at 454–456. I see no basis for this conclusion. There can be no dispute that the enactment of § 2250(a) shows that Congress did not think these measures were sufficient to deal with persons who have qualifying sex-offense convictions and who move from State to State after SORNA's enactment. And in light of that congressional judgment, is there any plausible reason to think that Congress concluded that these same measures would be adequate for those with qualifying sex-offense convictions who had already disappeared at the time of SORNA's enactment?[9] The Court has no answer, and I submit that there is none.[10]

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[9] Contrary to the Court's suggestion, see *ante*, at 455, n. 9, it is no answer to point to Congress' decision to delegate to the Attorney General the responsibility of deciding whether § 2250(a) should reach persons with pre-SORNA sex-offense convictions. Of course, that delegation created the possibility that the Attorney General would decide that § 2250(a) should not apply to such offenders, and if he had so decided it would likely follow that post-SORNA interstate travel would also be required. (This is the case because, as previously explained, there is a strong argument that § 2250(a) requires interstate travel that comes after a qualifying conviction.)

Now that the Attorney General has decided that § 2250(a) reaches persons with pre-SORNA sex-offense convictions, however, the relevant question is this: Is there any reason why Congress might have wanted to draw a distinction between (1) persons with pre-SORNA convictions and pre-SORNA travel and (2) persons with pre-SORNA convictions and post-SORNA travel? And to this question, the Court offers no plausible answer.

[10] Petitioner makes the additional argument that interpreting § 2250(a)(2)(B) to reach preenactment travel renders the statute an unlawful *ex post facto* law. See U. S. Const., Art. I, § 9, cl. 3. Petitioner remained unregistered in Indiana five months after the promulgation of the regulation making SORNA applicable to persons with pre-SORNA sex-offense convictions. For essentially the reasons explained by the Court of Appeals, see 551 F. 3d, at 585–587, I would reject petitioner's *ex post facto* argument.

IV

For these reasons, I would affirm the decision of the Seventh Circuit, and I therefore respectfully dissent.

Syllabus

BARBER ET AL. *v.* THOMAS, WARDEN

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

No. 09–5201. Argued March 30, 2010—Decided June 7, 2010

The federal sentencing statute at issue provides that a "prisoner . . . serving a term of imprisonment of more than 1 year . . . may receive credit toward the service of [that] sentence . . . of up to 54 days at the end of each year of the prisoner's term of imprisonment" subject to the Bureau of Prison's (BOP) "determination . . . that, during that year, the prisoner" has behaved in an exemplary fashion. 18 U. S. C. § 3624(b)(1). Credit "for the last year or portion of a year of the term of imprisonment [is] prorated . . . ." *Ibid.* The BOP applies this statute using a methodology that awards days of credit at the end of each year the prisoner serves and sets those days to the side. When the difference between the time remaining in the sentence and the amount of accumulated credit is less than one year, the BOP awards a prorated amount of credit for that final year proportional to the awards in other years.

Petitioners claim that the BOP's calculation method is unlawful because § 3624(b)(1) requires a calculation based on the length of the term of imprisonment imposed by the sentencing judge, not the length of time that the prisoner actually serves. The District Court rejected this challenge in each of petitioner's cases, and the Ninth Circuit affirmed.

Held: Because the BOP's method for calculating good time credit reflects the most natural reading of the statute, it is lawful. Pp. 480–492.

(a) The statute's language and purpose, taken together, support the BOP's method. That method tracks § 3624(b)'s language by providing a prisoner a maximum credit of 54 days for each full year of imprisonment and a proportionally adjusted amount of credit for any additional time served that is less than a full year. As § 3624(b) directs, the BOP awards the credit "at the end of each year" of imprisonment. Petitioners' approach cannot be reconciled with the statute. Because it awards credit for the sentence imposed, regardless of how much time is actually served, a prisoner could receive credit for a year that he does not spend in prison. Moreover the calculation of credit for such a year would *not* be made "at the end of" that year. Nor could the BOP determine whether the prisoner had exemplary behavior "during that year." This language did not find its way into the statute by accident. The differences between the prior provision (repealed in 1984)—which granted the prisoner a deduction at the outset of his sentence, subject to forfeiture for breaking prison rules—and the present statute—under which

"credit" is "earned" "at the end of" the year based on an evaluation of behavior "during that year"—show an intent to move from a prospective entitlement to a retrospective award. The BOP's method also furthers the basic purpose of the statute. Section 3624 was part of the comprehensive Sentencing Reform Act of 1984, which sought to achieve both increased sentencing uniformity and greater honesty by "mak[ing] all sentences basically determinate." *Mistretta* v. *United States*, 488 U. S. 361, 367. Thereafter, the sentence the judge imposed would be the one the offender actually served, with a sole statutory exception for good time credits. *Ibid.* Section 3624(b) states the reason for the exception: to provide an incentive for prisoners to "compl[y] with institutional disciplinary regulations." The exception is limited and tailored to its purpose—credit is earned at the end of the year after compliance with institutional rules is demonstrated and thereby rewards and reinforces a readily identifiable period of good behavior. The BOP's approach furthers § 3624's objectives by tying the award directly to good behavior during the preceding year. In contrast, petitioners' approach would allow a prisoner to earn credit for both the portion of his sentence that he served and the portion offset with earned credit, which would loosen the statute's connection between good behavior and the good time award. Pp. 480–483.

(b) Arguments to the contrary are unconvincing. Context indicates that the phrase "term of imprisonment" as used in the portion of § 3624(b) at issue here refers to prison time actually served not, as petitioners contend, to the sentence imposed by the judge. Petitioners' reliance on legislative history is misplaced. A U. S. Sentencing Commission Supplementary Report is not helpful to them either, because there is no indication that the Commission, in that report or in the Guidelines themselves, considered or referred to the particular question whether to base good time credit on time served or the sentence imposed. Nor, in light of the statute's text, structure, history, and purpose, is this a case in which there is a "grievous ambiguity or uncertainty in the statute," *Muscarello* v. *United States*, 524 U. S. 125, 139, permitting application of the rule of lenity. Because the BOP's calculation system applies the statute as its language is most naturally read, and in accordance with the statute's basic purpose, this Court need not determine the extent to which Congress has granted the BOP authority to interpret the statute more broadly, or differently than it has done here. Cf. *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 844–845. And because the BOP's approach reflects the statute's most natural reading and is the most consistent with its purpose, it is also preferable to the dissent's alternative interpretation. Pp. 483–492.

Affirmed.

BREYER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, THOMAS, ALITO, and SOTOMAYOR, JJ., joined. KENNEDY, J., filed a dissenting opinion, in which STEVENS and GINSBURG, JJ., joined, *post,* p. 493.

Stephen R. Sady argued the cause for petitioners. With him on the briefs was *Lynn Deffebach.*

Jeffrey B. Wall argued the cause for respondent. With him on the brief were *Solicitor General Kagan, Assistant Attorney General Breuer, Deputy Solicitor General Dreeben,* and *Kevin R. Gingras.**

JUSTICE BREYER delivered the opinion of the Court.

Federal sentencing law permits federal prison authorities to award prisoners credit against prison time as a reward for good behavior. 18 U. S. C. § 3624(b). Petitioners, two federal prisoners, challenge the method that the Federal Bureau of Prisons uses for calculating this "good time credit." We conclude that the Bureau's method reflects the most natural reading of the statute, and we reject petitioners' legal challenge.

I

A

A federal sentencing statute provides:

> "[A] prisoner who is serving a term of imprisonment of more than 1 year . . . may receive credit toward the service of the prisoner's sentence, beyond the time served, of up to 54 days at the end of each year of the prisoner's term of imprisonment, beginning at the end of the first year of the term . . . . [C]redit for the last year or portion of a year of the term of imprisonment

*Briefs of *amici curiae* urging reversal were filed for the National Association of Criminal Defense Lawyers et al. by *Jeffrey T. Green, Peter C. Pfaffenroth, Steven R. Shapiro, Paul M. Rashkind, Frances H. Pratt, Brett G. Sweitzer, Jonathan Hacker, Mary Price,* and *Peter Goldberger;* and for Pierce O'Donnell by *George J. Terwilliger III* and *Daniel B. Levin.*

> shall be prorated and credited within the last six weeks of the sentence." § 3624(b)(1).

The Bureau of Prisons (BOP) applies this statute using a methodology that petitioners in this case challenge as unlawful. In order to explain the BOP method, we shall use a simplified example that captures its essential elements. The unsimplified calculations described by the BOP in its policy statement, see App. 96–100, will reach approximately the same results as, and are essentially the mathematical equivalent of, the simplified system we describe (there may be other ways to describe the calculation as well). To the extent that there are any differences between the methodology employed by the BOP and that reflected in our example, they are of no consequence to the resolution of petitioners' challenge and are therefore not before us. Similarly, although petitioners committed their crimes before the current version of § 3624 was enacted and are therefore subject to a previous version that differed slightly in certain details, see 18 U. S. C. § 3624 (1988 ed.), the differences between the two versions are immaterial to the questions presented by this case. The parties refer to the current version as the relevant provision of law, see Brief for Petitioners 2–3; Brief for Respondent 8, n. 2, and we shall do the same.

In our example we shall imagine a prisoner who has received a sentence of 10 years' imprisonment. We shall assume that his behavior throughout his confinement is exemplary and that prison authorities will consequently consider him to merit the maximum good time credit that the statute will allow. And we shall ignore leap years.

Thus, at the end of the first year (Year 1) that prisoner would earn the statute's maximum credit of 54 days. The relevant official (whom we shall call the "good time calculator") would note that fact and, in effect, preliminarily put the 54 days to the side. At the end of Year 2 the prisoner would earn an additional 54 days of good time credit. The good time calculator would add this 54 days to the first 54

days, note the provisional total of 108 days, and again put the 108 days' credit to the side. By the end of Year 8, the prisoner would have earned a total of 432 days of good time credit (8 years times 54 days). At that time, the good time calculator would note that the difference between the time remaining in the sentence (2 years, or 730 days) and the amount of accumulated good time credit (432 days) is less than 1 year (730 minus 432 equals 298 days, which is less than 365). The 432 days of good time credit that the prisoner has earned by the end of Year 8 are sufficient to wipe out all of the last year of the 10-year prison term and to shorten the prisoner's 9th year of imprisonment by 67 days.

Year 9 of the sentence will consequently become the prisoner's last year of imprisonment. Further, because the prisoner has already earned 67 days of credit against that year (432 days already earned minus 365 days applied to Year 10 leaves 67 days to apply to Year 9), the prisoner will have no more than 298 days left to serve in Year 9. Now the good time calculator will have to work out just how much good time the prisoner can earn, and credit against, these remaining 298 days.

As we said, the statute provides that "good time" for this "last year or portion" thereof shall be "prorated." Thus, the good time calculator must divide the 298 days into two parts: (1) days that the prisoner will have to serve in prison, and (2) credit for good behavior the prisoner will earn during the days served in Year 9. In other words, the number of days to be served in Year 9 plus the number of good time credit days earned will be equal to the number of days left in the sentence, namely, 298. And to keep the award of credit in the last year proportional to awards in other years, the ratio of these two parts of Year 9 (*i. e.*, the number of good time days divided by the number of days served) must be 54 divided by 365, the same ratio that the BOP applies to full years served. We can use some elementary algebra, described in the Appendix, *infra*, to work out the rest. The

result is that if the prisoner serves 260 days, he can earn an additional 38 days of credit for good behavior. That is to say, of the 298 days remaining in his sentence, the prisoner will have to serve 260 days in confinement, after which point, his sentence will be fully accounted for (given the additional 38 days' credit earned), and he will be released. In sum, a prisoner subject to a 10-year (3,650-day) sentence who earns the maximum number of days the statute permits will serve 3,180 days in confinement and receive 470 days of "good time" credit, about 15% of the prison time actually served.

B

In this case petitioners claim that the BOP's calculation method is unlawful. They say that § 3624(b)(1) (2006 ed.) requires a straightforward calculation based upon the length of the term of imprisonment that the sentencing judge imposes, not the length of time that the prisoner actually serves. Thus, if a sentencing judge imposes a prison term of 10 years (as in our example), then, in petitioners' view, the statute permits a maximum good time award of 540 days (10 years times 54 days), not the 470 days that the method described above would allow. And if the judge imposes a prison term of 10 years and 6 months, then the statute permits 567 days (540 days for the 10 years plus 27 days for the extra 6 months), not the 494 days that the method above would allow. According to petitioners, the BOP's method causes model prisoners to lose seven days of good time credit per year of imprisonment, and because their sentences are fairly long (one, Michael Barber, was sentenced to 26 years and 8 months; the other, Tahir Jihad-Black, was sentenced to 21 years and 10 months), the difference in their cases amounts to several months of additional prison time.

The District Court in each of these cases rejected the prisoner's challenge. Civ. No. 08–226 MO (D Ore., Oct. 27, 2008), App. 13; *Jihad-Black* v. *Thomas*, Civ. No. 08–227 MO (D Ore., Oct. 27, 2008), App. 25. And in each instance the Court of

Appeals affirmed the District Court. *Tablada* v. *Thomas*, No. 07–35538 (CA9, Apr. 10, 2009), App. 11; see also *Tablada* v. *Thomas*, 533 F. 3d 800 (CA9 2008). Because the BOP's administration of good time credits affects the interests of a large number of federal prisoners, we granted the consolidated petition for certiorari to consider petitioners' challenge.

II

Having now considered petitioners' arguments, we conclude that that we must reject their legal challenge. The statute's language and its purpose, taken together, convince us that the BOP's calculation method is lawful. For one thing, that method tracks the language of § 3624(b). That provision says that a prisoner (serving a sentence of imprisonment of more than a year and less than life) "may receive credit . . . of up to 54 days *at the end of each year*" subject to the "determination by the Bureau of Prisons that, *during that year*, the prisoner" has behaved in an exemplary fashion. § 3624(b)(1) (emphasis added). And it says that credit for the "last year or portion of a year . . . shall be prorated and credited within the last six weeks of the sentence." *Ibid.* As the example in Part I makes clear, the BOP's interpretation provides a prisoner entitled to a maximum annual credit with 54 days of good time credit for each full year of imprisonment that he serves and a proportionally adjusted amount of credit for any additional time served that is less than a full year. And, as § 3624(b) directs, the BOP awards the credit *at the end of* each year of imprisonment (except, of course, for Year 9, which is subject to the statute's special instruction requiring proration and crediting during the last six weeks of the sentence).

We are unable similarly to reconcile petitioners' approach with the statute. Their system awards credit for the sentence imposed, regardless of how much time is actually served. Thus, a prisoner under petitioners' system could receive 54 days of credit for Year 10 despite the fact that he

would be released after less than 8½ years in prison. The good time calculation for Year 10 would *not* be made "*at the end of*" Year 10 (nor within the last six weeks of a sentence ending during that year). Neither could the BOP determine whether the prisoner had behaved in exemplary fashion "*during that year.*" 18 U. S. C. § 3624(b)(1) (emphasis added); see also *White* v. *Scibana*, 390 F. 3d 997, 1001 (CA7 2004) ("The Bureau cannot evaluate a prisoner's behavior and award credit for good conduct if the prisoner is not still in prison"); cf. *McGinnis* v. *Royster*, 410 U. S. 263, 273 (1973) ("Where there is no evaluation by state officials and little or no rehabilitative participation for anyone to evaluate, there is a rational justification for declining to give good-time credit").

We cannot say that this language ("at the end of," "during *that* year") found its way into the statute by accident. Under the previous good time provision, a prisoner was "entitled to a deduction from the term of his sentence beginning with the day on which the sentence commences to run." 18 U. S. C. § 4161 (1982 ed.) (repealed 1984). This deduction, granted at the outset of a prisoner's sentence, was then made subject to forfeiture if the prisoner "commit[ted] any offense or violate[d] the rules of the institution." § 4165 (repealed 1984). The present statute, § 3624 (2006 ed.), in contrast, creates a system under which "credit" is "earned" "at the end of" the year based on an evaluation of behavior "during that year." We agree with the Government that "[t]he textual differences between the two statutes reveal a purpose to move from a system of prospective entitlement to a system of retrospective award." Brief for Respondent 33; see also *White*, *supra*, at 1002, n. 3.

For another thing, the BOP's method better furthers the statute's basic purpose. The "good time" provision in § 3624 is part of the Sentencing Reform Act of 1984, 98 Stat. 1987, 18 U. S. C. § 3551 *et seq.*, 28 U. S. C. §§ 991–998, a comprehensive law that reformed federal sentencing practice and di-

rected the newly created United States Sentencing Commission "to devise guidelines to be used for sentencing" in district courts, *Mistretta* v. *United States*, 488 U. S. 361, 367 (1989). Under the previous regime, the United States Parole Commission, "as a general rule, [could] conditionally release a prisoner any time after he serve[d] one-third of the judicially fixed term." *United States* v. *Grayson*, 438 U. S. 41, 47 (1978). If, for example, a judge imposed a prison term of 15 years, the Parole Commission might have released the prisoner after only 5 years. And it routinely did so. See United States Sentencing Commission, Guidelines Manual §1A3, p. s., p. 1.2 (Oct. 1987) (USSG) ("[D]efendants often serv[ed] only about one-third of the sentence handed down by the court"). The result was "confusion and implicit deception." *Ibid.* With the Sentencing Reform Act, Congress sought to achieve both increased sentencing uniformity and greater honesty by "mak[ing] all sentences basically determinate," *Mistretta*, *supra*, at 367. See USSG §1A3, p. s., at 1.2 (statutory objectives included "honesty in sentencing," "uniformity," and "proportionality" (emphasis deleted)).

Thereafter, the sentence the judge imposed would be the sentence the offender actually served, *with a sole statutory exception for good time credits*. *Mistretta*, *supra*, at 367 (a "prisoner is to be released at the completion of his sentence reduced only by any credit earned by good behavior while in custody" (citing §3624(b))). The reason for this exception is provided in §3624(b)(1) itself: to provide an incentive for prisoners to "compl[y] with institutional disciplinary regulations." The good time exception is limited (to 54 days per year) and tailored to its purpose—credit is earned at the end of the year after compliance with institutional rules is demonstrated and thereby rewards and reinforces a readily identifiable period of good behavior.

The BOP's approach furthers the objective of §3624. It ties the award of good time credits directly to good behavior during the preceding year of imprisonment. By contrast,

petitioners' approach, insofar as it would award up to 54 days per year of time *sentenced* as opposed to time *served*, allows a prisoner to earn credit for both the portion of his sentence that he serves and the portion of his sentence that he offsets with earned good time credit. In other words, petitioners argue that the BOP should award good time credit not only for the days a prisoner spends in prison and behaves appropriately, but also for days that he will not spend in prison at all, such as Year 10 in our example. By doing so, it loosens the statute's connection between good behavior and the award of good time and transforms the nature of the exception to the basic sentence-imposed-is-sentence-served rule. And to that extent, it is inconsistent with the statute's basic purpose.

III

A

We are not convinced by petitioners' several arguments against the BOP's methodology. First, petitioners point to the statement in § 3624(b)(1) that a prisoner "may receive credit . . . at the end of each year of the prisoner's *term of imprisonment.*" (Emphasis added.) The words "term of imprisonment," they say, must refer to the years of the term that the sentencing judge imposed (10 years in our example), not the (less-than-10) years of the term that the prisoner actually served once good time credits were taken into account. After all, the very first phrase of that provision makes eligible for good time credits "a prisoner who is serving a *term of imprisonment* of more than 1 year other than a *term of imprisonment* for the duration of the prisoner's life." *Ibid.* (emphasis added; footnote omitted). The words "term of imprisonment" in this phrase almost certainly refer to the sentence imposed, not to the time actually served (otherwise prisoners sentenced to a year and a day would become ineligible for credit as soon as they earned it). And, as petitioners emphasize, we have recognized a "presumption

that a given term is used to mean the same thing throughout a statute," *Brown* v. *Gardner*, 513 U. S. 115, 118 (1994).

The problem for petitioners, however, is that this presumption is not absolute. It yields readily to indications that the same phrase used in different parts of the same statute means different things, particularly where the phrase is one that speakers can easily use in different ways without risk of confusion. *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U. S. 427, 433 (1932); *General Dynamics Land Systems, Inc.* v. *Cline*, 540 U. S. 581, 595–596 (2004). See, *e. g.*, *id.*, at 596–597 ("age" has different meanings in the Age Discrimination in Employment Act of 1967); *United States* v. *Cleveland Indians Baseball Co.*, 532 U. S. 200, 213 (2001) (same for "'wages paid'" in the Internal Revenue Code); *Robinson* v. *Shell Oil Co.*, 519 U. S. 337, 343–344 (1997) (same for "employee" in Title VII of the Civil Rights Act of 1964).

The phrase "term of imprisonment" is just such a phrase. It can refer to the sentence that the judge imposes, see, *e. g.*, § 3624(a) ("A prisoner shall be released" at the end of "the prisoner's term of imprisonment, less any time credited" for good behavior), but it also can refer to the time that the prisoner actually serves. Thus, § 3624(d) of the statute before us requires the BOP to "furnish [a] prisoner with . . . suitable clothing[,] . . . money, . . . and . . . transportation" "[u]pon the release of [the] prisoner on the expiration of the *prisoner's term of imprisonment*." (Emphasis added.) The statute here means to ensure that the prisoner is provided with these necessities at the time of his actual release from prison (sometime during Year 9 in our example), not at the end of the term that the judge imposed (which would be over a year later). Since the statute uses the same phrase "term of imprisonment" in two different ways, the presumption cannot help petitioners here. And, for the reasons we have given, see Part II, *supra*, context here indicates that the particular instance of the phrase "term of imprisonment"

at issue refers to prison time actually served rather than the sentence imposed by the judge.

Second, petitioners seek to draw support from the statute's legislative history. But those who consider legislative history significant cannot find that history helpful to petitioners here. Petitioners point, for example, to a statement in the Senate Report accompanying the Sentencing Reform Act, which says that the "method of calculation" of good time "will be considerably less complicated than under current law in many respects," and that "credit toward early release is earned at a steady and easily determined rate that will have an obvious impact on the prisoner's release date." S. Rep. No. 98–225, pp. 146–147 (1983); see Brief for Petitioners 31–32. But these statements are consistent with the BOP's interpretation of the statute. Its method, as we understand it, is not particularly difficult to apply and it is certainly less complex than prior law, which provided for the accumulation of two different kinds of good time credit (general and industrial), calculated in different manners (prospectively and retrospectively), and awarded at different rates, depending on the length of sentence imposed on the prisoner (5 to 10 days per month for general) or the year of employment (3 or 5 days per month for industrial). See 18 U. S. C. §§ 4161, 4162 (1982 ed.).

Petitioners also point to various statements contained in the Act's Conference Report and made by individual legislators that describe good time credit as providing sentence reductions of 15%. See Brief for Petitioners 34–36 (citing, *e. g.*, H. R. Conf. Rep. No. 98–1159, p. 415 (1984); 131 Cong. Rec. 488 (1985) (remarks of Rep. Hamilton)). But there is nothing in the context of these statements to suggest that they amounted to anything other than rough approximations or that they were made with the present controversy in mind. See, *e. g.*, H. R. Conf. Rep. No. 98–1159, at 415 (noting simply that an increase in the amount of maximum annual credit from 36 days to 54 days "increases 'good time' that

accrues from 10 percent to 15 percent"); 131 Cong. Rec. 488 (statement of Rep. Hamilton) ("Under [pre-Sentencing Reform Act] law, about 80% of all criminals are paroled after serving one third of their time. Now sentences will be reduced only 15% for good behavior"). And whatever interpretive force one attaches to legislative history, the Court normally gives little weight to statements, such as those of the individual legislators, made *after* the bill in question has become law. See, *e. g.*, *Heintz* v. *Jenkins*, 514 U. S. 291, 298 (1995).

Third, petitioners rely on a statement in the United States Sentencing Commission's Supplementary Report on the Initial Sentencing Guidelines and Policy Statements issued in 1987 (hereinafter Supplementary Report). In that Report, the Commission summarized its analysis of recent pre-Guidelines sentencing practice, which it had used to help draft the Guidelines. The results of the analysis were presented in a table that permits comparison of the likely prison-time consequences of the new Guidelines with prison time actually served under pre-Guidelines practice (specifically, by identifying the Guidelines "offense level that is closest to the average time . . . served by first-time offenders" convicted of a particular crime, Supplementary Report 23). Because the Guidelines "refer to sentences prior to the awarding of good time" (*i. e.*, because a Guidelines sentence of, say, 30 months' imprisonment does not necessarily mean that the offender will serve the entire 30 months in prison), the Commission adjusted the average time served "by dividing by 0.85 good time when the term exceeded 12 months." *Ibid.* This adjustment, the Commission explained, "made sentences in the [t]able comparable with those in the guidelines." *Ibid.*

Pointing to this adjustment and a reference in later editions of the Guidelines to a potential credit of "approximately fifteen percent for good behavior," see, *e. g.*, USSG §1A3, p. s., at 3 (Nov. 2009), petitioners maintain that the Commis-

sion set its Guidelines ranges with the expectation that well-behaved prisoners would receive good time credit of up to 15% of the sentence imposed, not 15% of the time actually served. They add that, in setting the Guidelines ranges in this way, the Commission exercised congressionally delegated power to interpret the Sentencing Reform Act, see *Mistretta*, 488 U. S., at 371–379 (approving Congress' delegation of the power to promulgate sentencing guidelines), and that as long as that interpretation is reasonable, courts must defer to it, see *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 843–844 (1984).

Again, however, we can find no indication that the Commission, in writing its Supplementary Report or in the Guidelines themselves, considered or referred to the particular question here before us, that is, whether good time credit is to be based on time served or the sentence imposed. The Guidelines Manual itself, a more authoritative account of the Commission's interpretive views than the Supplementary Report, says nothing directly on that subject. Moreover, with respect to comparisons between Guidelines sentences and pre-Guidelines practice, the original 1987 Manual cautioned that the Guidelines did not "simply cop[y] estimates of existing practice as revealed by the data," but rather "departed from the data at different points for various important reasons." USSG §1A3, p. s., at 1.4; see also *id.*, §1A4(g), p. s., at 1.11 (while "Guideline sentences in many instances will *approximate* existing [*i. e.*, pre-Guidelines] practice," the Commission did "not conside[r] itself bound by existing sentencing practice" (emphasis added)). Because the Commission has expressed no view on the question before us, we need not decide whether it would be entitled to deference had it done so. If it turns out that the calculation of good time credit based on prison time served rather than the sentence imposed produces results that are more severe than the Commission finds appropriate, the Commission remains free to adjust sentencing levels accordingly. See *id.*,

§ 1A2, at 1.2 (acknowledging that "the guideline-writing process [is] evolutionary" and that the Commission functions "as a permanent agency to monitor sentencing practices in the federal courts throughout the nation").

Fourth, petitioners ask us to invoke the rule of lenity and construe § 3624 (2006 ed.) in their favor, that is, in a way that will maximize the amount of available good time credit. We may assume for present purposes that § 3624(b) can be construed as imposing a criminal penalty. See *Bifulco* v. *United States*, 447 U. S. 381, 387 (1980) (rule of lenity applies to "interpretations of . . . the penalties" imposed by "criminal prohibitions"); but see *Sash* v. *Zenk*, 428 F. 3d 132, 134 (CA2 2005) (Sotomayor, J.) (holding that § 3624(b) is not a criminal statute for the purposes of the rule of lenity). Even so, the rule of lenity only applies if, after considering text, structure, history, and purpose, there remains a "grievous ambiguity or uncertainty in the statute," *Muscarello* v. *United States*, 524 U. S. 125, 139 (1998) (internal quotation marks omitted), such that the Court must simply "'guess as to what Congress intended," *Bifulco*, *supra*, at 387 (quoting *Ladner* v. *United States*, 358 U. S. 169, 178 (1958)). See *United States* v. *Hayes*, 555 U. S. 415, 429 (2009); *United States* v. *R. L. C.*, 503 U. S. 291, 305–306 (1992) (plurality opinion). Having so considered the statute, we do not believe that there remains a "grievous ambiguity or uncertainty" in the statutory provision before us. Nor need we now simply "guess" what the statute means.

Finally, we note that petitioners urge us not to defer to the BOP's implementation of § 3624(b). In our view, the BOP's calculation system applies that statute as its language is most naturally read, and in accordance with what that language makes clear is its basic purpose. No one doubts that the BOP has the legal power to implement the statute in accordance with its language and purposes; hence we need not determine the extent to which Congress has granted the BOP authority to interpret the statute more broadly, or

differently than it has done here. Cf. *Chevron*, *supra*, at 844–845.

B

Acknowledging that petitioners' arguments cannot carry the day, the dissent has proposed a "third possibility," *post*, at 495 (opinion of KENNEDY, J.), not raised by either party nor, to our knowledge, used elsewhere in the Criminal Code. The dissent reads the statutory phrase "term of imprisonment" to refer to "the administrative period along which progress toward eventual freedom is marked." *Ibid.* It derives from this reading the following method of calculation as applied to our 10-year example. First, "[t]he sentence is divided into ten 365-day segments." *Ibid.* At the end of the first segment, a prisoner may receive up to 54 days of credit for good behavior. These credits immediately "go toward completion of the next year" so that the prisoner need only serve "another 311 days behind bars before the second year of his term of imprisonment is at an end." *Post*, at 496. This process repeats itself until the "10th segment," in which a prisoner receives an unspecified "credit in a prorated amount." *Ibid.* In the end, the prisoner will have served 10 "administrative segments," *ibid.*, collectively comprising 3,117 days in prison and 533 days of credit.

The dissent claims "[r]eading 'term of imprisonment' this way is consistent with all parts of the statute." *Ibid.* We see at least four problems. First, the opening sentence of § 3624(a) instructs that "[a] prisoner shall be released" upon "the expiration of the prisoner's term of imprisonment, less any time credited" for good behavior. But if a prisoner's "term of imprisonment" is the "period that a prisoner must complete in order to earn his freedom," *post*, at 497, and it is "accounted for through a combination of prison time and credits," *post*, at 495, then a prisoner should be released exactly at the end of his term of imprisonment (without any further adjustment). Because the dissent's approach would

require us to read words out of the statute, or give prisoners double credit, its definition cannot be used here.

Second, § 3624(b)(1) tells us that a prisoner receives credit "at the end of each year" based on behavior "during that year." Under the dissent's approach, however, a prisoner may receive credit at the end of each "administrative segmen[t]" presumably based on his behavior during that segment. And because an "administrative segmen[t]" is made up of some "combination of service and credits," *post*, at 496, each one lasts less than a calendar year. We do not see how a system in which "a prisoner may complete a particular year of his term in less than 365 calendar days," *ibid.*, and receive full good time credit for doing so, can possibly represent the most natural reading of this statutory language. Nor do we know, because the BOP has not had an opportunity to tell us, whether a system in which a "year" lasts anywhere from 311 to 365 calendar days (and in which the "years" of a single prisoner's sentence may all be of different lengths) is easily administrable. (We doubt that this system will be more comprehensible to prisoners than one, like the BOP's, that provides credit for actual years.)

Third, under the dissent's approach, credit is earned at different rates during a single sentence. For the first "administrative segmen[t]" in its 10-year example, the prisoner serves 365 days and earns 54 days of credit. The ratio of credit earned to days served is 0.148. For the second "administrative segmen[t]," the prisoner serves 311 days and earns 54 days of credit. This time, the ratio of credit earned to days served is 0.174. (For the last "administrative segmen[t]," the dissent tells us the prisoner will receive "credit in a prorated amount," but it does not tell us which ratio should be used for the proration. *Post*, at 496.) The use of different rates finds no support in the statute. The dissent objects that the statute "prescribes no particular rate," *post*, at 499, but in fact it does—54 days of credit per year of good behavior—and it further requires that credit for the last year

be "prorated" using the same proportion. Moreover, the dissent's application of different rates leads to odd results. For example, a model prisoner sentenced on two separate 5-year terms (with a break in between) will serve a different number of days from one sentenced to a single 10-year term. How can this be if both prisoners are earning 54 days of credit for each of their 10 years in prison?

Fourth, § 3624(b)(2) provides that good time credit "shall vest on the date the prisoner is released from custody." (This provision does not apply to prisoners, like petitioners, who committed their offenses before it was amended in 1996, but the dissent plainly intends for its approach to apply more broadly. See *post*, at 501 (noting the effect on "almost 200,000 federal prisoners").) Yet under the dissent's approach, credit appears to vest immediately. See *post*, at 496 (Days of credit for the first year "go toward completion of the next year" so that the prisoner "would need another 311 days behind bars before the second year of his term of imprisonment is at an end"). And if it does not, then the situation quickly becomes complicated. What happens if, say, on the last day of the 10th "administrative segmen[t]" (somewhere in the 8th calendar year), a prisoner badly misbehaves and prison officials punish him by taking away all of his previously earned credit? Cf. 28 CFR § 541.13 (2009) (prescribing sanctions for prohibited acts). Does the BOP retroactively adjust the duration of all of his administrative segments to 365 days so that the prisoner now finds himself in the middle of the 8th "administrative segmen[t]"? (Again we do not know if the BOP would find such a system administrable, and we doubt that this system would be more comprehensible to a prisoner.) If so, does the prisoner have a second opportunity to earn credit for good behavior for the 9th "administrative segmen[t]" that he had previously completed but now must account for again? Cf. § 3624(b)(1) ("Credit that has not been earned may not later be granted"). Or, having previously awarded (and taken away) credit for that segment,

are prison authorities left without any incentive to offer for good behavior?

Finally, the dissent, like petitioners, invokes the rule of lenity to support its interpretation. But, the best efforts of the dissent notwithstanding, we still see no "grievous ambiguity or uncertainty" that would trigger the rule's application. We remain convinced that the BOP's approach reflects the most natural reading of the statutory language and the most consistent with its purpose. Whatever the merits of the dissent's policy arguments, the statute does not require the BOP to accept them.

For all of these reasons, we conclude that the BOP's methodology is lawful. The Ninth Circuit's judgment is

Affirmed.

APPENDIX

A fuller example of the BOP's method for calculating "credit for the last year or portion of a year of the term of imprisonment"

The defendant is sentenced to 10 years' imprisonment. As a prisoner he exhibits exemplary behavior and is awarded the maximum credit of 54 days at the end of each year served in prison. At the end of Year 8, the prisoner has 2 years remaining in his sentence and has accumulated 432 days of good time credit. Because the difference between the time remaining in his sentence and the amount of accumulated credit (*i. e.*, 730 minus 432) is less than a year (298 days), Year 9 is the last year he will spend in prison. (Year 10 has been completely offset by 365 of the 432 days of accumulated credit.) Further, Year 9 will be a partial year of 298 days (the other 67 days of the year being offset by the remainder of the accumulated credit).

Here is where the elementary algebra comes in. We know that x, the good time, plus y, the remaining time

served, must add up to 298. This gives us our first equation: $x + y = 298$.

We also know that the ratio of good time earned in the portion of the final year to the amount of time served in that year must equal the ratio of a full year's good time credit to the amount of time served in a full year. The latter ratio is $54 \div 365$ or 0.148. Thus, we know that $x \div y = 0.148$, or to put it another way, $x = 0.148y$. Because we know the value of x in terms of y, we can make a substitution in our first equation to get $0.148y + y = 298$. We then add the two y terms together ($1.148y = 298$), and we solve for y, which gives us $y = 260$. Now we can plug that value into our first equation to solve for x (the good time credit). If we subtract 260 from 298, we find that $x = 38$.

The offender will have to serve 260 days in prison in Year 9, and he will receive 38 days additional good time credit for that time served. The prisoner's total good time is 470 days ($432 + 38 = 470$). His total time served is 3,180 days.

As a final matter, while we have described the foregoing as the method to calculate credit for the portion of the last year to more transparently track the relevant statutory language, we note that the mathematical formula can be used to calculate the amount of maximum available credit for an entire sentence. Using the equations supplied above, if we divide the total number of days in a sentence by 1.148, we get the minimum number of days that a defendant must serve in that sentence. If we then subtract the number of days served from the total number of days in the sentence, we arrive at the maximum number of good time credit days the prisoner can earn. The statute, however, awards them on a yearly basis (but for the "last year or portion" thereof).

JUSTICE KENNEDY, with whom JUSTICE STEVENS and JUSTICE GINSBURG join, dissenting.

The Court has interpreted a federal sentencing statute in a manner that disadvantages almost 200,000 federal prison-

ers. See Pet. for Cert. 11, and n. 2. It adopts this reading despite the existence of an alternative interpretation that is more consistent with the statute's text. Absent a clear congressional directive, the statute ought not to be read as the Court reads it. For the Court's interpretation—an interpretation that in my submission is quite incorrect—imposes tens of thousands of years of additional prison time on federal prisoners according to a mathematical formula they will be unable to understand. And if the only way to call attention to the human implications of this case is to speak in terms of economics, then it should be noted that the Court's interpretation comes at a cost to the taxpayers of untold millions of dollars. See *id.*, at 11. The interpretation the Court adopts, moreover, will be devastating to the prisoners who have behaved the best and will undermine the purpose of the statute. These considerations, and those stated below, require this respectful dissent.

I

The federal sentencing statute at issue here provides:

> "[A] prisoner who is serving a *term of imprisonment* of more than 1 year[,] other than a *term of imprisonment* for the duration of the prisoner's life, may receive credit toward the service of the prisoner's sentence, beyond the time served, of up to 54 days at the end of each year of the prisoner's *term of imprisonment*, beginning at the end of the first year of the term, subject to determination by the Bureau of Prisons that, during that year, the prisoner has displayed exemplary compliance with institutional disciplinary regulations. . . . [C]redit for the last year or portion of a year of the *term of imprisonment* shall be prorated and credited within the last six weeks of the sentence." 18 U. S. C. § 3624(b)(1) (emphasis added).

According to the Court, the phrase "term of imprisonment" must mean "time actually served" the third time that it ap-

pears in this particular subsection. *Ante*, at 485. But the Court gives the phrase a different interpretation the first two times it is used in the very same sentence. This in itself indicates that something is quite wrong here.

Petitioners invite the Court to read "term of imprisonment" to mean "the sentence imposed." Brief for Petitioners i. This, too, seems unworkable. And it can be acknowledged that the Court's rejection of this interpretation is correct.

The choice, however, is not just between the Court's reading and that offered by petitioners. There is a third possibility, one more consistent with the statute than either of these two alternatives.

A fair reading of the statute, and a necessary reading to accomplish its purpose best, is to interpret the phrase "term of imprisonment" to refer to the span of time that a prisoner must account for in order to obtain release. The length of the term is set at the outset by the criminal sentence imposed. The prisoner earns release when that term has been fully completed. Most of the term will be satisfied through time spent behind bars. Assuming the prisoner is well behaved, however, he may earn good time credits along the way; and those credits may substitute for actual prison time. Each year of the term comprises a full 365 days, which must be accounted for through a combination of prison time and credits. Thus conceived, a prisoner's "term" is the administrative period along which progress toward eventual freedom is marked.

Consider the Court's example of a prisoner subject to a 10-year sentence. See *ante*, at 477–479. The sentence is divided into ten 365-day segments. Each segment constitutes a year of the term. The prisoner will spend the first 365 days behind bars. In the statute's words, he has reached "the end of the first year of the term." Now is the time for credit to be awarded, and he may receive up to 54 days if sufficiently well behaved. Because he has already com-

pleted a full year of his term, those credits go toward completion of the next year. If, based on good behavior, he has earned the maximum of 54 days, he would need another 311 days behind bars before the second year of his term of imprisonment is at an end (because 54 + 311 = 365). If he has earned fewer than 54 days, a longer incarceration will be required to reach 365. Regardless, once the prisoner reaches the end of the second year of his term, he will again be eligible to receive good time credits.

This process repeats itself for the third year of the term, and so on. In the final year of his term (in this example, the 10th segment into which his term has been divided), the prisoner will receive credit in a prorated amount, to be awarded "within the last six weeks of the sentence." This ensures that the prisoner does not reach the end of year 10, only to find that he has just earned 54 days of credit he no longer needs.

The controlling rule is that each year of the prisoner's term—each of the 10 administrative segments—comprises 365 days that must be completed through a combination of service and credits. By combining actual prison time with the credits he has earned, a prisoner may complete a particular year of his term in less than 365 calendar days. As a result, credits may enable a well-behaved prisoner to complete his 10-year sentence before 10 calendar years have elapsed. For a 10-year (3,650-day) sentence, a prisoner will serve 3,117 days behind bars if he earns a maximum of approximately 533 credits. This is 63 more days of credit than under the Court's reading—more than 6 additional credit days for every year of the sentence imposed.

Reading "term of imprisonment" this way is consistent with all parts of the statute. The prisoner receives his credit "at the end of each year of [his] term of imprisonment," a process that "begin[s] at the end of the first year of the term." Credit is only awarded if the prisoner has proven well behaved "during that year." This interpreta-

tion fulfills the "objective of § 3624"—rewarding a prisoner for exemplary conduct during the preceding year. See *ante*, at 482.

This approach also has a textual integrity that the Court's reading does not: It gives "term of imprisonment" the same meaning each time it is used by the statute. Every time it appears in § 3624(b)(1), "term of imprisonment" refers to the administrative period that a prisoner must complete in order to earn his freedom. The Court, by contrast, would read this phrase to mean "time actually served" the third time it is used, but "the sentence imposed" the first two times it is used ("'a prisoner who is serving a *term of imprisonment* of more than 1 year[,] other than a *term of imprisonment* for the duration of the prisoner's life'"). See *ante*, at 483–485. The Court's interpretation thus runs afoul of the "'presumption that a given term is used to mean the same thing throughout a statute.'" *Ante*, at 483–484 (quoting *Brown* v. *Gardner*, 513 U. S. 115, 118 (1994)). The inconsistency here is particularly egregious because all three uses appear in the same sentence. See *id.*, at 118 ("[The] presumption [is] surely at its most vigorous when a term is repeated within a given sentence").

The Court responds by noting another part of the statute, a provision stating that prisoners shall receive clothing, money, and transportation "[u]pon the release of [the] prisoner on the expiration of the prisoner's term of imprisonment." § 3624(d). A prisoner is released at the end of his actual time behind bars, says the Court, and so "term of imprisonment" must here refer to time actually served. Yet release also comes at the end of a prisoner's "term" in the sense described above—that is, when the balance of the sentence has been reduced to zero through a combination of prison time and good time credits. Indeed, this administrative use of the phrase fits well with the word "expiration," which in its most natural sense in this context refers to the close of a formal accounting period. See Black's Law Dic-

tionary 619 (8th ed. 2004) ("[a] coming to an end; esp., a formal termination on a closing date"). By contrast, it is awkward at best to say, as the Court would have it, that a prisoner's actual time behind bars is something that "expires."

The Court's approach produces yet another oddity. The statute requires that prorated credit be awarded for "the last year or portion of a year of the term of imprisonment." One might naturally assume that the last year of a 10-year term would be year 10. That is how things work under the approach described above, in which a 10-year sentence is subdivided into 10 administrative segments.

But under the Court's reading, a prisoner serving a 10-year sentence will never reach year 10 of his term; year 10 simply does not exist. According to the Court, year nine is the final year, and even year nine is not a full year: It lasts "no more than 298 days." *Ante*, at 478. If this sounds confusing, it will be all the more so to the prisoner who has just received his sentence and turns to the statute books to figure out when to expect his freedom.

The Court does not even attempt to defend these flaws. Instead, it points to four supposed defects in the approach described above. None withstands examination.

First, the Court notes that the statute requires the release of a prisoner "upon 'the expiration of the prisoner's term of imprisonment, less any time credited' for good behavior." *Ante*, at 489 (quoting § 3624(a)). But if "term of imprisonment" truly refers to the entire span that a prisoner must complete to earn his freedom—a period that accounts both for actual time and for good time credits—then why would the "less any time credited" language be appropriate? The answer is that this provision—which appears at the very beginning of the section entitled "Release of a prisoner"—announces to a prisoner when release may be expected: when the prisoner's term expires, taking into account credit days "as provided in subsection (b)." § 3624(a) (boldface deleted). This use of language is common. A debtor who

says "I will write a check for what I owe you, less what you owe me" is simply saying "I will pay what I owe, taking into account your debts to me." Perhaps the same meaning could have been conveyed using different words, but this is hardly probative.

Second, the Court alleges that the above approach conflicts with the statute's requirement that credit be awarded "at the end of each year" based upon behavior "during that year." After all, if a year of the term can be satisfied in part through credit, then it may last less than a full calendar year. Yet the statute does not require that credit be awarded at the end of a calendar year for good behavior during a calendar year. What it requires is that credit be awarded "at the end of each year of the prisoner's term of imprisonment" for good behavior "during that year." And this is precisely what the above approach does.

Third, the Court frets that, under the approach above, prisoners will earn credit at different rates during a single sentence. It admonishes that "[t]he use of different rates finds no support in the statute." *Ante*, at 490. This response is telling. The statute, in fact, prescribes no particular rate—and certainly no formula based on a rate—except as embodied in one clear directive: Prisoners are eligible to earn "up to 54 days at the end of each year of the prisoner's term of imprisonment." As to that command, the above approach is perfectly faithful.

Fourth, the Court suggests that the above approach causes credit to vest immediately, contrary to the statute. Again, this is not true. As per the statute, credit only vests "on the date the prisoner is released from custody," § 3624(b)(2), meaning that it can be revoked at any time before that date. This gives prisoners approaching their release date an extra incentive to behave.

As a fallback, the Court wonders what would happen if a prisoner misbehaved on the final day of his 10-year sentence. Would the Bureau of Prisons (BOP) be forced to "retroac-

tively adjust the duration of all of his [term years] to 365 days"? *Ante*, at 491. The answer is what one might suppose: A prisoner whose credits are revoked will find himself precisely where he would have been if those credits had never been earned. All years of the term remain 365 days, as they always have. But a misbehaving prisoner who had formerly earned, say, 500 credits will find himself without the benefit of those 500 days. That will leave him with more of his term to complete—500 days more, to be precise. If he behaves well again, he can resume earning credit for the remainder of his term, but he has lost the opportunity to earn credits for any prior years. See § 3624(b)(1). This is not at all confusing for a prisoner; and certainly it is as straightforward, if not more so, than the Court's approach. The Court's view causes a prisoner's "term of imprisonment" to shrink over time according to an algebraic formula, only to expand again if he misbehaves.

Finally, the Court speculates that BOP might find the above approach difficult to administer. The Court identifies no basis for this claim, nor does one exist. The information used to calculate a prisoner's term under the above approach is the same as it is under the Court's approach. True, a prisoner may become eligible to be awarded credit on different calendar days during the course of his term. But under the Court's approach, this also happens when awarding credit in the final year. And, it goes without saying, federal prisoners begin their incarceration on different calendar days anyway, so that under any approach, BOP will be forced to evaluate prisoners throughout the calendar year.

II

The Court's reading of § 3624(b)(1), therefore, is less consistent with the text than the reading explained above. But even if these interpretations were in equipoise, under any fair application the rule of lenity should tip the balance in petitioners' favor. When a penal statute is susceptible of

two interpretations, the one more favorable to the defendant must be chosen unless "text, structure, and history . . . establish that the [harsher] position is unambiguously correct." *United States* v. *Granderson*, 511 U. S. 39, 54 (1994). Resolving ambiguity in favor of lenity ensures that statutes provide "fair warning[,] . . . in language that the common world will understand, of what the law intends to do if a certain line is passed." *United States* v. *Bass*, 404 U. S. 336, 348 (1971) (internal quotation marks omitted). The rule thus applies "not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose." *Bifulco* v. *United States*, 447 U. S. 381, 387 (1980).

The Court assumes without deciding that § 3624(b) is penal in nature. See *ante*, at 488. No assumption is necessary: The statutory provision awarding good time credits "in fact is one determinant of [a] prison term," so that a prisoner's "effective sentence is altered once this determinant is changed." *Weaver* v. *Graham*, 450 U. S. 24, 32 (1981). In *Weaver*, the Court considered whether an amendment to Florida's statutory formula for calculating good time credits implicated the *Ex Post Facto* Clause. The Court concluded that it did, as the new statute "substantially alter[ed] the consequences attached to a crime already completed, and therefore change[d] 'the quantum of punishment.'" *Id.*, at 33 (quoting *Dobbert* v. *Florida*, 432 U. S. 282, 294 (1977)). For the same reason, the penal effect of § 3624(b)(1) is substantial enough to implicate the rule of lenity. We should not disadvantage almost 200,000 federal prisoners unless Congress clearly warned them they would face that harsh result.

III

The Government—although not the Court—argues that we should embrace its interpretation out of deference to BOP. BOP has been charged by the Attorney General with responsibility for "[a]pproving inmate disciplinary and good time regulations." 28 CFR § 0.96(s) (2009). BOP has long

followed the same credit-calculation method now advocated by the Court. The Government argues that we should defer to BOP's choice as a permissible exercise of its delegated responsibility.

This argument fails on multiple levels. There is no indication that BOP has exercised the sort of interpretive authority that would merit deference under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984). The statute does not create a legislative gap for BOP to fill. To the contrary, the procedures that govern the timing of credit awards are spelled out in great detail. Cf. *Lopez* v. *Davis*, 531 U. S. 230, 241–242 (2001) (where statute says that BOP "may" grant early release to certain prisoners, without specifying further criteria, Congress deliberately created a "statutory gap"). The statute even goes so far as to explain what to do "[i]f the date for a prisoner's release falls on a Saturday, a Sunday, or a legal holiday." § 3624(a). This legislative specificity as to timing contrasts with other provisions that do delegate authority to BOP. *E. g.*, § 3624(b)(1) (awarding of credit is "subject to determination" by BOP that the prisoner "has displayed exemplary compliance with institutional disciplinary regulations").

BOP has not claimed that its view is the product of any "formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement" with the force of law. *United States* v. *Mead Corp.*, 533 U. S. 218, 230 (2001). In 2005, BOP made final an administrative rule adopting its preferred methodology. 70 Fed. Reg. 66752 (adopting 28 CFR § 523.20). But when pressed during an earlier stage of this litigation, BOP conceded that it had "failed to articulate in the administrative record the rationale upon which it relied when it promulgated" the rule. *Tablada* v. *Thomas*, 533 F. 3d 800, 805 (CA9 2008). The Court of Appeals accepted BOP's concession, *ibid.*, and that aspect of its ruling has not been appealed.

As a fallback position, the Government argues that BOP's interpretation should receive at least some deference under *Skidmore* v. *Swift & Co.*, 323 U. S. 134 (1944). But under *Skidmore*, an agency decision only merits "respect proportional to its 'power to persuade.'" *Mead*, *supra*, at 235 (quoting *Skidmore*, *supra*, at 140). BOP's position is of long standing, but the administrative record is noteworthy for what it does not contain—namely, any reasoned justification for preferring BOP's methodology over statutorily permissible alternatives. BOP has consistently adhered to its mistaken belief that its approach is the only one that can be squared with the text. See 62 Fed. Reg. 50786 (1997) (explanation to interim rule asserting that the correct methodology "had been clearly stated by statute since the implementation of the Sentencing Reform Act of 1984"). For example, at no point did BOP consider, much less consciously reject, the interpretation outlined here. Cf. *Reno* v. *Koray*, 515 U. S. 50, 60–61 (1995) (deferring to BOP's reasoned decision to reject one interpretation in favor of another). An agency need not consider all possible alternatives. But deference is not owed to an agency view, however consistently held, that from the start has been premised on legal error. See *Mead*, *supra*, at 228; *Skidmore*, *supra*, at 140.

* * *

The straightforward interpretation urged here accords with the purpose of the statute, which is to give prisoners incentive for good behavior and dignity from its promised reward. Prisoners can add 54 days to each year. And when they do so, they have something tangible. In place of that simple calculation, of clear meaning, of a calendar that can be marked, the Court insists on something different. It advocates an interpretation that uses different definitions for the same phrase in the same sentence; denies prisoners the benefit of the rule of lenity; and caps off its decision with an

appendix that contains an algebraic formula to hang on a cell wall.

To a prisoner, time behind bars is not some theoretical or mathematical concept. It is something real, even terrifying. Survival itself may be at stake. See Dept. of Justice, Bureau of Justice Statistics, C. Mumola, Suicide and Homicide in State Prisons and Local Jails (NCJ 210036, Aug. 2005), online at http://bjs.ojp.usdoj.gov/content/pub/pdf/shsplj.pdf (as visited June 2, 2010, and available in Clerk of Court's case file) (prison homicide rates); National Prison Rape Elimination Commission Report, p. 4 (June 2009) (citing a national survey estimating that 60,500 state and federal prisoners had been sexually abused during the preceding year). To this time, the Court adds days—compounded to years. We should not embrace this harsh result where Congress itself has not done so in clear terms. I would reverse the judgment of the Court of Appeals.

Syllabus

HAMILTON, CHAPTER 13 TRUSTEE *v.* LANNING

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

No. 08–998. Argued March 22, 2010—Decided June 7, 2010

Debtors filing for protection under Chapter 13 of the Bankruptcy Code must agree to a court-approved plan under which they pay creditors out of their future income. If the bankruptcy trustee or an unsecured creditor objects, a bankruptcy court may not approve the plan unless it provides for the full repayment of unsecured claims or "provides that all of the debtor's projected disposable income to be received" over the plan's duration "will be applied to make payments" in accordance with plan terms. 11 U. S. C. § 1325(b)(1). Before enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), the Code loosely defined "disposable income." Though it did not define "projected disposable income," most bankruptcy courts calculated it using a mechanical approach, multiplying monthly income by the number of months in the plan and then determining the "disposable" portion of the result. In exceptional cases, those courts also took into account foreseeable changes in a debtor's income or expenses. BAPCPA defines "disposable income" as "current monthly income received by the debtor" less "amounts reasonably necessary to be expended" for, *e. g.*, the debtor's maintenance and support. § 1325(b)(2)(A)(i). "Current monthly income," in turn, is calculated by averaging the debtor's monthly income during a 6-month lookback period preceding the petition's filing. See § 101(10A)(A)(i). If a debtor's income is below the median for his or her State, "amounts reasonably necessary" include the full amount needed for "maintenance or support," see § 1325(b)(2)(A)(i), but if the debtor's income exceeds the state median, only certain specified expenses are included, see §§ 707(b)(2), 1325(b)(3)(A).

A one-time buyout from respondent's former employer caused her current monthly income for the six months preceding her Chapter 13 petition to exceed her State's median income. However, based on the income from her new job, which was below the state median, and her expenses, she reported a monthly disposable income of $149.03. She thus filed a plan that would have required her to pay $144 per month for 36 months. Petitioner, the Chapter 13 trustee, objected to confirmation of the plan because the proposed payment amount was less than the full amount of the claims against respondent, and because she had

not committed all of her "projected disposable income" to repaying creditors. Petitioner claimed that the mechanical approach was the proper way to calculate projected disposable income, and that using that approach, respondent should pay $756 per month for 60 months. Her actual income was insufficient to make such payments.

The Bankruptcy Court endorsed a $144 payment over a 60-month period, concluding that "projected" requires courts to consider the debtor's actual income. The Tenth Circuit Bankruptcy Appellate Panel affirmed, as did the Tenth Circuit, which held that a court calculating "projected disposable income" should begin with the "presumption" that the figure yielded by the mechanical approach is correct, but that this figure may be rebutted by evidence of a substantial change in the debtor's circumstances.

Held: When a bankruptcy court calculates a debtor's projected disposable income, the court may account for changes in the debtor's income or expenses that are known or virtually certain at the time of confirmation. Pp. 513–524.

(a) Respondent has the better interpretation of "projected disposable income." First, such a forward-looking approach is supported by the ordinary meaning of "projected." See *Asgrow Seed Co.* v. *Winterboer*, 513 U. S. 179, 187. In ordinary usage future occurrences are not "projected" based on the assumption that the past will necessarily repeat itself. While a projection takes past events into account, adjustments are often made based on other factors that may affect the outcome. Second, "projected" appears in many federal statutes, yet Congress rarely uses it to mean simple multiplication. See, *e. g.*, 7 U. S. C. § 1301(b)(8)(B). By contrast, as the Bankruptcy Code shows, Congress can make its mandate of simple multiplication unambiguous—commonly using the term "multiplied." See, *e. g.*, 11 U. S. C. § 1325(b)(3). Third, under pre-BAPCPA case law, the general rule was that courts would multiply a debtor's current monthly income by the number of months in the commitment period as the first step in determining projected disposable income, but would also have discretion to account for known or virtually certain changes in the debtor's income. This is significant, since the Court "will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure," *Travelers Casualty & Surety Co. of America* v. *Pacific Gas & Elec. Co.*, 549 U. S. 443, 454, and Congress did not amend the term "projected disposable income" in 2005. Pp. 513–517.

(b) The mechanical approach also clashes with § 1325's terms. First, § 1325(b)(1)(B)'s reference to projected disposable income "to be received in the applicable commitment period" strongly favors the

forward-looking approach. Because respondent would have far less than $756 per month in disposable income during the plan period, petitioner's projection does not accurately reflect disposable income "to be received." In such circumstances, the mechanical approach effectively reads that phrase out of the statute. Second, § 1325(b)(1)'s direction to courts to determine projected disposable income "as of the effective date of the plan"—*i. e.*, the confirmation date—is more consistent with the view that they are to consider postfiling information about a debtor's financial situation. Had Congress intended for projected disposable income to be no more than a multiple of disposable income, it could have specified the plan's *filing* date as the effective date. Third, § 1325(b)(1)(B)'s requirement that projected disposable income "will be applied to make payments" is rendered a hollow command if, as of the plan's effective date, the debtor lacks the means to pay creditors in the calculated monthly amounts. Pp. 517–519.

(c) The arguments supporting the mechanical approach are unpersuasive. The claim that the Code's detailed and precise "disposable income" definition would have no purpose without the mechanical approach overlooks the important role that this statutory formula plays under the forward-looking approach, which begins with a disposable income calculation. The Tenth Circuit's rebuttable "presumption" analysis simply heeds the ordinary meaning of "projected." This Court rejects petitioner's argument that only the mechanical approach is consistent with § 1129(a)(15)(B), which refers to "projected disposable income of the debtor (as defined in section 1325(b)(2))." And the Court declines to infer from the fact that § 1325(b)(3) incorporates § 707—which allows courts to consider "special circumstances," but only with respect to calculating expenses—that Congress intended to eliminate, *sub silentio*, the discretion that courts previously exercised to account for known or virtually certain changes. Pp. 519–520.

(d) Petitioner's proposed strategies for avoiding or mitigating the harsh results that the mechanical approach may produce for debtors—a debtor could delay filing a petition so as to place any extraordinary income outside the 6-month period; a debtor with unusually high income during that period could seek leave to delay filing a schedule of current income and ask the bankruptcy court to select a 6-month period more representative of the debtor's future disposable income; a debtor could dismiss the petition and refile at a later, more favorable date; and respondent might have been able to obtain relief by filing under Chapter 7 or converting her Chapter 13 petition to one under Chapter 7—are all flawed. Pp. 520–524.

545 F. 3d 1269, affirmed.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and STEVENS, KENNEDY, THOMAS, GINSBURG, BREYER, and SOTOMAYOR, JJ., joined. SCALIA, J., filed a dissenting opinion, *post*, p. 524.

Jan Hamilton, petitioner, argued the cause *pro se*. With him on the briefs was *Teresa L. Rhodd*.

Thomas C. Goldstein argued the cause for respondent. With him on the brief were *Patricia A. Millett*, *Peter J. Gurfein*, *Amy Howe*, *Kevin K. Russell*, *G. Eric Brunstad, Jr.*, and *Collin O'Connor Udell*.

Sarah E. Harrington argued the cause for the United States as *amicus curiae* in support of respondent. With her on the brief were *Solicitor General Kagan*, *Assistant Attorney General West*, *Deputy Solicitor General Stewart*, *William Kanter*, *Edward Himmelfarb*, *Ramona D. Elliott*, and *P. Matthew Sutko*.*

JUSTICE ALITO delivered the opinion of the Court.

Chapter 13 of the Bankruptcy Code provides bankruptcy protection to "individual[s] with regular income" whose debts fall within statutory limits. 11 U. S. C. §§ 101(30), 109(e). Unlike debtors who file under Chapter 7 and must liquidate their nonexempt assets in order to pay creditors, see §§ 704(a)(1), 726, Chapter 13 debtors are permitted to keep their property, but they must agree to a court-approved plan under which they pay creditors out of their future income, see §§ 1306(b), 1321, 1322(a)(1), 1328(a). A bankruptcy trustee oversees the filing and execution of a Chapter 13 debtor's plan. § 1322(a)(1); see also 28 U. S. C. § 586(a)(3).

Section 1325 of Title 11 specifies circumstances under which a bankruptcy court "shall" and "may not" confirm a plan. §§ 1325(a), (b). If an unsecured creditor or the bankruptcy trustee objects to confirmation, § 1325(b)(1) requires

*Briefs of *amici curiae* were filed for the National Association of Consumer Bankruptcy Attorneys by *Jonathan L. Marcus*, *Theodore P. Metzler, Jr.*, and *Tara Twomey;* and for Ned W. Waxman by *Mr. Waxman*, *pro se*.

the debtor either to pay unsecured creditors in full or to pay all "projected disposable income" to be received by the debtor over the duration of the plan.

We granted certiorari to decide how a bankruptcy court should calculate a debtor's "projected disposable income." Some lower courts have taken what the parties term the "mechanical approach," while most have adopted what has been called the "forward-looking approach." We hold that the "forward-looking approach" is correct.

I

As previously noted, § 1325 provides that if a trustee or an unsecured creditor objects to a Chapter 13 debtor's plan, a bankruptcy court may not approve the plan unless it provides for the full repayment of unsecured claims or "provides that all of the debtor's projected disposable income to be received" over the duration of the plan "will be applied to make payments" in accordance with the terms of the plan. 11 U. S. C. § 1325(b)(1); see also § 1325(b)(1) (2000 ed.). Before the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), 119 Stat. 23, the Bankruptcy Code (Code) loosely defined "disposable income" as "income which is received by the debtor and which is not reasonably necessary to be expended" for the "maintenance or support of the debtor," for qualifying charitable contributions, or for business expenditures. §§ 1325(b)(2)(A), (B).

The Code did not define the term "projected disposable income," and in most cases, bankruptcy courts used a mechanical approach in calculating projected disposable income. That is, they first multiplied monthly income by the number of months in the plan and then determined what portion of the result was "excess" or "disposable." See 2 K. Lundin, Chapter 13 Bankruptcy § 164.1, p. 164–1, and n. 4 (3d ed. 2000) (hereinafter Lundin (2000 ed.)) (citing cases).

In exceptional cases, however, bankruptcy courts took into account foreseeable changes in a debtor's income or ex-

penses. See *In re Heath*, 182 B. R. 557, 559–561 (Bkrtcy. App. Panel CA9 1995); *In re Richardson*, 283 B. R. 783, 799 (Bkrtcy. Ct. Kan. 2002); Tr. of Oral Arg. 7. Accord, 1 Lundin § 35.10, at 35–14 (2000 ed.) ("The debtor should take some care to project estimated future income on Schedule I to include anticipated increases or decreases [in income] so that the schedule will be consistent with any evidence of income the debtor would offer at a contested confirmation hearing").

BAPCPA left the term "projected disposable income" undefined but specified in some detail how "disposable income" is to be calculated. "Disposable income" is now defined as "current monthly income received by the debtor" less "amounts reasonably necessary to be expended" for the debtor's maintenance and support, for qualifying charitable contributions, and for business expenditures. §§ 1325(b)(2)(A)(i) and (ii) (2006 ed.). "Current monthly income," in turn, is calculated by averaging the debtor's monthly income during what the parties refer to as the 6-month lookback period, which generally consists of the six full months preceding the filing of the bankruptcy petition. See § 101(10A)(A)(i).[1] The phrase "amounts reasonably necessary to be expended" in § 1325(b)(2) is also newly defined. For a debtor whose income is below the median for his or her State, the phrase includes the full amount needed for "maintenance or support," see § 1325(b)(2)(A)(i), but for a debtor with income that exceeds the state median, only certain specified expenses are included,[2] see §§ 707(b)(2) (2006 ed. and Supp. II), 1325(b)(3)(A) (2006 ed.).

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[1] However, if a debtor does not file the required schedule (Schedule I), the bankruptcy court may select a different 6-month period. See § 101(10A)(A)(ii).

[2] The formula for above-median-income debtors is known as the "means test" and is reflected in a schedule (Form 22C) that a Chapter 13 debtor must file. See Fed. Rule Bkrtcy. Proc. Official Form 22C (2010); *In re Liverman*, 383 B. R. 604, 606, n. 1, 608–609 (Bkrtcy. Ct. NJ 2008).

II

A

Respondent had $36,793.36 in unsecured debt when she filed for Chapter 13 bankruptcy protection in October 2006. In the six months before her filing, she received a one-time buyout from her former employer, and this payment greatly inflated her gross income for April 2006 (to $11,990.03) and for May 2006 (to $15,356.42). App. 84, 107. As a result of these payments, respondent's current monthly income, as averaged from April through October 2006, was $5,343.70—a figure that exceeds the median income for a family of one in Kansas. See *id.*, at 78. Respondent's monthly expenses, calculated pursuant to § 707(b)(2), were $4,228.71. *Id.*, at 83. She reported a monthly "disposable income" of $1,114.98 on Form 22C. *Ibid.*

On the form used for reporting monthly income (Schedule I), she reported income from her new job of $1,922 per month—which is below the state median. *Id.*, at 66; see also *id.*, at 78. On the form used for reporting monthly expenses (Schedule J), she reported actual monthly expenses of $1,772.97. *Id.*, at 68. Subtracting the Schedule J figure from the Schedule I figure resulted in monthly disposable income of $149.03.

Respondent filed a plan that would have required her to pay $144 per month for 36 months. See *id.*, at 93. Petitioner, a private Chapter 13 trustee, objected to confirmation of the plan because the amount respondent proposed to pay was less than the full amount of the claims against her, see § 1325(b)(1)(A), and because, in petitioner's view, respondent was not committing all of her "projected disposable income" to the repayment of creditors, see § 1325(b)(1)(B). According to petitioner, the proper way to calculate projected disposable income was simply to multiply disposable income, as calculated on Form 22C, by the number of months in the commitment period. Employing this mechanical approach,

petitioner calculated that creditors would be paid in full if respondent made monthly payments of $756 for a period of 60 months. *Id.*, at 108. There is no dispute that respondent's actual income was insufficient to make payments in that amount. Tr. of Oral Arg. 3–4.

B

The Bankruptcy Court endorsed respondent's proposed monthly payment of $144 but required a 60-month plan period. *In re Lanning*, No. 06–41037 etc., 2007 WL 1451999, *8 (Bkrtcy. Ct. Kan. 2007). The court agreed with the majority view that the word "projected" in § 1325(b)(1)(B) requires courts "to consider at confirmation the debtor's *actual* income as it is reported on Schedule I." *Id.*, at *5 (emphasis added). This conclusion was warranted by the text of § 1325(b)(1), the Bankruptcy Court reasoned, and was necessary to avoid the absurd result of denying bankruptcy protection to individuals with deteriorating finances in the six months before filing. *Ibid.*

Petitioner appealed to the Tenth Circuit Bankruptcy Appellate Panel, which affirmed. *In re Lanning*, 380 B. R. 17, 19 (2007). The panel noted that, although Congress redefined "disposable income" in 2005, it chose not to alter the pre-existing term "projected disposable income." *Id.*, at 24. Thus, the panel concluded, there was no reason to believe that Congress intended to alter the pre-BAPCPA practice under which bankruptcy courts determined projected disposable income by reference to Schedules I and J but considered other evidence when there was reason to believe that the schedules did not reflect a debtor's actual ability to pay. *Ibid.*

The Tenth Circuit affirmed. *In re Lanning*, 545 F. 3d 1269, 1270 (2008). According to the Tenth Circuit, a court, in calculating "projected disposable income," should begin with the "presumption" that the figure yielded by the mechanical approach is correct, but the court concluded that

this figure may be rebutted by evidence of a substantial change in the debtor's circumstances. *Id.*, at 1278–1279.

This petition followed, and we granted certiorari. 558 U. S. 989 (2009).

III

A

The parties differ sharply in their interpretation of § 1325's reference to "projected disposable income." Petitioner, advocating the mechanical approach, contends that "projected disposable income" means past average monthly disposable income multiplied by the number of months in a debtor's plan. Respondent, who favors the forward-looking approach, agrees that the method outlined by petitioner should be determinative in most cases, but she argues that in exceptional cases, where significant changes in a debtor's financial circumstances are known or virtually certain, a bankruptcy court has discretion to make an appropriate adjustment. Respondent has the stronger argument.

First, respondent's argument is supported by the ordinary meaning of the term "projected." "When terms used in a statute are undefined, we give them their ordinary meaning." *Asgrow Seed Co.* v. *Winterboer*, 513 U. S. 179, 187 (1995). Here, the term "projected" is not defined, and in ordinary usage future occurrences are not "projected" based on the assumption that the past will necessarily repeat itself. For example, projections concerning a company's future sales or the future cashflow from a license take into account anticipated events that may change past trends. See, *e. g.*, *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U. S. 308, 316 (2007) (describing adjustments to "projected sales" in light of falling demand); *Innovair Aviation, Ltd.* v. *United States*, 83 Fed. Cl. 498, 502, 504–506 (2008) (calculating projected cashflow and noting that past sales are "not necessarily the number of sales" that will be made in the future). On the night of an election, experts do not "project" the percentage

of the votes that a candidate will receive by simply assuming that the candidate will get the same percentage as he or she won in the first few reporting precincts. And sports analysts do not project that a team's winning percentage at the end of a new season will be the same as the team's winning percentage last year or the team's winning percentage at the end of the first month of competition. While a projection takes past events into account, adjustments are often made based on other factors that may affect the final outcome. See *In re Kibbe*, 361 B. R. 302, 312, n. 9 (Bkrtcy. App. Panel CA1 2007) *(per curiam)* (contrasting "multiplied," which "requires only mathematical acumen," with "projected," which requires "mathematic acumen adjusted by deliberation and discretion").

Second, the word "projected" appears in many federal statutes, yet Congress rarely has used it to mean simple multiplication. For example, the Agricultural Adjustment Act of 1938 defined "projected national yield," "projected county yield," and "projected farm yield" as entailing historical averages "adjusted for abnormal weather conditions," "trends in yields," and "any significant changes in production practices." 7 U. S. C. §§ 1301(b)(8)(B), (13)(J), (K).[3]

By contrast, we need look no further than the Bankruptcy Code to see that when Congress wishes to mandate simple multiplication, it does so unambiguously—most commonly by using the term "multiplied." See, *e. g.*, 11 U. S. C. § 1325(b)(3) ("current monthly income, when multiplied by

[3] See also, *e. g.*, 8 U. S. C. §§ 1364(a), (c)(2) (requiring the triennial immigration-impact report to include information "projected for the succeeding five-year period, based on reasonable estimates substantiated by the best available evidence"); 10 U. S. C. § 2433a(a)(2)(B) (2006 ed., Supp. III) ("projected cost of completing the [defense acquisition] program based on reasonable modification of [current] requirements"); 15 U. S. C. § 719c(c)(2) (2006 ed.) ("projected natural gas supply and demand"); 25 U. S. C. §§ 2009(c)(1), (2) (requiring the Director of the Office of Indian Education Programs to submit an annual report containing certain projections and "a description of the methods and formulas used to calculate the amounts projected").

12"); §§ 704(b)(2), 707(b)(6), (7)(A) (same); §§ 707(b)(2)(A)(i), (B)(iv) ("multiplied by 60"). Accord, 2 U. S. C. § 58(b)(1)(B) ("multiplied by the number of months in such year"); 5 U. S. C. § 8415(a) ("multiplied by such individual's total service"); 42 U. S. C. § 403(f)(3) ("multiplied by the number of months in such year").

Third, pre-BAPCPA case law points in favor of the "forward-looking" approach. Prior to BAPCPA, the general rule was that courts would multiply a debtor's current monthly income by the number of months in the commitment period as the first step in determining projected disposable income. See, *e. g.*, *In re Killough*, 900 F. 2d 61, 62–63 (CA5 1990) *(per curiam); In re Anderson*, 21 F. 3d 355, 357 (CA9 1994); *In re Solomon*, 67 F. 3d 1128, 1132 (CA4 1995). See 2 Lundin § 164.1, at 164–1 (2000 ed.) ("Most courts focus on the debtor's current income and extend current income (and expenditures) over the life of the plan to calculate projected disposable income"). But courts also had discretion to account for known or virtually certain changes in the debtor's income. See *Heath*, 182 B. R., at 559–561; *Richardson*, 283 B. R., at 799; *In re James*, 260 B. R. 498, 514–515 (Bkrtcy. Ct. Idaho 2001); *In re Jobe*, 197 B. R. 823, 826–827 (Bkrtcy. Ct. WD Tex. 1996); *In re Crompton*, 73 B. R. 800, 808 (Bkrtcy. Ct. ED Pa. 1987); see also *In re Schyma*, 68 B. R. 52, 63 (Bkrtcy. Ct. Minn. 1985) ("[T]he prospect of dividends . . . is not so certain as to require Debtors or the Court to consider them as regular or disposable income"); *In re Krull*, 54 B. R. 375, 378 (Bkrtcy. Ct. Colo. 1985) ("Since there are no changes in income which can be clearly foreseen, the Court must simply multiply the debtor's current disposable income by 36 in order to determine his 'projected' income").[4]

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[4] When pre-BAPCPA courts declined to make adjustments based on possible changes in a debtor's future income or expenses, they did so because the changes were not sufficiently foreseeable, not because they concluded that they lacked discretion to depart from a strictly mechanical approach. In *In re Solomon*, 67 F. 3d 1128 (1995), for example, the Fourth Circuit refused to make such an adjustment because it deemed disbursements

This judicial discretion was well documented in contemporary bankruptcy treatises. See 8 Collier on Bankruptcy ¶ 1325.08[4][a], p. 1325–50 (rev. 15th ed. 2004) (hereinafter Collier) ("As a practical matter, *unless there are changes which can be clearly foreseen*, the court must simply multiply the debtor's current monthly income by 36 and determine whether the amount to be paid under the plan equals or exceeds that amount" (emphasis added)); 3 W. Norton, Bankruptcy Law and Practice § 75.10, p. 64 (1991) ("It has been held that the court should focus upon present monthly income and expenditures and, *absent extraordinary circumstances*, project these current amounts over the life of the plan to determine projected disposable income" (emphasis added)); 2 Lundin § 164.1, at 164–28 to 164–31 (2000 ed.) (describing how reported decisions treated anticipated changes in income, particularly where such changes were "too speculative to be projected"); see also *In re Greer*, 388 B. R. 889, 892 (Bkrtcy. Ct. CD Ill. 2008) ("'As a practical matter, unless there are changes which can be clearly foreseen, the court must simply multiply the debtor's current monthly income by thirty-six'" (quoting 5 Collier ¶ 1325.08[4][a] (15th ed. 1995))); *James*, *supra*, at 514 (same) (quoting 8 Collier ¶ 1325.08[4][a] (rev. 15th ed. 2000)); *Crompton*, *supra*, at 808 (same) (citing 5 Collier ¶¶ 1325.08[4][a], [b], at 1325–47 to

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from an individual retirement account during the plan period to be "speculative" and "hypothetical." *Id.*, at 1132. There is no reason to assume that the result would have been the same if future disbursements had been more assured. That was certainly true of *In re Killough*, 900 F. 2d 61 (1990) *(per curiam)*, in which the Fifth Circuit declined to require inclusion of overtime pay in projected disposable income because it "was not definite enough." *Id.*, at 65; see also *id.*, at 66 ("[T]here may be instances where income obtained through working overtime can and should appropriately be included in a debtor's projected and disposable income"). See also *Education Assistance Corp.* v. *Zellner*, 827 F. 2d 1222, 1226 (CA8 1987) (affirming bankruptcy court's exclusion of future tax returns and salary increases from debtor's projected and disposable income because they were "speculative").

1325–48 (15th ed. 1986)). Accord, 8 *id.*, ¶ 1325.08[4][b], at 1325–53 (rev. 15th ed. 2007) ("As with the income side of the budget, the court must simply use the debtor's current expenses, *unless a change in them is virtually certain*" (emphasis added)). Indeed, petitioner concedes that courts possessed this discretion prior to BAPCPA. Tr. of Oral Arg. 7.

Pre-BAPCPA bankruptcy practice is telling because we "'"will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure."'" *Travelers Casualty & Surety Co. of America* v. *Pacific Gas & Elec. Co.*, 549 U. S. 443, 454 (2007); *Lamie* v. *United States Trustee*, 540 U. S. 526, 539 (2004); *Cohen* v. *de la Cruz*, 523 U. S. 213, 221 (1998); see also *Grogan* v. *Garner*, 498 U. S. 279, 290 (1991); *Kelly* v. *Robinson*, 479 U. S. 36, 47 (1986). Congress did not amend the term "projected disposable income" in 2005, and pre-BAPCPA bankruptcy practice reflected a widely acknowledged and well-documented view that courts may take into account known or virtually certain changes to debtors' income or expenses when projecting disposable income. In light of this historical practice, we would expect that, had Congress intended for "projected" to carry a specialized—and indeed, unusual—meaning in Chapter 13, Congress would have said so expressly. Cf., *e. g.*, 26 U. S. C. §§ 279(c)(3)(A), (B) (expressly defining "projected earnings" as reflecting a 3-year historical average).

B

The mechanical approach also clashes repeatedly with the terms of 11 U. S. C. § 1325.

First, § 1325(b)(1)(B)'s reference to projected disposable income "to be received in the applicable commitment period" strongly favors the forward-looking approach. There is no dispute that respondent would in fact receive far less than $756 per month in disposable income during the plan period, so petitioner's projection does not accurately reflect "income

to be received" during that period. See *In re Nowlin*, 576 F. 3d 258, 263 (CA5 2009). The mechanical approach effectively reads this phrase out of the statute when a debtor's current disposable income is substantially higher than the income that the debtor predictably will receive during the plan period. See *Kawaauhau* v. *Geiger*, 523 U. S. 57, 62 (1998) ("[W]e are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law" (internal quotation marks omitted)).

Second, § 1325(b)(1) directs courts to determine projected disposable income "as of the effective date of the plan," which is the date on which the plan is confirmed and becomes binding, see § 1327(a). Had Congress intended for projected disposable income to be nothing more than a multiple of disposable income in all cases, we see no reason why Congress would not have required courts to determine that value as of the *filing* date of the plan. See Fed. Rule Bkrtcy. Proc. 3015(b) (requiring that a plan be filed within 14 days of the filing of a petition). In the very next section of the Code, for example, Congress specified that a debtor shall commence payments "not later than 30 days after the *date of the filing of the plan.*" § 1326(a)(1) (emphasis added). Congress' decision to require courts to measure projected disposable income "as of the *effective* date of the plan" is more consistent with the view that Congress expected courts to consider postfiling information about the debtor's financial circumstances. See 545 F. 3d, at 1279 ("[D]etermining whether or not a debtor has committed all projected disposable income to repayment of the unsecured creditors 'as of the effective date of the plan' suggests consideration of the debtor's actual financial circumstances as of the effective date of the plan").

Third, the requirement that projected disposable income "will be applied to make payments" is most naturally read to contemplate that the debtor will actually pay creditors

in the calculated monthly amounts. § 1325(b)(1)(B). But when, as of the effective date of a plan, the debtor lacks the means to do so, this language is rendered a hollow command.

C

The arguments advanced in favor of the mechanical approach are unpersuasive. Noting that the Code now provides a detailed and precise definition of "disposable income," proponents of the mechanical approach maintain that any departure from this method leaves that definition "'with no apparent purpose.'" *In re Kagenveama*, 541 F. 3d 868, 873 (CA9 2008). This argument overlooks the important role that the statutory formula for calculating "disposable income" plays under the forward-looking approach. As the Tenth Circuit recognized in this case, a court taking the forward-looking approach should begin by calculating disposable income, and in most cases, nothing more is required. It is only in unusual cases that a court may go further and take into account other known or virtually certain information about the debtor's future income or expenses.[5]

Petitioner faults the Tenth Circuit for referring to a rebuttable "presumption" that the figure produced by the mechanical approach accurately represents a debtor's "projected disposable income." See 545 F. 3d, at 1278–1279. Petitioner notes that the Code makes no reference to any such presumption but that related Code provisions expressly create other rebuttable presumptions. See §§ 707(b)(2)(A)(i) and (B)(i). He thus suggests that the Tenth Circuit improperly supplemented the text of the Code.

The Tenth Circuit's analysis, however, simply heeds the ordinary meaning of the term "projected." As noted, a person making a projection uses past occurrences as a starting point, and that is precisely what the Tenth Circuit prescribed. See, *e. g.*, *Nowlin*, *supra*, at 260, 263.

[5] For the same reason, the phrase "[f]or purposes of this subsection" in § 1325(b)(2) is not rendered superfluous by the forward-looking approach.

Petitioner argues that only the mechanical approach is consistent with § 1129(a)(15)(B), which refers to "projected disposable income of the debtor (as defined in section 1325(b)(2))." This cross-reference, petitioner argues, shows that Congress intended for the term "projected disposable income" to incorporate, presumably in all contexts, the defined term "disposable income." It is evident that § 1129(a)(15)(B) refers to the defined term "disposable income," see § 1325(b)(2), but that fact offers no insight into the meaning of the word "projected" in §§ 1129(a)(15)(B) and 1325(b)(1)(B). We fail to see how that word acquires a specialized meaning as a result of this cross-reference—particularly where both §§ 1129(a)(15)(B) and 1325(b)(1)(B) refer to projected disposable income "to be received" during the relevant period. See *supra*, at 517–518.

Petitioner also notes that § 707 allows courts to take "special circumstances" into consideration, but that § 1325(b)(3) incorporates § 707 only with respect to calculating expenses. See *In re Wilson*, 397 B. R. 299, 314–315 (Bkrtcy. Ct. MDNC 2008). Thus, he argues, a "special circumstances" exception should not be inferred with respect to the debtor's income. We decline to infer from § 1325's incorporation of § 707 that Congress intended to eliminate, *sub silentio*, the discretion that courts previously exercised when projecting disposable income to account for known or virtually certain changes. Accord, *In re Liverman*, 383 B. R. 604, 613, and n. 15 (Bkrtcy. Ct. NJ 2008).

D

In cases in which a debtor's disposable income during the 6-month lookback period is either substantially lower or higher than the debtor's disposable income during the plan period, the mechanical approach would produce senseless results that we do not think Congress intended. In cases in which the debtor's disposable income is higher during the plan period, the mechanical approach would deny creditors payments that the debtor could easily make. And where, as in the present case, the debtor's disposable income during

the plan period is substantially lower, the mechanical approach would deny the protection of Chapter 13 to debtors who meet the chapter's main eligibility requirements. Here, for example, respondent is an "individual whose income is sufficiently stable and regular" to allow her "to make payments under a plan," § 101(30), and her debts fall below the limits set out in § 109(e). But if the mechanical approach were used, she could not file a confirmable plan. Under § 1325(a)(6), a plan cannot be confirmed unless "the debtor will be able to make all payments under the plan and to comply with the plan." And as petitioner concedes, respondent could not possibly make the payments that the mechanical approach prescribes.

In order to avoid or at least to mitigate the harsh results that the mechanical approach may produce for debtors, petitioner advances several possible escape strategies. He proposes no comparable strategies for creditors harmed by the mechanical approach, and in any event none of the maneuvers that he proposes for debtors is satisfactory.

1

Petitioner first suggests that a debtor may delay filing a petition so as to place any extraordinary income outside the 6-month lookback period. We see at least two problems with this proposal.

First, delay is often not a viable option for a debtor sliding into bankruptcy.

> "Potential Chapter 13 debtors typically find a lawyer's office when they are one step from financial Armageddon: There is a foreclosure sale of the debtor's home the next day; the debtor's only car was mysteriously repossessed in the dark of last night; a garnishment has reduced the debtor's take-home pay below the ordinary requirements of food and rent. Instantaneous relief is expected, if not necessary." K. Lundin & W. Brown, Chapter 13 Bankruptcy § 3.1[2] (rev. 4th ed. 2009), http://www.ch13online.com/Subscriber/Chapter_13_

Bankruptcy_4th_Lundin_Brown.htm (as visited June 3, 2010, and available in Clerk of Court's case file).

See also *id.*, § 38.1 ("Debtor's counsel often has little discretion when to file the Chapter 13 case").

Second, even when a debtor is able to delay filing a petition, such delay could be risky if it gives the appearance of bad faith. See 11 U. S. C. § 1325(a)(7) (requiring, as a condition of confirmation, that "the action of the debtor in filing the petition was in good faith"); see also, *e. g.*, *In re Myers*, 491 F. 3d 120, 125 (CA3 2007) (citing "'the timing of the petition'" as a factor to be considered in assessing a debtor's compliance with the good-faith requirement). Accord, *Neufeld* v. *Freeman*, 794 F. 2d 149, 153 (CA4 1986) (a debtor's prepetition conduct may inform the court's good-faith inquiry).

2

Petitioner next argues that a debtor with unusually high income during the six months prior to the filing of a petition could seek leave to delay filing a schedule of current income (Schedule I) and then ask the bankruptcy court to exercise its authority under § 101(10A)(A)(ii) to select a 6-month period that is more representative of the debtor's future disposable income. We see little merit in this convoluted strategy. If the Code required the use of the mechanical approach in all cases, this strategy would improperly undermine what the Code demands. And if, as we believe, the Code does not insist upon rigid adherence to the mechanical approach in all cases, this strategy is not needed. In any event, even if this strategy were allowed, it would not help all debtors whose disposable income during the plan period is sharply lower than their previous disposable income.[6]

[6] Under 11 U. S. C. § 521(i)(3), a debtor seeking additional time to file a schedule of income must submit the request within 45 days after filing the petition, and the court may not grant an extension of more than 45 days.

3

Petitioner suggests that a debtor can dismiss the petition and refile at a later, more favorable date. But petitioner offers only the tepid assurance that courts "generally" do not find this practice to be abusive. Brief for Petitioner 53. This questionable stratagem plainly circumvents the statutory limits on a court's ability to shift the lookback period, see *supra*, at 522, and n. 6, and should give debtors pause.[7] Cf. *In re Glenn*, 288 B. R. 516, 520 (Bkrtcy. Ct. ED Tenn. 2002) (noting that courts should consider, among other factors, "whether this is the first or [a] subsequent filin[g]" when assessing a debtor's compliance with the good-faith requirement).

4

Petitioner argues that respondent might have been able to obtain relief by filing under Chapter 7 or by converting her Chapter 13 petition to one under Chapter 7. The availability of Chapter 7 to debtors like respondent who have above-median incomes is limited. In respondent's case, a presumption of abuse would attach under § 707(b)(2)(A)(i) because her disposable income, "multiplied by 60," exceeds the amounts specified in subclauses (I) and (II). See also § 707(b)(1) (allowing a court to dismiss a petition filed by a debtor "whose debts are primarily consumer debts . . . if it finds that the granting of relief would be an abuse of the provisions of this chapter"); App. 86–88 ("Notice to Individual Consumer Debtor under § 342(b) of the Bankruptcy Code"; "If your income is greater than the median income for your state of residence and family size, in some cases, creditors have the

[7] For example, a debtor otherwise eligible for Chapter 13 protection may become ineligible if "at any time in the preceding 180 days" "the case was dismissed by the court for willful failure of the debtor to abide by orders of the court, or to appear before the court in proper prosecution of the case," or "the debtor requested and obtained the voluntary dismissal of the case following the filing of a request for relief from the automatic stay provided by section 362 of this title." § 109(g).

right to file a motion requesting that the court dismiss your case under § 707(b) of the Code"). Nevertheless, petitioner argues, respondent might have been able to overcome this presumption by claiming that her case involves "special circumstances" within the meaning of § 707(b)(2)(B)(i). Section 707 identifies as examples of "special circumstances" a "serious medical condition or a call or order to active duty in the Armed Forces," *ibid.*, and petitioner directs us to no authority for the proposition that a prepetition decline in income would qualify as a "special circumstance." In any event, the "special circumstances" exception is available only to the extent that "there is no reasonable alternative," *ibid.*, a proposition we reject with our interpretation of § 1325(b)(1) today.[8]

In sum, each of the strategies that petitioner identifies for mitigating the anomalous effects of the mechanical approach is flawed. There is no reason to think that Congress meant for any of these strategies to operate as a safety valve for the mechanical approach.

IV

We find petitioner's remaining arguments unpersuasive. Consistent with the text of § 1325 and pre-BAPCPA practice, we hold that when a bankruptcy court calculates a debtor's projected disposable income, the court may account for changes in the debtor's income or expenses that are known or virtually certain at the time of confirmation. We therefore affirm the decision of the Court of Appeals.

It is so ordered.

JUSTICE SCALIA, dissenting.

The Bankruptcy Code requires a debtor seeking relief under Chapter 13, unless he will repay his unsecured cred-

[8] Petitioner also suggests that some Chapter 13 debtors may be able to plead "special circumstances" on the expense side of the calculation by virtue of BAPCPA's incorporation of the Chapter 7 means test into Chapter 13. See §§ 707(b)(2)(B)(i), (ii). This is no help to debtors like respondent, whose income has changed but whose expenses are constant.

itors in full, to pay them all of his "projected disposable income" over the life of his repayment plan. 11 U. S. C. § 1325(b)(1)(B). The Code provides a formula for "project-[ing]" what a debtor's "disposable income" will be, which so far as his earnings are concerned turns only on his past income. The Court concludes that this formula should not apply in "exceptional cases" where "known or virtually certain" changes in the debtor's circumstances make it a poor predictor. *Ante*, at 513. Because that conclusion is contrary to the Code's text, I respectfully dissent.

I

A

A bankruptcy court cannot confirm a Chapter 13 plan over the objection of the trustee unless, as of the plan's effective date, either (1) the property to be distributed on account of the unsecured claim at issue exceeds its amount or (2) "the plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan." § 1325(b)(1)(B). The Code does not define "projected disposable income," but it does define "disposable income." The next paragraph of § 1325(b) provides that "[f]or purposes of this subsection, the term 'disposable income' means current monthly income received by the debtor," excluding certain payments received for child support, "less amounts reasonably necessary to be expended" on three categories of expenses. § 1325(b)(2). The Code in turn defines "current monthly income" as "the average monthly income from all sources that the debtor receives . . . derived during the 6-month period ending on" one of two dates.[1] § 101(10A)(A). Whichever date applies, a debtor's

[1] If the debtor files a schedule of current income, as ordinarily required by § 521(a)(1)(B)(ii), then the 6-month period ends on the last day of the month preceding the date the case is commenced, § 101(10A)(A)(i)—that

"current monthly income," and thus the income component of his "disposable income," is a sum certain, a rate fixed once for all based on historical figures.

This definition of "disposable income" applies to the use of that term in the longer phrase "projected disposable income" in § 1325(b)(1)(B), since the definition says that it applies to subsection (b). Cf. § 1129(a)(15)(B) (referring to "the projected disposable income of the debtor (as defined in section 1325(b)(2))"). The puzzle is what to make of the word "projected."

In the Court's view, this modifier makes all the difference. Projections, it explains, ordinarily account for later developments, not just past data. *Ante*, at 513–514. Thus, the Court concludes, in determining "projected disposable income" a bankruptcy court may depart from § 1325(b)(2)'s inflexible formula, at least in "exceptional cases," to account for "significant changes" in the debtor's circumstances, either actual or anticipated. *Ante*, at 513.

That interpretation runs aground because it either renders superfluous text Congress included or requires adding text Congress did not. It would be pointless to define disposable income in such detail, based on data during a specific 6-month period, if a court were free to set the resulting figure aside whenever it appears to be a poor predictor. And since "disposable income" appears nowhere else in § 1325(b), then unless § 1325(b)(2)'s definition applies to "projected disposable income" in § 1325(b)(1)(B), it does not apply at all.

The Court insists its interpretation does not render § 1325(b)(2)'s incorporation of "current monthly income" a nullity: A bankruptcy court must still *begin* with that figure, but is simply free to fiddle with it if a "significant" change in

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is, when the petition is filed, §§ 301(a), 302(a), 303(b). If the debtor does not file such a schedule on time—which the bankruptcy court apparently may excuse him from doing, § 521(a)(1)(B)(ii)—the 6-month period ends on the date the bankruptcy court determines the debtor's current income. § 101(10A)(A)(ii).

the debtor's circumstances is "known or virtually certain." *Ante*, at 513, 519. That construction conveniently avoids superfluity, but only by utterly abandoning the text the Court purports to construe. Nothing in the text supports treating the definition of disposable income Congress supplied as a suggestion. And even if the word "projected" did allow (or direct) a court to disregard § 1325(b)(2)'s fixed formula and to consider other data, there would be no basis in the text for the restrictions the Court reads in, regarding when and to what extent a court may (or must) do so. If the statute authorizes estimations, it authorizes them in *every* case, not just those where changes to the debtor's income are both "significant" and either "known or virtually certain." *Ibid.* If the evidence indicates it is merely more likely than not that the debtor's income will increase by some minimal amount, there is no reading of the word "projected" that permits (or requires) a court to ignore that change. The Court, in short, can arrive at its compromise construction only by rewriting the statute.

B

The only reasonable reading that avoids deleting words Congress enacted, or adding others it did not, is this: Setting aside expenses excludable under § 1325(b)(2)(A) and (B), which are not at issue here, a court must calculate the debtor's "projected disposable income" by multiplying his current monthly income by the number of months in the "applicable commitment period." The word "projected" in this context, I agree, most sensibly refers to a calculation, prediction, or estimation of future events, see Brief for United States as *Amicus Curiae* 12–13 (collecting dictionary definitions); see also Webster's New International Dictionary 1978 (2d ed. 1954). But one assuredly can calculate, predict, or estimate future figures based on the past. And here Congress has commanded that a specific historical figure shall be the basis for the projection.

The Court rejects this reading as unrealistic. A projection, the Court explains, may be based in *part* on past data, but "adjustments are often made based on other factors that may affect the final outcome." *Ante*, at 514. Past performance is no guarantee of future results. No gambler would bet the farm using "project[ions]" that are based only on a football team's play *before* its star quarterback was injured. And no pundit would keep his post if he "projected" election results relying only on prior cycles, ignoring recent polls. So too, the Court appears to reason, it makes no sense to say a court "project[s]" a debtor's "disposable income" when it considers only what he earned in a specific 6-month period in the past. *Ante*, at 513–514.

Such analogies do not establish that carrying current monthly income forward to determine a debtor's future ability to pay is not a "projection." They show only that relying exclusively on past data for the projection may be a bad idea. One who is asked to predict future results, but is armed with no other information than prior performance, can still make a projection; it may simply be off the mark. Congress, of course, could have tried to prevent that possibility by prescribing, as it has done in other contexts, that a debtor's projected disposable income be determined based on the "best available evidence," 8 U. S. C. § 1364(c)(2), or "any . . . relevant information," 25 U. S. C. § 2009(c)(1). But it included no such prescription here, and instead identified the data a court should consider. Perhaps Congress concluded that other information a bankruptcy court might consider is too uncertain or too easily manipulated. Or perhaps it thought the cost of considering such information outweighed the benefits. Cf. 7 U. S. C. § 1301(b)(13)(J)–(M) (requiring national and local "projected" yields of various crops to be adjusted only for abnormal weather, trends in yields, and production practices, apparently to the exclusion of other presumably relevant variables such as a sudden increase or decrease in the number of producers, farm subsidies, etc.). In all events, neither the reasons for nor the wisdom of the

projection method Congress chose has any bearing on what the statute means.

The Court contends that if Congress really meant courts to multiply a static figure by a set number of months, it would have used the word "multiplied," as it has done elsewhere—indeed, elsewhere in the same subsection, see, *e. g.*, 11 U. S. C. § 1325(b)(3)—instead of the word "projected."[2] *Ante*, at 514–515. I do not dispute that, as a general matter, we should presume that Congress does not ordinarily use two words in the same context to denote the same thing. But if forced to choose between (1) assuming Congress enacted text that serves no purpose at all, (2) ascribing an unheard-of meaning to the word "projected" (loaded with made-to-order restrictions) simply to avoid undesirable results, or (3) assuming Congress employed synonyms to express a single idea, the last is obviously the least evil.

In any event, we are not put to that choice here. While under my reading a court must determine the *income* half of the "projected disposable income" equation by multiplying a fixed number, that is not necessarily true of the *expenses* excludable under § 1325(b)(2)(A) and (B). Unlike the debtor's current monthly income, none of the three types of expenses—payments for the support of the debtor and his dependents, charitable contributions, and expenses to keep an existing business above water—is explicitly defined in terms of historical figures (at least for debtors with incomes below the state median). The first of those cannot possibly (in many cases) be determined based on the same 6-month period from which current monthly income is derived,[3] and the

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[2] Of course, since the number of months in the commitment period may vary, Congress could not simply have substituted a single word, but would have had to write "disposable income multiplied by the number of months in the applicable commitment period" or some such phrase.

[3] For a debtor whose income is below the state median, excludable expenses include domestic-support obligations "that first becom[e] payable after the date the petition is filed," § 1325(b)(2)(A)(i)—that is, *after* the 6-month window relevant to the debtor's current monthly income has

texts of the other two are consistent with determining expenses based on expectations. See § 1325(b)(2)(A)(ii) (charitable expenses to qualified entities limited to "15 percent of gross income of the debtor for the year in which the contributions are made"); § 1325(b)(2)(B) ("expenditures necessary for the continuation, preservation, and operation" of a business in which the debtor is engaged).

In short, a debtor's projected disposable income consists of two parts: one (current monthly income) that is fixed once for all based on historical data, and another (the enumerated expenses) that at least arguably depends on estimations of the debtor's future circumstances. The statute thus requires the court to predict the difference between two figures, each of which depends on the duration of the commitment period, and one of which also turns partly on facts besides historical data. In light of all this, it seems to me not at all unusual to describe this process as projection, not merely multiplication.

C

The Court's remaining arguments about the statute's meaning are easily dispatched. A "mechanical" reading of projected disposable income, it contends, renders superfluous the phrase "to be received in the applicable commitment period" in § 1325(b)(1)(B). *Ante*, at 517. Not at all. That phrase defines the period for which a debtor's disposable income must be calculated (*i. e.*, the period over which the projection extends), and thus the amount the debtor must ultimately pay his unsecured creditors.

Similarly insubstantial is the Court's claim regarding the requirement that the plan provide that the debtor's projected disposable income "will be applied to make payments" toward unsecured creditors' claims, § 1325(b)(1)(B). The Court says this requirement makes no sense unless the

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closed (unless the debtor does not file a current-income schedule), see § 101(10A)(A)(i).

debtor is actually able to pay an amount equal to his projected disposable income. *Ante*, at 518–519. But it makes no sense only if one assumes that the debtor is entitled to confirmation in the first place; and that assumption is wrong. The requirement that the debtor pay at least his projected disposable income is a *prerequisite* to confirmation. The "will be applied" proviso does not require a debtor to pay what he cannot; it simply withholds Chapter 13 relief when he cannot pay.

The Court also argues that § 1325(b)(1)'s directive to determine projected disposable income "as of the effective date of the plan" makes no sense if mere multiplication of existing numbers is required. *Ante*, at 518. As I have explained, however, "projected disposable income" may in some cases require more than multiplication (as to expenses), and the estimations involved may vary from the date of the plan's filing until the date it takes effect. Moreover, the provision also applies to the alternative avenue to confirmation in § 1325(b)(1)(A), which requires that "the value of the property to be distributed under the plan" to an unsecured creditor equals or exceeds the creditor's claim. As to that requirement, the effective-date requirement makes perfect sense.

Text aside, the Court also observes that Circuit practice prior to the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), 119 Stat. 23, aligns with the atextual approach the Court adopts today. *Ante*, at 515–517. That is unsurprising, since the prior version of the relevant provisions was completely consistent with that approach. The Court is correct that BAPCPA "did not amend the term 'projected disposable income,'" *ante*, at 517. But it *did* amend the *definition* of that term. Before 2005, § 1325(b)(2) defined "disposable income" simply as "income which is received by the debtor and which is not reasonably necessary to be expended" on the same basic types of expenses excluded by the current statute. § 1325(b)(2) (2000

ed.). Nothing in that terse definition compelled a court to rely exclusively on past data, let alone a specific 6-month period. But in BAPCPA—the same Act in which Congress defined "current monthly income" in § 101(10A)(A)—Congress redefined "disposable income" in § 1325(b)(2) to incorporate that backward-looking definition. See Pub. L. 109–8, § 102(b), (h), 119 Stat. 32–34. Given these significant changes, the fact that the Court's approach conforms with pre-BAPCPA practice not only does not recommend it, see, *e. g.*, *Pennsylvania Dept. of Public Welfare* v. *Davenport*, 495 U. S. 552, 563–564 (1990), but renders it suspect.

II

Unable to assemble a compelling case based on what the statute says, the Court falls back on the "senseless results" it would produce—results the Court "do[es] not think Congress intended." *Ante*, at 520. Even if it were true that a "mechanical" reading resulted in undesirable outcomes, that would make no difference. *Lewis* v. *Chicago*, *ante*, at 217. For even assuming (though I do not believe it) that we could know which results Congress thought it was achieving (or avoiding) apart from the only congressional expression of its thoughts, the text, those results would be entirely irrelevant to what the statute means.

In any event, the effects the Court fears are neither as inevitable nor as "senseless" as the Court portrays. The Court's first concern is that if actual or anticipated changes in the debtor's earnings are ignored, then a debtor whose income increases after the critical 6-month window will not be required to pay all he can afford. *Ante*, at 520. But as Lanning points out, Brief for Respondent 22–23, Chapter 13 authorizes the Bankruptcy Court, at the request of unsecured creditors, to modify the plan "[a]t any time after confirmation" to "increase . . . the amount of payments" on a class of claims or "reduce the time for such payments." § 1329(a)(1)–(2) (2006 ed.). The Court offers no explanation

of why modification would not be available in such instances, and sufficient to resolve the concern.

The Court also cringes at the prospect that a debtor whose income suddenly *declines* after the 6-month window or who, as in this case, receives a one-off windfall during that window, will be barred from Chapter 13 relief because he will be unable to devote his "disposable income" (which turns on his prior earnings) to paying his unsecured creditors going forward. *Ante*, at 520–521. At least for debtors whose circumstances deteriorate *after* confirmation, however, the Code already provides an answer. Just as a creditor can request an upward modification in light of postconfirmation developments, so too can a debtor ask for a downward adjustment. § 1329(a). Cf. § 1329(b)(1) (requiring that modifications meet requirements of §§ 1322(a)–(b), 1323(c), and 1325(a), but not § 1325(b)).

Moreover, even apart from the availability of modification it requires little imagination to see why Congress might want to withhold relief from debtors whose situations have suddenly deteriorated (after or even toward the end of the 6-month window), or who in the midst of dire straits have been blessed (within the 6-month window) by an influx of unusually high income. Bankruptcy protection is not a birthright, and Congress could reasonably conclude that those who have just hit the skids do not yet need a reprieve from repaying their debts; perhaps they will recover. And perhaps the debtor who has received a one-time bonus will thereby be enabled to stay afloat. How long to wait before throwing the debtor a lifeline is inherently a policy choice. Congress confined the calculation of current monthly income to a 6-month period (ordinarily ending before the case is commenced), but it could have picked 2 or 12 months (or a different end date) instead. Whatever the wisdom of the window it chose, we should not assume it did not know what it was doing and accordingly refuse to give effect to its words.

Even if one insists on making provision for such debtors, the Court is wrong to write off four alternative strategies the trustee suggests, Brief for Petitioner 50–54:

• Presumably some debtors whose income has only recently been reduced, or who have just received a jolt that causes a temporary uptick in their average income, can delay filing a Chapter 13 petition until their "current monthly income" catches up with their present circumstances. The Court speculates that delay might "giv[e] the appearance of bad faith," *ante*, at 522 (citing § 1325(a)(7)), but it offers no explanation of why that is so, and no authority supporting it.[4]

• Even if bad faith were a real worry, or if it were essential to a debtor's prospects that he invoke § 362's automatic stay immediately, the debtor might ask the bankruptcy court to excuse him from filing a statement of current income, so that it determines his "current monthly income" at a later date. See § 101(10A)(A)(ii). The Court dismisses this alternative, explaining that if the Code requires a mechanical approach this solution would "improperly undermine" it, and if the Code allows exceptions for changed circumstances the solution is unnecessary. *Ante*, at 522. The second premise is correct, but the first is not. Congress does not pursue its purposes at all costs. *Rodriguez* v. *United States*, 480 U. S. 522, 525–526 (1987) *(per curiam)*. Here it may have struck the very balance the Court thinks critical by creating a fixed formula but leaving leeway as to the time to which it applies.[5]

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[4] Neither of the two Court of Appeals cases the Court cites—*In re Myers*, 491 F. 3d 120, 125 (CA3 2007), and *Neufeld* v. *Freeman*, 794 F. 2d 149, 153 (CA4 1986)—involved a debtor's delaying his petition until his circumstances would permit the court to confirm a repayment plan.

[5] The Court observes that not every debtor will benefit from this exception, *ante*, at 522, and n. 6, since § 521(i)(3) provides that a bankruptcy court may not grant a request (which may be made *after* the deadline for filing the current-income schedule) for an extension of more than 45 days to file such a schedule. But the statute appears to assume that a court may excuse the filing of such a schedule altogether: A debtor is required to file a schedule in the first instance "*unless* the court orders otherwise,"

• A debtor who learns after filing that he will be unable to repay his full projected disposable income might also be able to dismiss his case and refile it later. § 1307(b). The Court worries that this alternative also might be deemed abusive, again with no pertinent authority for the speculation.[6] Its concern is based primarily on its belief that this "circumvents the statutory limits on a court's ability to shift the lookback period." *Ante*, at 523. That belief is mistaken, both because the Court exaggerates the statutory limitations on adjusting the lookback period, and because, just as it does not defeat the disposable-income formula's rigidity to allow adjustments regarding the time of determining that figure, it would not undermine the limitations on adjustment applicable in a pending case to allow the debtor to dismiss and refile.[7]

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§ 521(a)(1)(B) (emphasis added). And § 101(10A)(A)(ii)'s provision of a method for calculating current monthly income "if the debtor does not file the schedule of current income required by section 521(a)(1)(B)(ii)" makes little sense unless a court can excuse the failure to do so, since an *unexcused* failure to do so would be a basis for dismissing the case, see § 521(i). Allowing courts to excuse such schedules does not render superfluous § 521(i)(3)'s authorization for limited extensions, since that applies to extensions sought up to 45 days *after* the filing deadline, whereas § 521(a)(1)(B) seems to apply only *before* the deadline.

[6] The sole authority the Court supplies—a single Bankruptcy Court decision predating BAPCPA—provides no support. See *In re Glenn*, 288 B. R. 516, 519–521 (ED Tenn. 2002). Although acknowledging that "[m]ultiple filings by a debtor are not, in and of themselves, improper," the court did note that "whether this is the first or subsequent filin[g]" by the debtor is one among the "totality of the circumstances" to be considered in a good-faith analysis. *Id.*, at 520 (internal quotation marks omitted). The debtor in the case at hand had filed three previous Chapter 13 petitions, "each on the eve of a scheduled foreclosure," and according to the court "never had any intention of following through with any of the Chapter 13 cases," but had used the bankruptcy process "to hold [his creditor] hostage, while remaining in his residence without paying for it." *Id.*, at 520–521.

[7] The Court also notes that the Code precludes a debtor who has had a case pending in the last 180 days from refiling if his prior case was dismissed because he willfully failed to obey the court's orders or to appear

• A debtor unable to pursue any of these avenues to Chapter 13 might still seek relief under Chapter 7. The Court declares this cold comfort, noting that some debtors—including Lanning—will have incomes *too high* to qualify for Chapter 7. *Ante*, at 523–524. Some such debtors, however, may be able to show "special circumstances," § 707(b)(2)(B), and still take advantage of Chapter 7. Aside from noting the absence of authority on the issue, the Court's answer is unsatisfyingly circular: It notes that the special-circumstances exception is available only if the debtor has "no reasonable alternative," § 707(b)(2)(B)(i), which will not be true after today given the Court's holding that bankruptcy courts can consider changes in a debtor's income. As for those who cannot establish special circumstances, it is hard to understand why there is cause for concern. Congress has evidently concluded that such debtors do not need the last-ditch relief of liquidation, and that they are not suitable candidates for repaying their debts (at least in part) under Chapter 13's protective umbrella. We have neither reason nor warrant to second-guess either determination.

* * *

Underlying the Court's interpretation is an understandable urge: Sometimes the best reading of a text yields results that one thinks must be a mistake, and bending that reading just a little bit will allow all the pieces to fit together. But taking liberties with text in light of outcome makes sense only if we assume that we know better than Congress which outcomes are mistaken. And by refusing to hold that Congress meant what it said, but see *Connecticut Nat. Bank* v. *Germain*, 503 U. S. 249, 253–254 (1992), we deprive it of the

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before the court, § 109(g)(1), or if he voluntarily dismissed the prior suit "following the filing of a request for relief from the automatic stay" under § 362, § 109(g)(2). *Ante*, at 523, n. 7. But the Court does not explain why these barriers have any bearing on whether refiling for bankruptcy would be abusive when the barriers *do not apply*.

ability to say what it means in the future. It may be that no interpretation of § 1325(b)(1)(B) is entirely satisfying. But it is in the hard cases, even more than the easy ones, that we should faithfully apply our settled interpretive principles, and trust that Congress will correct the law if what it previously prescribed is wrong.

I respectfully dissent.

Syllabus

KRUPSKI *v.* COSTA CROCIERE S. p. A.

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

No. 09–337. Argued April 21, 2010—Decided June 7, 2010

Petitioner Krupski sought compensation for injuries she suffered on a cruise ship. Her passenger ticket, which was issued by Costa Cruise Lines, identified respondent Costa Crociere S. p. A. as the carrier; required an injured party to submit to the carrier or its agent written notice of a claim; required any lawsuit to be filed within one year of the injury; and designated a specific Federal District Court as the exclusive forum for lawsuits such as Krupski's. The front of the ticket listed Costa Cruise's Florida address and made references to "Costa Cruises." After Krupski's attorney notified Costa Cruise of her claims but did not reach a settlement, Krupski filed a diversity negligence action against Costa Cruise. Over the next several months—after the limitations period had expired—Costa Cruise brought Costa Crociere's existence to Krupski's attention three times, including in its motion for summary judgment, in which it stated that Costa Crociere was the proper defendant. Krupski responded and moved to amend her complaint to add Costa Crociere as a defendant. The District Court denied Costa Cruise's summary judgment motion without prejudice and granted Krupski leave to amend. After she served Costa Crociere with an amended complaint, the court dismissed Costa Cruise from the case. Thereafter, Costa Crociere—represented by the same counsel as Costa Cruise—moved to dismiss, contending that the amended complaint did not satisfy the requirements of Federal Rule of Civil Procedure 15(c), which governs when an amended pleading "relates back" to the date of a timely filed original pleading and is thus timely even though it was filed outside an applicable limitations period. The Rule requires, *inter alia*, that within the Rule 4(m) 120-day period for service after a complaint is filed, the newly named defendant "knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity." Rule 15(c)(1)(C)(ii). The District Court found this condition fatal to Krupski's attempt to relate back. It concluded that she had not made a mistake about the proper party's identity because, although Costa Cruise had disclosed Costa Crociere's role in several court filings, she nonetheless delayed for months filing an amended complaint. The Eleventh Circuit affirmed, finding that

Krupski either knew or should have known of Costa Crociere's identity as a potential party because she furnished the ticket identifying it to her counsel well before the limitations period ended. It was therefore appropriate to treat her as having chosen to sue one potential party over another. Additionally, the court held that relation back was not appropriate because of Krupski's undue delay in seeking to amend the complaint.

Held: Relation back under Rule 15(c)(1)(C) depends on what the party to be added knew or should have known, not on the amending party's knowledge or timeliness in seeking to amend the pleading. Pp. 547–557.

(a) The Rule's text does not support the Eleventh Circuit's decision to rely on the plaintiff's knowledge in denying relation back. The question under Rule 15(c)(1)(C)(ii) is not whether Krupski knew or should have known Costa Crociere's identity as the proper defendant, but whether Costa Crociere knew or should have known during the Rule 4(m) period that it would have been named as the defendant but for an error. The plaintiff's information is relevant only if it bears on the defendant's understanding of whether the plaintiff made a mistake regarding the proper party's identity. It would be error to conflate knowledge of a party's existence with the absence of mistake. That a plaintiff knows of a party's existence does not preclude her from making a mistake with respect to that party's identity. Making a deliberate choice to sue one party over another while understanding the factual and legal differences between the two parties may be the antithesis of making a mistake, but that does not mean that any time a plaintiff is aware of the existence of two parties and chooses to sue the wrong one, the proper defendant could reasonably believe that the plaintiff made no mistake. A plaintiff might know that the prospective defendant exists but nonetheless choose to sue a different defendant based on a misunderstanding about the proper party's identity. That kind of deliberate but mistaken choice should not foreclose a finding that Rule 15(c)(1)(C)(ii) has been satisfied. This reading is consistent with relation back's purpose of balancing the defendant's interests protected by the statute of limitations with the preference of the Federal Rules of Civil Procedure in general, and Rule 15 in particular, for resolving disputes on their merits. It is also consistent with the history of Rule 15(c)(1)(C). And it is not foreclosed by *Nelson* v. *Adams USA, Inc.*, 529 U. S. 460. Pp. 547–552.

(b) The Eleventh Circuit also erred in ruling that Krupski's undue delay in seeking to file, and in eventually filing, an amended complaint justified its denial of relation back under Rule 15(c)(1)(C). The Rule

plainly sets forth an exclusive list of requirements for relation back, and the plaintiff's diligence is not among them. Moreover, it mandates relation back once its requirements are satisfied; it does not leave that decision to the district court's equitable discretion. Its mandatory nature is particularly striking in contrast to the inquiry under Rule 15(a), which gives a district court discretion to decide whether to grant a motion to amend a pleading before trial. See *Foman* v. *Davis*, 371 U. S. 178, 182. Rule 15(c)(1)(C) permits a court to examine a plaintiff's conduct during the Rule 4(m) period, but only to the extent the plaintiff's postfiling conduct informs the prospective defendant's understanding of whether the plaintiff initially made a "mistake concerning the proper party's identity." The plaintiff's postfiling conduct is otherwise immaterial to the relation-back question. Pp. 552–554.

(c) Under these principles, the courts below erred in denying relation back. Because the original complaint (of which Costa Crociere had constructive notice) made clear that Krupski meant to sue the company that "owned, operated, managed, supervised and controlled" the ship on which she was injured and also indicated (mistakenly) that Costa Cruise performed those roles, Costa Crociere should have known that it avoided suit within the limitations period only because of Krupski's misunderstanding about which "Costa" entity was in charge of the ship—clearly a "mistake concerning the proper party's identity." That Krupski may have known the ticket's contents does not foreclose the possibility that she nonetheless misunderstood crucial facts regarding the two companies' identities. Especially because the face of the complaint plainly indicated such a misunderstanding, respondent's contention that it was entitled to think she made no mistake is not persuasive. Moreover, respondent has articulated no strategy that it could reasonably have thought Krupski was pursuing in suing a defendant that was legally unable to provide relief. Nothing in Krupski's conduct during the Rule 4(m) period suggests that she failed to name Costa Crociere because of anything other than a mistake. The interrelationship between Costa Cruise and Costa Crociere and their similar names heighten the expectation that Costa Crociere should suspect a mistake when Costa Cruise is named in a complaint actually describing Costa Crociere's activities. In addition, Costa Crociere's own actions contributed to passenger confusion over "the proper party": The front of the ticket advertises that "Costa Cruises" has achieved a certification of quality without clarifying which "Costa" company is meant. And as shown in similar lawsuits, Costa Crociere is evidently well aware that the difference between it and Costa Cruise can be confusing for passengers. Pp. 554–557.

330 Fed. Appx. 892, reversed and remanded.

SOTOMAYOR, J., delivered the opinion of the Court, in which ROBERTS, C. J., and STEVENS, KENNEDY, THOMAS, GINSBURG, BREYER, and ALITO, JJ., joined. SCALIA, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 557.

Mark R. Bendure argued the cause for petitioner. With him on the briefs was *Matthew L. Turner.*

Robert S. Glazier argued the cause for respondent. With him on the brief were *David J. Horr* and *Stephanie H. Wylie.*

JUSTICE SOTOMAYOR delivered the opinion of the Court.

Rule 15(c) of the Federal Rules of Civil Procedure governs when an amended pleading "relates back" to the date of a timely filed original pleading and is thus itself timely even though it was filed outside an applicable statute of limitations. Where an amended pleading changes a party or a party's name, the Rule requires, among other things, that "the party to be brought in by amendment . . . knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity." Rule 15(c)(1)(C). In this case, the Court of Appeals held that Rule 15(c) was not satisfied because the plaintiff knew or should have known of the proper defendant before filing her original complaint. The court also held that relation back was not appropriate because the plaintiff had unduly delayed in seeking to amend. We hold that relation back under Rule 15(c)(1)(C) depends on what the party to be added knew or should have known, not on the amending party's knowledge or its timeliness in seeking to amend the pleading. Accordingly, we reverse the judgment of the Court of Appeals.

I

On February 21, 2007, petitioner, Wanda Krupski, tripped over a cable and fractured her femur while she was on board the cruise ship Costa Magica. Upon her return home, she acquired counsel and began the process of seeking compensa-

tion for her injuries. Krupski's passenger ticket—which explained that it was the sole contract between each passenger and the carrier, App. to Pet. for Cert. 37a—included a variety of requirements for obtaining damages for an injury suffered on board one of the carrier's ships. The ticket identified the carrier as

> "Costa Crociere S. p. A., an Italian corporation, and all Vessels and other ships owned, chartered, operated, marketed or provided by Costa Crociere, S. p. A., and all officers, staff members, crew members, independent contractors, medical providers, concessionaires, pilots, suppliers, agents and assigns onboard said Vessels, and the manufacturers of said Vessels and all their component parts." *Id.*, at 27a.

The ticket required an injured party to submit "written notice of the claim with full particulars . . . to the carrier or its duly authorized agent within 185 days after the date of injury." *Id.*, at 28a. The ticket further required any lawsuit to be "filed within one year after the date of injury" and to be "served upon the carrier within 120 days after filing." *Ibid.* For cases arising from voyages departing from or returning to a United States port in which the amount in controversy exceeded $75,000, the ticket designated the United States District Court for the Southern District of Florida in Broward County, Florida, as the exclusive forum for a lawsuit. *Id.*, at 36a. The ticket extended the "defenses, limitations and exceptions . . . that may be invoked by the CARRIER" to "all persons who may act on behalf of the CARRIER or on whose behalf the CARRIER may act," including "the CARRIER's parents, subsidiaries, affiliates, successors, assigns, representatives, agents, employees, servants, concessionaires and contractors" as well as "Costa Cruise Lines N. V.," identified as the "sales and marketing agent for the CARRIER and the issuer of this Passage Ticket Contract." *Id.*, at 29a. The front of the ticket listed

Costa Cruise Lines' address in Florida and stated that an entity called "Costa Cruises" was "the first cruise company in the world" to obtain a certain certification of quality. *Id.*, at 25a.

On July 2, 2007, Krupski's counsel notified Costa Cruise Lines of Krupski's claims. App. 69–70. On July 9, 2007, the claims administrator for Costa Cruise requested additional information from Krupski "[i]n order to facilitate our future attempts to achieve a pre-litigation settlement." App. to Pet. for Cert. 23a–24a. The parties were unable to reach a settlement, however, and on February 1, 2008—three weeks before the 1-year limitations period expired—Krupski filed a negligence action against Costa Cruise, invoking the diversity jurisdiction of the Federal District Court for the Southern District of Florida. The complaint alleged that Costa Cruise "owned, operated, managed, supervised and controlled" the ship on which Krupski had injured herself; that Costa Cruise had extended to its passengers an invitation to enter onto the ship; and that Costa Cruise owed Krupski a duty of care, which it breached by failing to take steps that would have prevented her accident. App. 23–26. The complaint further stated that venue was proper under the passenger ticket's forum selection clause and averred that, by the July 2007 notice of her claims, Krupski had complied with the ticket's presuit requirements. *Id.*, at 23. Krupski served Costa Cruise on February 4, 2008.

Over the next several months—after the limitations period had expired—Costa Cruise brought Costa Crociere's existence to Krupski's attention three times. First, on February 25, 2008, Costa Cruise filed its answer, asserting that it was not the proper defendant, as it was merely the North American sales and marketing agent for Costa Crociere, which was the actual carrier and vessel operator. *Id.*, at 31. Second, on March 20, 2008, Costa Cruise listed Costa Crociere as an interested party in its corporate disclosure statement. App. to Pet. for Cert. 20a. Finally, on May 6, 2008,

Costa Cruise moved for summary judgment, again stating that Costa Crociere was the proper defendant. App. 5, 33–38.

On June 13, 2008, Krupski responded to Costa Cruise's motion for summary judgment, arguing for limited discovery to determine whether Costa Cruise should be dismissed. According to Krupski, the following sources of information led her to believe Costa Cruise was the responsible party: The travel documents prominently identified Costa Cruise and gave its Florida address; Costa Cruise's Web site listed Costa Cruise in Florida as the United States office for the Italian company Costa Crociere; and the Web site of the Florida Department of State listed Costa Cruise as the only "Costa" company registered to do business in that State. *Id.*, at 43–45, 56–59. Krupski also observed that Costa Cruise's claims administrator had responded to her claims notification without indicating that Costa Cruise was not a responsible party. *Id.*, at 45. With her response, Krupski simultaneously moved to amend her complaint to add Costa Crociere as a defendant. *Id.*, at 41–42, 52–54.

On July 2, 2008, after oral argument, the District Court denied Costa Cruise's motion for summary judgment without prejudice and granted Krupski leave to amend, ordering that Krupski effect proper service on Costa Crociere by September 16, 2008. *Id.*, at 71–72. Complying with the court's deadline, Krupski filed an amended complaint on July 11, 2008, and served Costa Crociere on August 21, 2008. *Id.*, at 73, 88–89. On that same date, the District Court issued an order dismissing Costa Cruise from the case pursuant to the parties' joint stipulation, Krupski apparently having concluded that Costa Cruise was correct that it bore no responsibility for her injuries. *Id.*, at 85–86.

Shortly thereafter, Costa Crociere—represented by the same counsel who had represented Costa Cruise, compare *id.*, at 31, with *id.*, at 100—moved to dismiss, contending that the amended complaint did not relate back under

Rule 15(c) and was therefore untimely. The District Court agreed. App. to Pet. for Cert. 8a–22a. Rule 15(c), the court explained, imposes three requirements before an amended complaint against a newly named defendant can relate back to the original complaint. First, the claim against the newly named defendant must have arisen "out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading." Fed. Rules Civ. Proc. 15(c)(1)(B), (C). Second, "within the period provided by Rule 4(m) for serving the summons and complaint" (which is ordinarily 120 days from when the complaint is filed, see Rule 4(m)), the newly named defendant must have "received such notice of the action that it will not be prejudiced in defending on the merits." Rule 15(c)(1)(C)(i). Finally, the plaintiff must show that, within the Rule 4(m) period, the newly named defendant "knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity." Rule 15(c)(1)(C)(ii).

The first two conditions posed no problem, the court explained: The claim against Costa Crociere clearly involved the same occurrence as the original claim against Costa Cruise, and Costa Crociere had constructive notice of the action and had not shown that any unfair prejudice would result from relation back. App. to Pet. for Cert. 14a–18a. But the court found the third condition fatal to Krupski's attempt to relate back, concluding that Krupski had not made a mistake concerning the identity of the proper party. *Id.*, at 18a–21a. Relying on Eleventh Circuit precedent, the court explained that the word "mistake" should not be construed to encompass a deliberate decision not to sue a party whose identity the plaintiff knew before the statute of limitations had run. Because Costa Cruise informed Krupski that Costa Crociere was the proper defendant in its answer, corporate disclosure statement, and motion for summary judgment, and yet Krupski delayed for months in moving to

amend and then in filing an amended complaint, the court concluded that Krupski knew of the proper defendant and made no mistake.

The Eleventh Circuit affirmed in an unpublished *per curiam* opinion. *Krupski* v. *Costa Cruise Lines, N. V., LLC*, 330 Fed. Appx. 892 (2009). Rather than relying on the information contained in Costa Cruise's filings, all of which were made after the statute of limitations had expired, as evidence that Krupski did not make a mistake, the Court of Appeals noted that the relevant information was located within Krupski's passenger ticket, which she had furnished to her counsel well before the end of the limitations period. Because the ticket clearly identified Costa Crociere as the carrier, the court stated, Krupski either knew or should have known of Costa Crociere's identity as a potential party.[1] It was therefore appropriate to treat Krupski as having chosen to sue one potential party over another. Alternatively, even assuming that she first learned of Costa Crociere's identity as the correct party from Costa Cruise's answer, the Court of Appeals observed that Krupski waited 133 days from the time she filed her original complaint to seek leave to amend and did not file an amended complaint for another month after that. In light of this delay, the Court of Appeals concluded that the District Court did not abuse its discretion in denying relation back.

We granted certiorari to resolve tension among the Circuits over the breadth of Rule 15(c)(1)(C)(ii),[2] 558 U. S. 1142 (2010), and we now reverse.

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[1] The Court of Appeals stated that it was "imput[ing]" knowledge to Krupski. 330 Fed. Appx., at 895. Petitioner uses the terms "imputed knowledge" and "constructive knowledge" interchangeably in her brief, while respondent addresses only actual knowledge. Because we reject the Court of Appeals' focus on the plaintiff's knowledge in the first instance, see *infra*, at 548–552, the distinction among these types of knowledge is not relevant to our resolution of this case.

[2] See, *e. g.*, *Krupski* v. *Costa Cruise Lines, N. V., LLC*, 330 Fed. Appx. 892, 895 (CA11 2009) *(per curiam)* (case below); *Rendall-Speranza* v. *Nassim*, 107 F. 3d 913, 918 (CADC 1997) (provision does not authorize relation

II

Under the Federal Rules of Civil Procedure, an amendment to a pleading relates back to the date of the original pleading when:

> "(A) the law that provides the applicable statute of limitations allows relation back;
>
> "(B) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading; or
>
> "(C) the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment:
>
> "(i) received such notice of the action that it will not be prejudiced in defending on the merits; and
>
> "(ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity." Rule 15(c)(1).

In our view, neither of the Court of Appeals' reasons for denying relation back under Rule 15(c)(1)(C)(ii) finds support in the text of the Rule. We consider each reason in turn.

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back where plaintiff "was fully aware of the potential defendant's identity but not of its responsibility for the harm alleged"); *Cornwell* v. *Robinson*, 23 F. 3d 694, 705 (CA2 1994) (no relation back where plaintiff knew the identities of the responsible defendants and failed to name them); *Goodman* v. *Praxair, Inc.*, 494 F. 3d 458, 469–470 (CA4 2007) (en banc) (rejecting argument that plaintiff's knowledge of proper corporate defendant's existence and name meant that no mistake had been made); *Arthur* v. *Maersk, Inc.*, 434 F. 3d 196, 208 (CA3 2006) ("A 'mistake' is no less a 'mistake' when it flows from lack of knowledge as opposed to inaccurate description"); *Leonard* v. *Parry*, 219 F. 3d 25, 28–29 (CA1 2000) (plaintiff's knowledge of proper defendant's identity was not relevant to whether she made a "'mistake concerning the identity of the proper party'"). We express no view on whether these decisions may be reconciled with each other in light of their specific facts and the interpretation of Rule 15(c)(1)(C)(ii) we adopt today.

A

The Court of Appeals first decided that Krupski either knew or should have known of the proper party's identity and thus determined that she had made a deliberate choice instead of a mistake in not naming Costa Crociere as a party in her original pleading. 330 Fed. Appx., at 895. By focusing on Krupski's knowledge, the Court of Appeals chose the wrong starting point. The question under Rule 15(c)(1)(C)(ii) is not whether Krupski knew or should have known the identity of Costa Crociere as the proper defendant, but whether Costa Crociere knew or should have known that it would have been named as a defendant but for an error. Rule 15(c)(1)(C)(ii) asks what the prospective *defendant* knew or should have known during the Rule 4(m) period, not what the *plaintiff* knew or should have known at the time of filing her original complaint.[3]

Information in the plaintiff's possession is relevant only if it bears on the defendant's understanding of whether the plaintiff made a mistake regarding the proper party's identity. For purposes of that inquiry, it would be error to conflate knowledge of a party's existence with the absence of mistake. A mistake is "[a]n error, misconception, or misunderstanding; an erroneous belief." Black's Law Dictionary 1092 (9th ed. 2009); see also Webster's Third New International Dictionary 1446 (2002) (defining "mistake" as "a misunderstanding of the meaning or implication of something"; "a wrong action or statement proceeding from faulty judg-

[3] Rule 15(c)(1)(C) speaks generally of an amendment to a "pleading" that changes "the party against whom a claim is asserted," and it therefore is not limited to the circumstance of a plaintiff filing an amended complaint seeking to bring in a new defendant. Nevertheless, because the latter is the "typical case" of Rule 15(c)(1)(C)'s applicability, see 3 Moore's Federal Practice § 15.19[2] (3d ed. 2009), we use this circumstance as a shorthand throughout this opinion. See also *id.*, § 15.19[3][a]; Advisory Committee's 1966 Notes on Fed. Rule Civ. Proc. 15, 28 U. S. C. App., pp. 122–123 (hereinafter Advisory Committee's 1966 Notes).

ment, inadequate knowledge, or inattention"; "an erroneous belief"; or "a state of mind not in accordance with the facts"). That a plaintiff knows of a party's existence does not preclude her from making a mistake with respect to that party's identity. A plaintiff may know that a prospective defendant—call him party A—exists, while erroneously believing him to have the status of party B. Similarly, a plaintiff may know generally what party A does while misunderstanding the roles that party A and party B played in the "conduct, transaction, or occurrence" giving rise to her claim. If the plaintiff sues party B instead of party A under these circumstances, she has made a "mistake concerning the proper party's identity" notwithstanding her knowledge of the existence of both parties. The only question under Rule 15(c)(1)(C)(ii), then, is whether party A knew or should have known that, absent some mistake, the action would have been brought against him.

Respondent urges that the key issue under Rule 15(c)(1)(C)(ii) is whether the plaintiff made a deliberate choice to sue one party over another. Brief for Respondent 11–16. We agree that making a deliberate choice to sue one party instead of another while fully understanding the factual and legal differences between the two parties is the antithesis of making a mistake concerning the proper party's identity. We disagree, however, with respondent's position that any time a plaintiff is aware of the existence of two parties and chooses to sue the wrong one, the proper defendant could reasonably believe that the plaintiff made no mistake. The reasonableness of the mistake is not itself at issue. As noted, a plaintiff might know that the prospective defendant exists but nonetheless harbor a misunderstanding about his status or role in the events giving rise to the claim at issue, and she may mistakenly choose to sue a different defendant based on that misimpression. That kind of deliberate but mistaken choice does not foreclose a finding that Rule 15(c)(1)(C)(ii) has been satisfied.

This reading is consistent with the purpose of relation back: to balance the interests of the defendant protected by the statute of limitations with the preference expressed in the Federal Rules of Civil Procedure in general, and Rule 15 in particular, for resolving disputes on their merits. See, *e. g.*, Advisory Committee's 1966 Notes 122; 3 Moore's Federal Practice §§ 15.02[1], 15.19[3][a] (3d ed. 2009). A prospective defendant who legitimately believed that the limitations period had passed without any attempt to sue him has a strong interest in repose. But repose would be a windfall for a prospective defendant who understood, or who should have understood, that he escaped suit during the limitations period only because the plaintiff misunderstood a crucial fact about his identity. Because a plaintiff's knowledge of the existence of a party does not foreclose the possibility that she has made a mistake of identity about which that party should have been aware, such knowledge does not support that party's interest in repose.

Our reading is also consistent with the history of Rule 15(c)(1)(C). That provision was added in 1966 to respond to a recurring problem in suits against the Federal Government, particularly in the Social Security context. Advisory Committee's 1966 Notes 122. Individuals who had filed timely lawsuits challenging the administrative denial of benefits often failed to name the party identified in the statute as the proper defendant—the current Secretary of what was then the Department of Health, Education, and Welfare—and named instead the United States; the Department of Health, Education, and Welfare itself; the nonexistent "Federal Security Administration"; or a Secretary who had recently retired from office. *Ibid.* By the time the plaintiffs discovered their mistakes, the statute of limitations in many cases had expired, and the district courts denied the plaintiffs leave to amend on the ground that the amended complaints would not relate back. Rule 15(c) was therefore "amplified to provide a general solution" to this problem.

Ibid. It is conceivable that the Social Security litigants knew or reasonably should have known the identity of the proper defendant either because of documents in their administrative cases or by dint of the statute setting forth the filing requirements. See 42 U. S. C. § 405(g) (1958 ed., Supp. III). Nonetheless, the Advisory Committee clearly meant their filings to qualify as mistakes under the Rule.

Respondent suggests that our decision in *Nelson* v. *Adams USA, Inc.*, 529 U. S. 460 (2000), forecloses the reading of Rule 15(c)(1)(C)(ii) we adopt today. We disagree. In that case, Adams USA, Inc. (Adams), had obtained an award of attorney's fees against the corporation of which Donald Nelson was the president and sole shareholder. After Adams became concerned that the corporation did not have sufficient funds to pay the award, Adams sought to amend its pleading to add Nelson as a party and simultaneously moved to amend the judgment to hold Nelson responsible. The District Court granted both motions, and the Court of Appeals affirmed. We reversed, holding that the requirements of due process, as codified in Rules 12 and 15 of the Federal Rules of Civil Procedure, demand that an added party have the opportunity to respond before judgment is entered against him. *Id.*, at 465–467. In a footnote explaining that relation back does not deny the added party an opportunity to respond to the amended pleading, we noted that the case did not arise under the "mistake clause" of Rule 15(c):[4] "Respondent Adams made no such mistake. It knew of Nelson's role and existence and, until it moved to amend its pleading,

[4] The "mistake clause" at the time we decided *Nelson* was set forth in Rule 15(c)(3). 529 U. S., at 467, n. 1; 28 U. S. C. App., p. 743 (1988 ed., Supp. III). Rule 15(c) was renumbered in 2007 without substantive change "as part of the general restyling of the Civil Rules," at which time it received its current placement in Rule 15(c)(1)(C)(ii). Advisory Committee's 2007 Notes on Fed. Rule Civ. Proc. 15, 28 U. S. C. App., p. 37 (2006 ed., Supp. II).

chose to assert its claim for costs and fees only against [Nelson's company]." *Id.*, at 467, n. 1.

Contrary to respondent's claim, *Nelson* does not suggest that Rule 15(c)(1)(C)(ii) cannot be satisfied if a plaintiff knew of the prospective defendant's existence at the time she filed her original complaint. In that case, there was nothing in the initial pleading suggesting that Nelson was an intended party, while there was evidence in the record (of which Nelson was aware) that Adams sought to add him only after learning that the company would not be able to satisfy the judgment. *Id.*, at 463–464. This evidence countered any implication that Adams had originally failed to name Nelson because of any "mistake concerning the proper party's identity," and instead suggested that Adams decided to name Nelson only after the fact in an attempt to ensure that the fee award would be paid. The footnote merely observes that Adams had originally been under no misimpression about the function Nelson played in the underlying dispute. We said, after all, that Adams knew of Nelson's "role" as well as his existence. *Id.*, at 467, n. 1. Read in context, the footnote in *Nelson* is entirely consistent with our understanding of the Rule: When the original complaint and the plaintiff's conduct compel the conclusion that the failure to name the prospective defendant in the original complaint was the result of a fully informed decision as opposed to a mistake concerning the proper defendant's identity, the requirements of Rule 15(c)(1)(C)(ii) are not met. This conclusion is in keeping with our rejection today of the Court of Appeals' reliance on the plaintiff's knowledge to deny relation back.

B

The Court of Appeals offered a second reason why Krupski's amended complaint did not relate back: Krupski had unduly delayed in seeking to file, and in eventually filing, an amended complaint. 330 Fed. Appx., at 895. The Court of Appeals offered no support for its view that a plaintiff's dila-

tory conduct can justify the denial of relation back under Rule 15(c)(1)(C), and we find none. The Rule plainly sets forth an exclusive list of requirements for relation back, and the amending party's diligence is not among them. Moreover, the Rule mandates relation back once the Rule's requirements are satisfied; it does not leave the decision whether to grant relation back to the district court's equitable discretion. See Rule 15(c)(1) ("An amendment . . . *relates back* . . . when" the three listed requirements are met (emphasis added)).

The mandatory nature of the inquiry for relation back under Rule 15(c) is particularly striking in contrast to the inquiry under Rule 15(a), which sets forth the circumstances in which a party may amend its pleading before trial. By its terms, Rule 15(a) gives discretion to the district court in deciding whether to grant a motion to amend a pleading to add a party or a claim. Following an initial period after filing a pleading during which a party may amend once "as a matter of course," "a party may amend its pleading only with the opposing party's written consent or the court's leave," which the court "should freely give . . . when justice so requires." Rules 15(a)(1)–(2). We have previously explained that a court may consider a movant's "undue delay" or "dilatory motive" in deciding whether to grant leave to amend under Rule 15(a). *Foman* v. *Davis*, 371 U. S. 178, 182 (1962). As the contrast between Rule 15(a) and Rule 15(c) makes clear, however, the speed with which a plaintiff moves to amend her complaint or files an amended complaint after obtaining leave to do so has no bearing on whether the amended complaint relates back. Cf. 6A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 1498, pp. 142–143, and nn. 49–50 (2d ed. 1990 and Supp. 2010).

Rule 15(c)(1)(C) does permit a court to examine a plaintiff's conduct during the Rule 4(m) period, but not in the way or for the purpose respondent or the Court of Appeals suggests. As we have explained, the question under Rule

15(c)(1)(C)(ii) is what the prospective defendant reasonably should have understood about the plaintiff's intent in filing the original complaint against the first defendant. To the extent the plaintiff's postfiling conduct informs the prospective defendant's understanding of whether the plaintiff initially made a "mistake concerning the proper party's identity," a court may consider the conduct. Cf. *Leonard* v. *Parry*, 219 F. 3d 25, 29 (CA1 2000) ("[P]ost-filing events occasionally can shed light on the plaintiff's state of mind at an earlier time" and "can inform *a defendant's* reasonable beliefs concerning whether her omission from the original complaint represented a mistake (as opposed to a conscious choice)"). The plaintiff's postfiling conduct is otherwise immaterial to the question whether an amended complaint relates back.[5]

C

Applying these principles to the facts of this case, we think it clear that the courts below erred in denying relation back under Rule 15(c)(1)(C)(ii). The District Court held that Costa Crociere had "constructive notice" of Krupski's complaint within the Rule 4(m) period. App. to Pet. for Cert. 15a–17a. Costa Crociere has not challenged this finding. Because the complaint made clear that Krupski meant to sue the company that "owned, operated, managed, supervised and controlled" the ship on which she was injured, App. 23, and also indicated (mistakenly) that Costa Cruise performed those roles, *id.*, at 23–27, Costa Crociere should have known, within the Rule 4(m) period, that it was not named as a

[5] Similarly, we reject respondent's suggestion that Rule 15(c) requires a plaintiff to move to amend her complaint or to file and serve an amended complaint within the Rule 4(m) period. Rule 15(c)(1)(C)(i) simply requires that the prospective defendant has received sufficient "notice of the action" within the Rule 4(m) period that he will not be prejudiced in defending the case on the merits. The Advisory Committee Notes to the 1966 Amendment clarify that "the notice need not be formal." Advisory Committee's 1966 Notes 122.

defendant in that complaint only because of Krupski's misunderstanding about which "Costa" entity was in charge of the ship—clearly a "mistake concerning the proper party's identity."

Respondent contends that because the original complaint referred to the ticket's forum requirement and presuit claims notification procedure, Krupski was clearly aware of the contents of the ticket, and because the ticket identified Costa Crociere as the carrier and proper party for a lawsuit, respondent was entitled to think that she made a deliberate choice to sue Costa Cruise instead of Costa Crociere. Brief for Respondent 13. As we have explained, however, that Krupski may have known the contents of the ticket does not foreclose the possibility that she nonetheless misunderstood crucial facts regarding the two companies' identities. Especially because the face of the complaint plainly indicated such a misunderstanding, respondent's contention is not persuasive. Moreover, respondent has articulated no strategy that it could reasonably have thought Krupski was pursuing in suing a defendant that was legally unable to provide relief.

Respondent also argues that Krupski's failure to move to amend her complaint during the Rule 4(m) period shows that she made no mistake in that period. *Id.*, at 13–14. But as discussed, any delay on Krupski's part is relevant only to the extent it may have informed Costa Crociere's understanding during the Rule 4(m) period of whether she made a mistake originally. Krupski's failure to add Costa Crociere during the Rule 4(m) period is not sufficient to make reasonable any belief that she had made a deliberate and informed decision not to sue Costa Crociere in the first instance.[6] Nothing in

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[6] The Court of Appeals concluded that Krupski was not diligent merely because she did not seek leave to add Costa Crociere until 133 days after she filed her original complaint and did not actually file an amended complaint for another month after that. 330 Fed. Appx., at 895. It is not clear why Krupski should have been found dilatory for not accepting at face value the unproven allegations in Costa Cruise's answer and corpo-

Krupski's conduct during the Rule 4(m) period suggests that she failed to name Costa Crociere because of anything other than a mistake.

It is also worth noting that Costa Cruise and Costa Crociere are related corporate entities with very similar names; "crociera" even means "cruise" in Italian. Cassell's Italian Dictionary 137, 670 (1967). This interrelationship and similarity heighten the expectation that Costa Crociere should suspect a mistake has been made when Costa Cruise is named in a complaint that actually describes Costa Crociere's activities. Cf. *Morel* v. *DaimlerChrysler AG*, 565 F. 3d 20, 27 (CA1 2009) (where complaint conveyed plaintiffs' attempt to sue automobile manufacturer and erroneously named the manufacturer as Daimler-Chrysler Corporation instead of the actual manufacturer, a legally distinct but related entity named DaimlerChrysler AG, the latter should have realized it had not been named because of plaintiffs' mistake); *Goodman* v. *Praxair, Inc.*, 494 F. 3d 458, 473–475 (CA4 2007) (en banc) (where complaint named parent company Praxair, Inc., but described status of subsidiary company Praxair Services, Inc., subsidiary company knew or should have known it had not been named because of plaintiff's mistake). In addition, Costa Crociere's own actions contributed to passenger confusion over "the proper party" for a lawsuit. The front of the ticket advertises that "Costa Cruises" has achieved a certification of quality, App. to Pet. for Cert. 25a, without clarifying whether "Costa Cruises" is Costa Cruise Lines, Costa Crociere, or some other related "Costa" company. Indeed, Costa Crociere is evidently aware that the difference between Costa Cruise and Costa Crociere can be confusing for cruise ship passengers. See, *e. g.*, *Suppa* v. *Costa Crociere, S. p. A.*, No. 07–60526–CIV, 2007 WL 4287508, *1 (SD Fla., Dec. 4, 2007) (denying Costa

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rate disclosure form. In fact, Krupski moved to amend her complaint to add Costa Crociere within the time period prescribed by the District Court's scheduling order. See App. 3, 6–7; Record, Doc. 23, p. 1.

Crociere's motion to dismiss the amended complaint where the original complaint had named Costa Cruise as a defendant after "find[ing] it simply inconceivable that Defendant Costa Crociere was not on notice . . . that . . . but for the mistake in the original Complaint, Costa Crociere was the appropriate party to be named in the action").

In light of these facts, Costa Crociere should have known that Krupski's failure to name it as a defendant in her original complaint was due to a mistake concerning the proper party's identity. We therefore reverse the judgment of the Court of Appeals for the Eleventh Circuit and remand the case for further proceedings consistent with this opinion.

It is so ordered.

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

I join the Court's opinion except for its reliance, *ante,* at 550–551, 554, n. 5, on the Notes of the Advisory Committee as establishing the meaning of Federal Rule of Civil Procedure 15(c)(1)(C). The Advisory Committee's insights into the proper interpretation of a Rule's text are useful to the same extent as any scholarly commentary. But the Committee's *intentions* have no effect on the Rule's meaning. Even assuming that we and the Congress that allowed the Rule to take effect read and agreed with those intentions, it is the text of the Rule that controls. *Tome* v. *United States*, 513 U. S. 150, 167–168 (1995) (SCALIA, J., concurring in part and concurring in judgment).

Syllabus

UNITED STATES *v.* JUVENILE MALE

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

No. 09–940. Decided June 7, 2010

When respondent was 15, he admitted to engaging in sexual acts with a child under 12, was adjudged delinquent under the Federal Juvenile Delinquency Act (FJDA), and was sentenced to two years' detention followed by juvenile supervision until his 21st birthday. While he was in juvenile detention, Congress enacted the Sex Offender Registration and Notification Act (SORNA), which includes a registration requirement for persons adjudicated delinquent for sex offenses such as his. The Attorney General then issued an interim rule specifying that SORNA applies to sex offenders convicted even before SORNA's enactment. Subsequently, the District Court required respondent to register as a sex offender pursuant to SORNA as a condition of his supervised release. The Ninth Circuit vacated that part of the order, concluding that SORNA's retroactive application to individuals adjudicated delinquent under the FJDA before SORNA's enactment violates the *Ex Post Facto* Clause. Respondent's juvenile-supervision term ended in 2008.

Held: Because respondent's juvenile-supervision term has ended, and he thus is no longer subject to his supervision's sex-offender-registration conditions, his case will be moot unless he can show that a decision invalidating those conditions would be sufficiently likely to redress "collateral consequences adequate to meet Article III's injury-in-fact requirement," *Spencer* v. *Kemna*, 523 U. S. 1, 14. One potential collateral consequence that might be remedied by a judgment in respondent's favor is the requirement that he remain registered as a sex offender under Montana law. To determine whether a favorable decision in this case would likely enable respondent to remove his name from Montana's registry, the following question is certified to the Montana Supreme Court: Is respondent's duty to remain registered as a sex offender under Montana law contingent on the validity of the conditions of his now-expired federal juvenile-supervision order, or is it an independent requirement of Montana law that is unaffected by the validity or invalidity of those conditions?

Question certified. Reported below: 590 F. 3d 924.

PER CURIAM.

In 2005, respondent was charged in the United States District Court for the District of Montana with juvenile delinquency under the Federal Juvenile Delinquency Act (FJDA), 18 U. S. C. § 5031 *et seq.* Respondent eventually pleaded "true" to knowingly engaging in sexual acts with a person under 12 years of age, which would have been a crime under §§ 2241(c) and 1153(a) if committed by an adult. In June 2005, the District Court accepted respondent's plea and adjudged him delinquent. The court sentenced respondent to two years' official detention and juvenile delinquent supervision until his 21st birthday. The court also ordered respondent to spend the first six months of his juvenile supervision in a prerelease center and to abide by the center's conditions of residency.

In 2006, Congress enacted the Sex Offender Registration and Notification Act (SORNA), 120 Stat. 590, 42 U. S. C. § 16901 *et seq.* With respect to juvenile offenders, SORNA requires individuals who have been adjudicated delinquent for certain serious sex offenses to register and to keep their registrations current in each jurisdiction where they live, work, and go to school. §§ 16911(8); 16913. In February 2007, the Attorney General issued an interim rule specifying that SORNA's requirements "apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of [SORNA]." 72 Fed. Reg. 8897 (codified at 28 CFR § 72.3 (2009)).

In July 2007, the District Court revoked respondent's juvenile supervision, finding that respondent had failed to comply with the requirements of the prerelease program. The court sentenced respondent to an additional 6-month term of official detention, to be followed by a period of supervision until his 21st birthday. The Government, invoking SORNA's juvenile registration provisions, argued that respondent should be required to register as a sex offender, at

least for the duration of his juvenile supervision. As "special conditions" of his supervision, the court ordered respondent to register as a sex offender and to keep his registration current. App. to Pet. for Cert. 39a.

The Ninth Circuit vacated the sex-offender-registration requirements of the District Court's order. 590 F. 3d 924 (2010). The Court of Appeals determined that "retroactive application of SORNA's provision covering individuals who were adjudicated juvenile delinquents because of the commission of certain sex offenses before SORNA's passage violates the Ex Post Facto Clause of the United States Constitution." *Id.*, at 927. The court thus held that "SORNA's juvenile registration provision may not be applied retroactively to individuals adjudicated delinquent under the [FJDA]." *Id.*, at 928.

The United States asks us to grant certiorari to review the Ninth Circuit's determination that SORNA violates the *Ex Post Facto* Clause as applied to individuals who were adjudicated juvenile delinquents under the FJDA prior to SORNA's enactment. Before we can address that question, however, we must resolve a threshold issue of mootness. Before the Ninth Circuit, respondent challenged only the conditions of his juvenile supervision requiring him to register as a sex offender. But on May 2, 2008, respondent's term of supervision expired, and thus he no longer is subject to those sex-offender-registration conditions. As such, this case likely is moot unless respondent can show that a decision invalidating the sex-offender-registration conditions of his juvenile supervision would be sufficiently likely to redress "collateral consequences adequate to meet Article III's injury-in-fact requirement." *Spencer* v. *Kemna*, 523 U. S. 1, 14 (1998).

Perhaps the most likely potential "collateral consequenc[e]" that might be remedied by a judgment in respondent's favor is the requirement that respondent remain regis-

tered as a sex offender under Montana law. ("By the time of the court of appeals' decision, respondent had become registered as a sex offender in Montana, where he continues to be registered today." Pet. for Cert. 29.) We thus must know whether a favorable decision in this case would make it sufficiently likely that respondent "could remove his name and identifying information from the Montana sex offender registry." *Ibid.* Therefore, we certify the following question to the Supreme Court of Montana, pursuant to Montana Rule of Appellate Procedure 15 (2009):

> Is respondent's duty to remain registered as a sex offender under Montana law contingent upon the validity of the conditions of his now-expired federal juvenile-supervision order that required him to register as a sex offender, see Mont. Code Ann. §§ 46–23–502(6)(b), 41–5–1513(1)(c) (2005); *State* v. *Villanueva*, 328 Mont. 135, 138–140, 118 P. 3d 179, 181–182 (2005); see also § 46–23–502(9)(b) (2009), or is the duty an independent requirement of Montana law that is unaffected by the validity or invalidity of the federal juvenile-supervision conditions, see § 46–23–502(10) (2009); 2007 Mont. Laws ch. 483, § 31, p. 2185?

We respectfully request that the Montana Supreme Court accept our certified question. The court's answer to this question will help determine whether this case presents a live case or controversy, and there is no controlling appellate decision, constitutional provision, or statute on point. Mont. Rule App. Proc. 15(3). We understand that the Montana Supreme Court may wish to reformulate the certified question. Rule 15(6)(a)(iii).

The Clerk of this Court is directed to transmit to the Supreme Court of Montana a copy of this opinion, the briefs filed in this Court in this case, and a list of the counsel appearing in this matter along with their names and addresses.

Per Curiam

See Rules 15(5) and (6)(a)(iv). Further proceedings in this case are reserved pending our receipt of a response from the Supreme Court of Montana.

It is so ordered.

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CARACHURI-ROSENDO *v.* HOLDER, ATTORNEY GENERAL

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

No. 09–60. Argued March 31, 2010—Decided June 14, 2010

Petitioner, a lawful permanent resident of the United States, faced deportation after committing two misdemeanor drug offenses in Texas. For the first, possession of a small amount of marijuana, he received 20 days in jail. For the second, possession without a prescription of one anti-anxiety tablet, he received 10 days. Texas law, like federal law, authorized a sentencing enhancement if the State proved that petitioner had been previously convicted of a similar offense, but Texas did not seek such an enhancement here. After the second conviction, the Federal Government initiated removal proceedings. Petitioner conceded that he was removable, but claimed that he was eligible for discretionary cancellation of removal under the Immigration and Nationality Act (INA) because he had not been convicted of any "aggravated felony," 8 U. S. C. § 1229b(a)(3). Section 1101(a)(43)(B) defines that term to include, *inter alia*, "illicit trafficking in a controlled substance . . . including a drug trafficking crime" as defined in 18 U. S. C. § 924(c), which, in turn, defines a "drug trafficking crime" as a "felony punishable under," *inter alia*, "the Controlled Substances Act (21 U. S. C. 801 et seq.)." A felony is a crime for which the "maximum term of imprisonment authorized" is "more than one year." § 3559(a). Simple possession offenses are ordinarily misdemeanors punishable with shorter sentences, but a conviction "after a prior conviction under this subchapter [or] the law of any State . . . has become final," 21 U. S. C. § 844(a)—a "recidivist" simple possession offense—is "punishable" as a "felony" under § 924(c)(2) and subject to a 2-year sentence. Only this "recidivist" simple possession category might be an "aggravated felony" under 8 U. S. C. § 1101(a)(43). A prosecutor must charge the existence of the prior conviction. See 21 U. S. C. § 851(a)(1). Notice and an opportunity to challenge its validity, §§ 851(b)–(c), are mandatory prerequisites to obtaining a punishment based on the fact of the prior conviction and necessary prerequisites to "authorize" a felony punishment, 18 U. S. C. § 3559(a), for the simple possession offense at issue.

Here, the Immigration Judge held that petitioner's second simple possession conviction was an "aggravated felony" that made him ineligible for cancellation of removal. The Board of Immigration Appeals and

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Fifth Circuit affirmed. Relying on the holding in *Lopez* v. *Gonzales*, 549 U. S. 47, 56—that to be an "aggravated felony" for immigration law purposes, a state drug conviction must be punishable as a felony under federal law—the court used a "hypothetical approach," concluding that because petitioner's "conduct" could have been prosecuted as a recidivist simple possession under state law, it could have also been punished as a felony under federal law.

Held: Second or subsequent simple possession offenses are not aggravated felonies under § 1101(a)(43) when, as in this case, the state conviction is not based on the fact of a prior conviction. Pp. 573–582.

(a) Considering the disputed provisions' terms and their "commonsense conception," *Lopez*, 549 U. S., at 53, it would be counterintuitive and "unorthodox" to apply an "aggravated felony" or "illicit trafficking" label to petitioner's recidivist possession, see *id.*, at 54. The same is true for his penalty. One does not usually think of a 10-day sentence for unauthorized possession of one prescription pill as an "aggravated felony." This Court must be very wary in this case because the Government seeks a result that "the English language tells [the Court] not to expect." *Ibid.* Pp. 573–575.

(b) The Government's position—that "conduct punishable as a felony" should be treated as the equivalent of a felony conviction when the underlying conduct could have been a felony under federal law—is unpersuasive. First, it ignores the INA's text, which limits the Attorney General's cancellation power only when, *inter alia*, a noncitizen "has . . . been convicted of a[n] aggravated felony." 8 U. S. C. § 1229b(a)(3). Thus, the conviction itself is the starting place, not what might have or could have been charged. Under the Controlled Substances Act, simple possession offenses carry only a 1-year sentence unless a prosecutor elects to charge the defendant as a recidivist and the defendant receives notice and an opportunity to defend against that charge. Here, petitioner's record of conviction contains no finding of the fact of his prior drug offense. An immigration court cannot, *ex post*, enhance the state offense of record just because facts known to it would have authorized a greater penalty. The Government contends that had petitioner been prosecuted in federal court under identical circumstances, he would have committed an "aggravated felony" for immigration law purposes. But his circumstances were not identical to the Government's hypothesis. And the Government's approach cannot be reconciled with § 1229b(a)(3), which requires an "aggravated felony" conviction—not that the noncitizen merely could have been convicted of a felony but was not. Second, the Government's position fails to effectuate 21 U. S. C. § 851's mandatory notice and process requirements, which have great

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practical significance with respect to the conviction itself and are integral to the structure and design of federal drug laws. They authorize prosecutors to exercise discretion when electing whether to pursue a recidivist enhancement. So do many state criminal codes, including Texas'. Permitting an immigration judge to apply his own recidivist enhancement after the fact would denigrate state prosecutors' independent judgment to execute such laws. Third, the Fifth Circuit misread *Lopez.* This Court never used a "hypothetical approach" in its analysis. By focusing on facts known to the immigration court that could have *but did not* serve as the basis for the state conviction and punishment, the Circuit's approach introduces a level of conjecture that has no basis in *Lopez.* Fourth, the Government's argument is inconsistent with common practice in the federal courts, for it is quite unlikely that petitioner's conduct would have been punished as a felony in federal court. Finally, as the Court noted in *Leocal* v. *Ashcroft,* 543 U. S. 1, 11, n. 8, ambiguities in criminal statutes referenced in immigration laws should be construed in the noncitizen's favor. Notably, here, the question whether petitioner has committed an "aggravated felony" is relevant to the type of relief he may obtain from a removal order, but not to whether he is in fact removable. Thus, any relief he may obtain still depends on the Attorney General's discretion. Pp. 575–581.

570 F. 3d 263, reversed.

STEVENS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, GINSBURG, BREYER, ALITO, and SOTOMAYOR, JJ., joined. SCALIA, J., *post,* p. 582, and THOMAS, J., *post,* p. 584, filed opinions concurring in the judgment.

Sri Srinivasan argued the cause for petitioner. With him on the briefs were *Irving L. Gornstein*, *Kathryn E. Tarbert*, and *Geoffrey A. Hoffman.*

Nicole A. Saharsky argued the cause for respondent. With her on the brief were *Solicitor General Kagan*, *Assistant Attorney General West*, *Deputy Solicitors General Kneedler* and *Dreeben*, *Donald E. Keener*, *W. Manning Evans*, *Saul Greenstein*, *Andrew MacLachlan*, and *Holly M. Smith.**

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*Briefs of *amici curiae* urging reversal were filed for the Center on the Administration of Criminal Law by *Catherine M. Amirfar*, *Jill van Berg*, *Anthony S. Barkow,* and *David B. Edwards;* for the National Association

JUSTICE STEVENS delivered the opinion of the Court.

Petitioner Jose Angel Carachuri-Rosendo, a lawful permanent resident who has lived in the United States since he was five years old, faced deportation under federal law after he committed two misdemeanor drug possession offenses in Texas. For the first, possession of less than two ounces of marijuana, he received 20 days in jail. For the second, possession without a prescription of one tablet of a common anti-anxiety medication, he received 10 days in jail. After this second offense, the Federal Government initiated removal proceedings against him. He conceded that he was removable, but claimed he was eligible for discretionary relief from removal under 8 U. S. C. § 1229b(a).

To decide whether Carachuri-Rosendo is eligible to seek cancellation of removal or waiver of inadmissibility under § 1229b(a), we must decide whether he has been convicted of an "aggravated felony," § 1229b(a)(3), a category of crimes singled out for the harshest deportation consequences. The Court of Appeals held that a simple drug possession offense, committed after the conviction for a first possession offense became final, is always an aggravated felony. We now reverse and hold that second or subsequent simple possession offenses are not aggravated felonies under § 1101(a)(43) when, as in this case, the state conviction is not based on the fact of a prior conviction.

I

Under the Immigration and Nationality Act (INA), 66 Stat. 163, as amended, 8 U. S. C. § 1101 *et seq.*, a lawful per-

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of Criminal Defense Lawyers et al. by *Jim Walden* and *Richard A. Bierschbach;* for the National Association of Federal Defenders et al. by *Iris E. Bennett*, *Paul M. Rashkind*, *Frances H. Pratt*, *Brett G. Sweitzer*, *Mary Price*, and *Margaret Colgate Love;* and for Organizations Representing Asylum Seekers by *Linda T. Coberly.*

Nancy Morawetz filed a brief for the Asian American Justice Center et al. as *amici curiae.*

manent resident subject to removal from the United States may apply for discretionary cancellation of removal if, *inter alia*, he "has not been convicted of any aggravated felony," § 1229b(a)(3). The statutory definition of the term "aggravated felony" includes a list of numerous federal offenses,[1] one of which is "illicit trafficking in a controlled substance . . . including a drug trafficking crime (as defined in section 924(c) of title 18)." § 1101(a)(43)(B). Section 924(c)(2), in turn, defines a "drug trafficking crime" to mean "any felony punishable under," *inter alia*, "the Controlled Substances Act (21 U. S. C. 801 et seq.)." A felony is a crime for which the "maximum term of imprisonment authorized" is "more than one year." 18 U. S. C. § 3559(a).[2]

The maze of statutory cross-references continues. Section 404 of the Controlled Substances Act criminalizes simple possession offenses, the type of offense at issue in this case. But it prescribes punishment for both misdemeanor and felony offenses. Except for simple possession of crack cocaine or flunitrazepam, a first-time simple possession offense is a federal misdemeanor; the maximum term authorized for such a conviction is less than one year. 21 U. S. C. § 844(a). However, a conviction for a simple possession offense "after a prior conviction under this subchapter [or] under the law of any State . . . has become final"—what we will call recidivist simple possession[3]—may be punished as a felony, with

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[1] The term "aggravated felony" "applies to an offense . . . whether in violation of Federal or State law" (or, in certain circumstances, "the law of a foreign country"). 8 U. S. C. § 1101(a)(43).

[2] The Controlled Substances Act itself defines the term "felony" as "any Federal or State offense classified by applicable Federal or State law as a felony." 21 U. S. C. § 802(13). The Government concedes that the classification of felonies under 18 U. S. C. § 3559(a) controls in this case. Brief for Respondent 4.

[3] Although § 844(a) does not expressly define a separate offense of "recidivist simple possession," the fact of a prior conviction must nonetheless be found before a defendant is subject to a felony sentence. True, the statu-

a prison sentence of up to two years. *Ibid.*[4] Thus, except for simple possession offenses involving isolated categories of drugs not presently at issue, only *recidivist* simple possession offenses are "punishable" as a federal "felony" under the Controlled Substances Act, 18 U. S. C. § 924(c)(2). And thus only a conviction within this particular category of simple possession offenses might, conceivably, be an "aggravated felony" under 8 U. S. C. § 1101(a)(43).

For a subsequent simple possession offense to be eligible for an enhanced punishment, *i. e.*, to be punishable as a felony, the Controlled Substances Act requires that a prosecutor charge the existence of the prior simple possession conviction before trial, or before a guilty plea. See 21 U. S. C. § 851(a)(1).[5] Notice, plus an opportunity to challenge the validity of the prior conviction used to enhance the current

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tory scheme comports with *Almendarez-Torres* v. *United States*, 523 U. S. 224, 247 (1998), in which we explained that the Constitution does not require treating recidivism as an element of the offense. In other words, Congress has permissibly set out a criminal offense for simple possession whereby a recidivist finding by the judge, by a preponderance of the evidence, authorizes a punishment that exceeds the statutory maximum penalty for a simple possession offense. But the fact of a prior conviction must still be found—if only by a judge and if only by a preponderance of the evidence—before a defendant is subject to felony punishment. For present purposes, we therefore view § 844(a)'s felony simple possession provision as separate and distinct from the misdemeanor simple possession offense that section also prescribes.

[4] The statute provides in relevant part: "Any person who violates this subsection may be sentenced to a term of imprisonment of not more than 1 year . . . except that if he commits such offense after a prior conviction . . . he shall be sentenced to a term of imprisonment for not less than 15 days but not more than 2 years . . . ." 21 U. S. C. § 844(a).

[5] This subsection provides: "No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon." § 851(a)(1).

conviction, §§ 851(b)–(c), are mandatory prerequisites to obtaining a punishment based on the fact of a prior conviction.[6] And they are also necessary prerequisites under federal law to "authorize" a felony punishment, 18 U. S. C. § 3559(a), for the type of simple possession offense at issue in this case.

Neither the definition of an "illicit trafficking" offense under 8 U. S. C. § 1101(a)(43)(B) nor that of a "drug trafficking crime" under 18 U. S. C. § 924(c)(2) describes or references any state offenses. The "aggravated felony" definition does explain that the term applies "to an offense described in this paragraph whether in violation of Federal or State law." § 1101(a)(43). But in *Lopez* v. *Gonzales*, 549 U. S. 47, 56 (2006), we determined that, in order to be an "aggravated felony" for immigration law purposes, a state drug conviction must be punishable as a felony under *federal* law. We held that "a state offense constitutes a 'felony punishable under the Controlled Substances Act' only if it proscribes conduct punishable as a felony under that federal law." *Id.*, at 60. Despite the fact that the *Lopez* petitioner had been punished as a felon under state law—and, indeed, received a 5-year sentence—the conduct of his offense was not punishable as a felony under federal law, and this prevented the state conviction from qualifying as an aggravated

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[6] We have previously recognized the mandatory nature of these requirements, as have the Courts of Appeals. See *United States* v. *LaBonte*, 520 U. S. 751, 754, n. 1 (1997) ("We note that imposition of an enhanced penalty [for recidivism] is not automatic. . . . If the Government does not file such notice [under 21 U. S. C. § 851(a)(1)] . . . the lower sentencing range will be applied even though the defendant may otherwise be eligible for the increased penalty"); see also, *e. g.*, *United States* v. *Beasley*, 495 F. 3d 142, 148 (CA4 2007); *United States* v. *Ceballos*, 302 F. 3d 679, 690–692 (CA7 2002); *United States* v. *Dodson*, 288 F. 3d 153, 159 (CA5 2002); *United States* v. *Mooring*, 287 F. 3d 725, 727–728 (CA8 2002). Although § 851's procedural safeguards are not constitutionally compelled, see *Almendarez-Torres*, 523 U. S., at 247, they are nevertheless a mandatory feature of the Controlled Substances Act and a prerequisite to securing a felony conviction under § 844(a) for a successive simple possession offense.

felony for immigration law purposes. *Id.*, at 55 ("Unless a state offense is punishable as a federal felony it does not count").

In the case before us, the Government argues that Carachuri-Rosendo, despite having received only a 10-day sentence for his Texas misdemeanor simple possession offense, nevertheless has been "convicted" of an "aggravated felony" within the meaning of the INA. This is so, the Government contends, because had Carachuri-Rosendo been prosecuted in federal court instead of state court, he *could have been* prosecuted as a felon and received a 2-year sentence based on the fact of his prior simple possession offense. Our holding in *Lopez* teaches that, for a state conviction to qualify as an "aggravated felony" under the INA, it is necessary for the underlying conduct to be punishable as a federal felony. *Id.*, at 60. We now must determine whether the mere possibility, no matter how remote, that a 2-year sentence might have been imposed in a federal trial is a sufficient basis for concluding that a state misdemeanant who was not charged as a recidivist has been "convicted" of an "aggravated felony" within the meaning of § 1229b(a)(3).

II

Carachuri-Rosendo was born in Mexico in 1978. He came to the United States with his parents in 1983 and has been a lawful permanent resident of Texas ever since. His common-law wife and four children are American citizens, as are his mother and two sisters.

Like so many in this country, Carachuri-Rosendo has gotten into some trouble with our drug laws. In 2004, he pleaded guilty to possessing less than two ounces of marijuana, a class B misdemeanor, and was sentenced to confinement for 20 days by a Texas court. See App. 19a–22a; Tex. Health & Safety Code Ann. §§ 481.121(a) and (b)(1) (West Supp. 2009). In 2005, he pleaded *nolo contendere* to possessing less than 28 grams—one tablet—of alprazolam

(known commercially as Xanax) without a prescription, a class A misdemeanor. See App. 31a–34a; Tex. Health & Safety Code Ann. §§ 481.117(a) and (b). Although Texas law, like federal law, authorized a sentencing enhancement if the prosecutor proved that Carachuri-Rosendo had been previously convicted of an offense of a similar class, the State did not elect to seek an enhancement based on his criminal history. App. 32a.

In 2006, on the basis of Carachuri-Rosendo's second possession offense, the Federal Government initiated removal proceedings against him. Appearing *pro se* before the Immigration Judge, Carachuri-Rosendo did not dispute that his conviction for possessing one tablet of Xanax without a prescription made him removable,[7] but he applied for a discretionary cancellation of removal pursuant to 8 U. S. C. § 1229b(a). Under that statutory provision, the Attorney General may cancel an order of removal or an order of inadmissibility so long as, *inter alia*, the noncitizen "has not been convicted of a[n] aggravated felony." § 1229b(a)(3). The Immigration Judge held that petitioner's second simple possession conviction was an "aggravated felony" that made him ineligible for cancellation of removal.

The Board of Immigration Appeals (BIA) followed Circuit precedent and affirmed that decision, but it disagreed with the Immigration Judge's legal analysis. In its en banc opinion, the BIA ruled that in cases arising in Circuits in which the question had not yet been decided, the BIA would not treat a second or successive misdemeanor conviction as an aggravated felony unless the conviction contained a finding that the offender was a recidivist. *In re Carachuri-Rosendo*, 24 I. & N. Dec. 382, 387, 391 (2007).

The BIA explained that the statutory question is complicated by the fact that "'recidivist possession'" is not a

[7] But for trivial marijuana possession offenses (such as Carachuri-Rosendo's 2004 state offense), virtually all drug offenses are grounds for removal under 8 U. S. C. § 1227(a)(2)(B)(i).

"discrete offense under Federal law." *Id.*, at 388. While most federal offenses are defined by elements that must be proved to a jury beyond a reasonable doubt, recidivist possession is an "amalgam of elements, substantive sentencing factors, and procedural safeguards." *Id.*, at 389. Section 844(a) defines simple possession by reference to statutory elements, but "facts leading to recidivist felony *punishment*, such as the existence of a prior conviction, do not qualify as 'elements' in the traditional sense." *Ibid.*

The BIA observed, however, that "21 U. S. C. § 851 precludes a Federal judge from enhancing a drug offender's sentence on the basis of recidivism absent compliance with a number of safeguards that, among other things, serve to protect the right of the accused to notice and an opportunity to be heard as to the propriety of an increased punishment based on prior convictions." *Ibid.* Therefore, these requirements "are part and parcel of what it means for a crime to be a 'recidivist' offense." *Id.*, at 391. "[U]nless the State successfully sought to impose punishment for a recidivist drug conviction," the BIA concluded, a state simple possession "conviction cannot 'proscribe conduct punishable as' recidivist possession" under federal law. *Ibid.*

On review, the Court of Appeals affirmed the BIA's decision in Carachuri-Rosendo's case, reading our decision in *Lopez* as dictating its outcome. "[I]f the *conduct* proscribed by state offense could have been prosecuted as a felony" under the Controlled Substances Act, the court reasoned, then the defendant's conviction qualifies as an aggravated felony. 570 F. 3d 263, 267 (CA5 2009) (citing *Lopez*, 549 U. S., at 60). The court deemed its analysis "[t]he hypothetical approach," a term it derived from its understanding of our method of analysis in *Lopez*. 570 F. 3d, at 266, and n. 3; see also *United States* v. *Pacheco-Diaz*, 513 F. 3d 776, 779 (CA7 2008) *(per curiam)* (employing the "hypothetical-federal-felony approach"). Under this approach, as the Court of Appeals understood it, courts "g[o] beyond the state statute's

elements to look at the hypothetical conduct a state statute proscribes." 570 F. 3d, at 266, n. 3. Accordingly, any "conduct" that "hypothetically" "could have been punished as a felony" "had [it] been prosecuted in federal court" is an "aggravated felony" for federal immigration law purposes. *Id.*, at 265. In applying this hypothetical approach, the Court of Appeals did not discuss the § 851 procedural requirements. Instead, it concluded that because Carachuri-Rosendo's "conduct" could have been prosecuted as simple possession with a recidivist enhancement under state law—even though it was not—it could have also been punished as a felony under federal law. Thus, in the Court of Appeals' view, his conviction for simple possession under state law, without a recidivist enhancement, was an "aggravated felony" for immigration law purposes.[8]

We granted certiorari to resolve the conflict among the Courts of Appeals over whether subsequent simple possession offenses are aggravated felonies.[9] 558 U. S. 1091 (2009).

III

When interpreting the statutory provisions under dispute, we begin by looking at the terms of the provisions and the "commonsense conception" of those terms. *Lopez*, 549 U. S.,

[8] Since the Court of Appeals issued its decision in this case, Carachuri-Rosendo has been removed. Brief for Respondent 10–11. Neither party, however, has suggested that this case is now moot. If Carachuri-Rosendo was not convicted of an "aggravated felony," and if he continues to satisfy the requirements of 8 U. S. C. § 1229b(a), he may still seek cancellation of removal even after having been removed. See § 1229b(a) ("The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien" meets several criteria).

[9] Compare 570 F. 3d 263 (CA5 2009) (holding state conviction for simple possession after prior conviction for simple possession is a felony under the Controlled Substances Act and thus an aggravated felony) and *Fernandez* v. *Mukasey*, 544 F. 3d 862 (CA7 2008) (same), with *Berhe* v. *Gonzales*, 464 F. 3d 74 (CA1 2006) (taking contrary view), *Alsol* v. *Mukasey*, 548 F. 3d 207 (CA2 2008) (same), *Gerbier* v. *Holmes*, 280 F. 3d 297 (CA3 2002) (same), and *Rashid* v. *Mukasey*, 531 F. 3d 438 (CA6 2008) (same).

at 53. Carachuri-Rosendo is ineligible for cancellation of removal only if he was "convicted of a[n] aggravated felony," 8 U. S. C. § 1229b(a)(3), which, in this case, could only be a conviction for "illicit trafficking in a controlled substance . . . including a drug trafficking crime," § 1101(a)(43)(B).

A recidivist possession offense such as Carachuri-Rosendo's does not fit easily into the "everyday understanding" of those terms, *Lopez*, 549 U. S., at 53. This type of petty simple possession offense is not typically thought of as an "aggravated felony" or as "illicit trafficking." We explained in *Lopez* that "ordinarily 'trafficking' means some sort of commercial dealing." *Id.*, at 53–54 (citing Black's Law Dictionary 1534 (8th ed. 2004)). And just as in *Lopez*, "[c]ommerce . . . was no part of" Carachuri-Rosendo's possessing a single tablet of Xanax, "and certainly it is no element of simple possession." 549 U. S., at 54. As an initial matter, then, we observe that a reading of this statutory scheme that would apply an "aggravated" or "trafficking" label to *any* simple possession offense is, to say the least, counterintuitive and "unorthodox," *ibid.*

The same is true for the type of penalty at issue. We do not usually think of a 10-day sentence for the unauthorized possession of a trivial amount of a prescription drug as an "aggravated felony." A "felony," we have come to understand, is a "serious crime usu[ally] punishable by imprisonment for more than one year or by death." Black's Law Dictionary 694 (9th ed. 2009) (hereinafter Black's). An "aggravated" offense is one "made worse or more serious by circumstances such as violence, the presence of a deadly weapon, or the intent to commit another crime." *Id.*, at 75. The term "aggravated felony" is unique to Title 8, which covers immigration matters; it is not a term used elsewhere within the United States Code. Our statutory criminal law classifies the most insignificant of federal felonies—"Class E" felonies—as carrying a sentence of "less than five years but

more than one year." 18 U. S. C. § 3559(a)(5). While it is true that a defendant's criminal history might be seen to make an offense "worse" by virtue thereof, Black's 75, it is nevertheless unorthodox to classify this type of petty simple possession recidivism as an "aggravated felony."

Of course, as Justice Souter observed in his opinion for the Court in *Lopez*, Congress, like "Humpty Dumpty," has the power to give words unorthodox meanings. 549 U. S., at 54. But in this case the Government argues for a result that "the English language tells us not to expect," so we must be "very wary of the Government's position." *Ibid.* Because the English language tells us that most aggravated felonies are punishable by sentences far longer than 10 days, and that mere possession of one tablet of Xanax does not constitute "trafficking," *Lopez* instructs us to be doubly wary of the Government's position in this case.[10]

IV

The Government's position, like the Court of Appeals' "hypothetical approach," would treat all "conduct punishable as a felony" as the equivalent of a "conviction" of a felony when-

[10] The Court stated in *Lopez* that "recidivist possession, see 21 U. S. C. § 844(a), clearly fall[s] within the definitions used by Congress in 8 U. S. C. § 1101(a)(43)(B) and 18 U. S. C. § 924(c)(2), regardless of whether these federal possession felonies or their state counterparts constitute 'illicit trafficking in a controlled substance' or 'drug trafficking' as those terms are used in ordinary speech." 549 U. S., at 55, n. 6. Our decision today is not in conflict with this footnote; it is still true that recidivist simple possession offenses charged and prosecuted as such "clearly fall" within the definition of an aggravated felony. What we had no occasion to decide in *Lopez*, and what we now address, is what it means to be *convicted* of an aggravated felony. *Lopez* teaches us that it is necessary that the conduct punished under state law correspond to a felony punishable under the Controlled Substances Act to be an aggravated felony under § 1101(a)(43)(B). But it does not instruct as to whether the mere possibility that conduct could be—but is not—charged as an offense punishable as a felony under federal law is sufficient.

ever, hypothetically speaking, the underlying conduct could have received felony treatment under federal law. We find this reasoning—and the "hypothetical approach" itself—unpersuasive for the following reasons.

First, and most fundamentally, the Government's position ignores the text of the INA, which limits the Attorney General's cancellation power only when, *inter alia*, a noncitizen "has . . . been *convicted* of a[n] aggravated felony." 8 U. S. C. § 1229b(a)(3) (emphasis added). The text thus indicates that we are to look to the conviction itself as our starting place, not to what might have or could have been charged. And to be convicted of an aggravated felony punishable as such under the Controlled Substances Act, the "maximum term of imprisonment authorized" must be "more than one year," 18 U. S. C. § 3559(a)(5). Congress, recall, chose to authorize only a 1-year sentence for nearly all simple possession offenses, but it created a narrow exception for those cases in which a prosecutor elects to charge the defendant as a recidivist and the defendant receives notice and an opportunity to defend against that charge. See 21 U. S. C. § 851; Part I, *supra.*

Indisputably, Carachuri-Rosendo's record of conviction contains no finding of the fact of his prior drug offense. Carachuri-Rosendo argues that even such a finding would be insufficient, and that a prosecutorial charge of recidivism and an opportunity to defend against that charge also would be required before he could be deemed "convicted" of a felony punishable under the Controlled Substances Act. In the absence of any finding of recidivism, we need not, and do not, decide whether these additional procedures would be necessary. Although a federal immigration court may have the power to make a recidivist finding in the first instance, see, *e. g., Almendarez-Torres* v. *United States*, 523 U. S. 224, 247 (1998), it cannot, *ex post*, enhance the state offense of record just because facts known to it would have authorized a greater penalty under either state or federal

law.[11] Carachuri-Rosendo was not actually "convicted," § 1229b(a)(3), of a drug possession offense committed "after a prior conviction . . . has become final," § 844(a), and no subsequent development can undo that history.[12]

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[11] Our decision last Term in *Nijhawan* v. *Holder*, 557 U. S. 29 (2009), also relied upon by the Government, is not to the contrary. In that case, we rejected the so-called categorical approach employed in cases like *United States* v. *Rodriquez*, 553 U. S. 377 (2008), when assessing whether, under 8 U. S. C. § 1101(a)(43)(M)(i), a noncitizen has committed "an offense that . . . involves fraud or deceit in which the loss to the . . . victims exceeds $10,000." Our analysis was tailored to the "circumstance-specific" language contained in that particular subsection of the aggravated felony definition. *Nijhawan*, 557 U. S., at 38. And we specifically distinguished the "generic" categories of aggravated felonies for which a categorical approach might be appropriate—including the "illicit trafficking" provision—from the "circumstance-specific" offense at hand. *Id.*, at 36–39. Moreover, unlike the instant case, there was no debate in *Nijhawan* over whether the petitioner actually had been "convicted" of fraud; we only considered how to calculate the amount of loss once a conviction for a particular category of aggravated felony has occurred.

[12] Linking our inquiry to the record of conviction comports with how we have categorized convictions for state offenses within the definition of generic federal criminal sanctions under the Armed Career Criminal Act (ACCA), 18 U. S. C. § 924(e). The United States urges that our decision in *Rodriquez*, 553 U. S. 377, an ACCA case, supports its position in this case. Brief for Respondent 29–30. To the extent that *Rodriquez* is relevant to the issue at hand, we think the contrary is true. In that decision we considered whether a recidivist finding under state law that had the effect of increasing the "maximum term of imprisonment" to 10 years, irrespective of the actual sentence imposed, made the offense a "serious drug offense" within the meaning of 18 U. S. C. § 924(e)(1) and therefore an ACCA predicate offense. 553 U. S., at 382. We held that a recidivist finding could set the "maximum term of imprisonment," but only when the finding is a part of the record of conviction. *Id.*, at 389. Indeed, we specifically observed that "in those cases in which the records that may properly be consulted do not show that the defendant faced the possibility of a recidivist enhancement, it may well be that the Government will be precluded from establishing that a conviction was for a qualifying offense." *Ibid.* In other words, when the recidivist finding giving rise to a 10-year sentence is not apparent from the sentence itself, or appears neither as part of the "judgment of conviction" nor the "formal charging document,"

The Government contends that if Carachuri-Rosendo had been prosecuted in federal court for simple possession under 21 U. S. C. § 844(a) under identical circumstances, he would have committed an "aggravated felony" for immigration law purposes. Tr. of Oral Arg. 36–37. This is so, the Government suggests, because the only statutory text that matters is the word "punishable" in 18 U. S. C. § 924(c)(2): Whatever conduct might be "punishable" as a felony, regardless of whether it actually is so punished or not, is a felony for immigration law purposes. But for the reasons just stated, the circumstances of Carachuri-Rosendo's prosecution were not identical to those hypothesized by the Government. And the Government's abstracted approach to § 924(c)(2) cannot be reconciled with the more concrete guidance of 8 U. S. C. § 1229b(a)(3), which limits the Attorney General's cancellation authority only when the noncitizen has actually been "convicted of a[n] aggravated felony"—not when he merely could have been convicted of a felony but was not.

Second, and relatedly, the Government's position fails to give effect to the mandatory notice and process requirements contained in 21 U. S. C. § 851. For federal-law purposes, a simple possession offense is not "punishable" as a felony unless a federal prosecutor first elects to charge a defendant as a recidivist in the criminal information. The statute, as described in Part I, *supra,* at 568–569, speaks in mandatory terms, permitting "[n]o person" to be subject to a recidivist enhancement—and therefore, in this case, a felony sentence—"unless" he has been given notice of the Government's intent to prove the fact of a prior conviction. Federal law also gives the defendant an opportunity to challenge the fact of the prior conviction itself. §§ 851(b)–(c). The Government would dismiss these procedures as meaningless,

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ibid., the Government will not have established that the defendant had a prior conviction for which the maximum term of imprisonment was 10 years or more (assuming the recidivist finding is a necessary precursor to such a sentence).

so long as they may be satisfied during the immigration proceeding.

But these procedural requirements have great practical significance with respect to the conviction itself and are integral to the structure and design of our drug laws. They authorize prosecutors to exercise discretion when electing whether to pursue a recidivist enhancement. See *United States* v. *Dodson*, 288 F. 3d 153, 159 (CA5 2002) ("Whereas the prior version of [§ 851(a)] made enhancements for prior offenses mandatory, the new statutory scheme gave prosecutors discretion whether to seek enhancements based on prior convictions"). Because the procedures are prerequisites to an enhanced sentence, § 851 allows federal prosecutors to choose whether to seek a conviction that is "punishable" as a felony under § 844(a). Underscoring the significance of the § 851 procedures, the United States Attorney's Manual places decisions with respect to seeking recidivist enhancements on par with the filing of a criminal charge against a defendant. See Dept. of Justice, United States Attorneys' Manual § 9–27.300(B) (1997), online at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm#9-27.300 (as visited June 3, 2010, and available in Clerk of Court's case file) ("Every prosecutor should regard the filing of an information under 21 U. S. C. § 851 . . . as equivalent to the filing of charges").

Many state criminal codes, like the federal scheme, afford similar deference to prosecutorial discretion when prescribing recidivist enhancements. Texas is one such State. See, *e. g.*, Tex. Penal Code Ann. §§ 12.42, 12.43 (West 2003 and Supp. 2009) (recidivist enhancement is available "[i]f it is shown on the trial" that defendant was previously convicted of identified categories of felonies and misdemeanors). And, in this case, the prosecutor specifically elected to "[a]bandon" a recidivist enhancement under state law. App. 32a (reproducing state judgment). Were we to permit a federal immigration judge to apply his own recidivist enhancement after

the fact so as to make the noncitizen's offense "punishable" as a felony for immigration law purposes, we would denigrate the independent judgment of state prosecutors to execute the laws of those sovereigns.

Third, the Court of Appeals' hypothetical felony approach is based on a misreading of our decision in *Lopez*. We never used the term "hypothetical" to describe our analysis in that case. We did look to the "proscribe[d] conduct" of a state offense to determine whether it is "punishable as a felony under that federal law." 549 U. S., at 60. But the "hypothetical approach" employed by the Court of Appeals introduces a level of conjecture at the outset of this inquiry that has no basis in *Lopez*. It ignores both the conviction (the relevant statutory hook) and the conduct actually punished by the state offense. Instead, it focuses on facts known to the immigration court that could have *but did not* serve as the basis for the state conviction and punishment. As the Sixth Circuit has explained, this approach is really a "'hypothetical to a hypothetical.'" *Rashid* v. *Mukasey*, 531 F. 3d 438, 445 (2008). Not only does the Government wish us to consider a fictional federal felony—whether the crime for which Carachuri-Rosendo was actually convicted would be a felony under the Controlled Substances Act—but the Government also wants us to consider facts not at issue in the crime of conviction (*i. e.*, the existence of a prior conviction) to determine whether Carachuri-Rosendo *could have* been charged with a federal felony. This methodology is far removed from the more focused, categorical inquiry employed in *Lopez*.

Fourth, it seems clear that the Government's argument is inconsistent with common practice in the federal courts. It is quite unlikely that the "conduct" that gave rise to Carachuri-Rosendo's conviction would have been punished as a felony in federal court. Under the United States Sentencing Guidelines, Carachuri-Rosendo's recommended sentence, based on the type of controlled substance at issue, would not

have exceeded one year and very likely would have been less than six months. See United States Sentencing Commission, Guidelines Manual §2D2.1(a)(3) (Nov. 2009) (base offense level of 4). And as was true in *Lopez*, the Government has provided us with no empirical data suggesting that "even a single eager Assistant United States Attorney" has ever sought to prosecute a comparable federal defendant as a felon. 549 U. S., at 57–58. The Government's "hypothetical" approach to this case is therefore misleading as well as speculative, in that Carachuri-Rosendo's federal-court counterpart would *not*, in actuality, have faced any felony charge.

Finally, as we noted in *Leocal* v. *Ashcroft*, 543 U. S. 1, 11, n. 8 (2004), ambiguities in criminal statutes referenced in immigration laws should be construed in the noncitizen's favor. And here the critical language appears in a criminal statute, 18 U. S. C. §924(c)(2).

We note that whether a noncitizen has committed an "aggravated felony" is relevant, *inter alia*, to the type of relief he may obtain from a removal order, but not to whether he is in fact removable. In other words, to the extent that our rejection of the Government's broad understanding of the scope of "aggravated felony" may have any practical effect on policing our Nation's borders, it is a limited one. Carachuri-Rosendo, and others in his position, may now seek cancellation of removal and thereby avoid the harsh consequence of mandatory removal. But he will not avoid the fact that his conviction makes him, in the first instance, removable. Any relief he may obtain depends upon the discretion of the Attorney General.

* * *

In sum, the Government is correct that to qualify as an "aggravated felony" under the INA, the conduct prohibited by state law must be punishable as a felony under federal law. See *Lopez*, 549 U. S., at 60. But as the text and structure of the relevant statutory provisions demonstrate, the

defendant must *also* have been *actually convicted* of a crime that is itself punishable as a felony under federal law. The mere possibility that the defendant's conduct, coupled with facts outside of the record of conviction, could have authorized a felony conviction under federal law is insufficient to satisfy the statutory command that a noncitizen be "convicted of a[n] aggravated felony" before he loses the opportunity to seek cancellation of removal. 8 U. S. C. § 1229b(a)(3). The Court of Appeals, as well as the Government, made the logical error of assuming that a necessary component of an aggravated felony is also sufficient to satisfy its statutory definition.

V

We hold that when a defendant has been convicted of a simple possession offense that has not been enhanced based on the fact of a prior conviction, he has not been "convicted" under § 1229b(a)(3) of a "felony punishable" as such "under the Controlled Substances Act," 18 U. S. C. § 924(c)(2). The prosecutor in Carachuri-Rosendo's case declined to charge him as a recidivist. He has, therefore, not been convicted of a felony punishable under the Controlled Substances Act.

The judgment of the Court of Appeals is reversed.

It is so ordered.

JUSTICE SCALIA, concurring in the judgment.

I agree with the Court that Carachuri-Rosendo's 2005 conviction for simple possession of a tablet of Xanax in violation of Texas law is not a conviction for an "aggravated felony" under 8 U. S. C. § 1101(a)(43)(B). But my reasoning is more straightforward than the Court's, and so I concur only in the judgment.

Under the Immigration and Nationality Act, the Attorney General may cancel the removal of an alien from the United States provided the alien "has not been convicted of any aggravated felony." § 1229b(a)(3). There is no statutory definition of "convicted," but a "conviction" is defined to

mean a "formal judgment of guilt of the alien entered by a court." § 1101(a)(48)(A). The term "aggravated felony" includes, among many other offenses, "a drug trafficking crime (as defined in [18 U. S. C. § 924(c)])." § 1101(a)(43)(B). A "drug trafficking crime" is in turn defined as "any felony punishable under the Controlled Substances Act." 18 U. S. C. § 924(c)(2).

It could be concluded from the provisions discussed above that only a *federal* conviction for a felony offense under the Controlled Substances Act would qualify under 8 U. S. C. § 1101(a)(43)(B). But the penultimate sentence in § 1101(a)(43) provides that the statutory definition of "aggravated felony" "applies to an offense described in this paragraph whether in violation of Federal or State law." This language, we have said, confirms that "a state offense whose elements include the elements of a felony punishable under the [Controlled Substances Act] is an aggravated felony." *Lopez* v. *Gonzales*, 549 U. S. 47, 57 (2006).

The conceptual problem in the present case is that the only crime defined by 21 U. S. C. § 844(a) of the Controlled Substances Act, simple possession of prohibited drugs, is a misdemeanor. That misdemeanor becomes a "felony punishable under the Controlled Substances Act" only because the sentencing factor of recidivism authorizes additional punishment beyond one year, the criterion for a felony. We held in *Almendarez-Torres* v. *United States*, 523 U. S. 224 (1998), that recidivism can constitutionally be made a sentencing factor rather than an element of the crime, despite the fact that it is used to increase the allowable sentence. And we said in *Lopez* that a "state possession crim[e] that correspond[s] to" the "felony violatio[n]" of "recidivist possession" in § 844(a) "clearly fall[s] within the definitions used by Congress in . . . § 1101(a)(43)(B) and . . . § 924(c)(2)." 549 U. S., at 55, n. 6.

But to say all that is not to say that an alien has been "convicted of" an aggravated felony (which is what § 1229b(a)(3) requires) when he has been convicted of nothing

more than a second state misdemeanor violation, the punishment for which could, because of recidivism, be extended beyond one year. Just because, by reason of *Almendarez-Torres*, the federal misdemeanor offense has been raised to a felony offense without changing its elements, solely by increasing its penalty pursuant to a recidivist "sentencing factor"; it does not follow that when the question is asked whether someone has been "convicted of" a state offense that "corresponds" to the federal misdemeanor-become-felony, the answer can be sought in sentencing factors. A defendant is not "convicted" of sentencing factors, but only of the elements of the crime charged in the indictment. In other words, a misdemeanor offense with a sentencing factor that raises its punishment to the felony level qualifies for purposes of establishing the elements of a "felony punishable under the Controlled Substances Act"; but does *not* qualify for purposes of determining what elements the alien has been "convicted of."

Here, Carachuri-Rosendo was only "convicted of" the crime of knowing possession of a controlled substance without a valid prescription, a class A misdemeanor under Texas law. Tex. Health & Safety Code Ann. §§ 481.117(a) and (b) (West Supp. 2009). Since the elements of that crime did not include recidivism, the crime of his conviction did not "correspond" to the Controlled Substances Act felony of possession-plus-recidivism under 21 U. S. C. § 844(a).

For these reasons, I concur in the judgment.

JUSTICE THOMAS, concurring in the judgment.

A plain reading of 18 U. S. C. § 924(c)(2) identifies two requirements that must be satisfied for Carachuri-Rosendo's state conviction to qualify as a "'drug trafficking crime'" that renders him ineligible for cancellation of removal:*

*See 8 U. S. C. § 1229b(a) (permitting cancellation of removal); § 1229b(a)(3) (barring aliens convicted of an "aggravated felony" from cancellation of removal); § 1101(a)(43)(B) (defining "aggravated felony" as "il-

"First, the offense must be a felony; second, the offense must be capable of punishment under the Controlled Substances Act (CSA)." *Lopez* v. *Gonzales*, 549 U. S. 47, 61 (2006) (THOMAS, J., dissenting). Carachuri-Rosendo's offense of simple possession was "punishable under the [CSA]," § 924(c)(2), and thus satisfied the second requirement, but his crime of conviction in state court was only a misdemeanor. Accordingly, that offense does not bar him from obtaining cancellation of removal.

The Fifth Circuit understandably felt constrained by this Court's decision in *Lopez* to rule otherwise. In *Lopez*, this Court held that "a state offense constitutes a 'felony punishable under the [CSA]' only if it proscribes conduct punishable *as a felony* under that federal law." *Id.*, at 60 (emphasis added). Though *Lopez* addressed a felony conviction under state law that did not correlate to a felony under the CSA, the Court's rule preordained the result in this case:

> "[T]he Court admits that its reading will subject an alien defendant convicted of a state misdemeanor to deportation if his conduct was punishable as a felony under the CSA. Accordingly, even if never convicted of an actual felony, an alien defendant becomes eligible for deportation based on a hypothetical federal prosecution." *Id.*, at 67 (THOMAS, J., dissenting).

Today, the Court engages in jurisprudential gymnastics to avoid *Lopez*. I will not contort the law to fit the case. *Lopez* was wrongly decided. But because a proper reading of the statutory text, see *id.*, at 60–63, supports the result the Court reaches today, I concur in the judgment.

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licit trafficking in a controlled substance . . . including a drug trafficking crime (as defined in [18 U. S. C. § 924(c)])"); 18 U. S. C. § 924(c)(2) (defining "drug trafficking crime" to mean "any felony punishable under the Controlled Substances Act").

Syllabus

ASTRUE, COMMISSIONER OF SOCIAL SECURITY *v.* RATLIFF

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

No. 08–1322. Argued February 22, 2010—Decided June 14, 2010

Respondent Ratliff was Ruby Kills Ree's attorney in Kills Ree's successful suit against the United States Social Security Administration for Social Security benefits. The District Court granted Kills Ree's unopposed motion for attorney's fees under the Equal Access to Justice Act (EAJA), which provides, *inter alia*, that "a court shall award to a prevailing party . . . fees and other expenses . . . in any civil action . . . brought by or against the United States." 28 U. S. C. § 2412(d)(1)(A). Before paying the fees award, the Government discovered that Kills Ree owed the United States a debt that predated the award. Accordingly, it sought an administrative offset against the award under 31 U. S. C. § 3716, which subjects to offset all "funds payable by the United States," § 3701(a)(1), to an individual who owes certain delinquent federal debts, see § 3701(b), unless, *e. g.*, payment is exempted by statute or regulation. See, *e. g.*, § 3716(e)(2). The parties to this case have not established that any such exemption applies to § 2412(d) fees awards, which, as of 2005, are covered by the Treasury Department's Offset Program (TOP). After the Government notified Kills Ree that it would apply TOP to offset her fees award against a portion of her debt, Ratliff intervened, challenging the offset on the grounds that § 2412(d) fees belong to a litigant's attorney and thus may not be used to satisfy the litigant's federal debts. The District Court held that because § 2412(d) directs that fees be awarded to the "prevailing party," not to her attorney, Ratliff lacked standing to challenge the offset. The Eighth Circuit reversed, holding that under its precedent, EAJA attorney's fees are awarded to prevailing parties' attorneys.

Held: A § 2412(d)(1)(A) attorney's fees award is payable to the litigant and is therefore subject to an offset to satisfy the litigant's pre-existing debt to the Government. Pp. 591–598.

(a) Nothing in EAJA contradicts this Court's longstanding view that the term "prevailing party" in attorney's fees statutes is a "term of art" that refers to the prevailing litigant. See, *e. g.*, *Buckhannon Board & Care Home, Inc.* v. *West Virginia Dept. of Health and Human Resources*, 532 U. S. 598, 603. That the term has its usual meaning in subsection (d)(1)(A) is underscored by the fact that subsection (d)(1)(B)

and other provisions clearly distinguish the party who receives the fees award (the litigant) from the attorney who performed the work that generated the fees. The Court disagrees with Ratliff's assertion that subsection (d)(1)(A)'s use of the verb "award" nonetheless renders § 2412(d) fees payable directly to a prevailing party's attorney. The dictionaries show that, in the litigation context, the transitive verb "award" has the settled meaning of giving or assigning *by* judicial decree. Its plain meaning in subsection (d)(1)(A) is thus that the court shall "give or assign by . . . judicial determination" to the "prevailing party" (here, Kills Ree) attorney's fees in the amount sought and substantiated under, *inter alia,* subsection (d)(1)(B). That the prevailing party's attorney may have a beneficial interest or a contractual right in the fees does not alter this conclusion. Pp. 591–593.

(b) The Court rejects Ratliff's argument that other EAJA provisions, combined with the Social Security Act (SSA) and the Government's practice of paying some EAJA fees awards directly to attorneys in Social Security cases, render § 2412(d) at least ambiguous on the question presented here, and that these other provisions resolve the ambiguity in her favor. Even accepting that § 2412(d) is ambiguous, the provisions and practices Ratliff identifies do not alter the Court's conclusion. Subsection (d)(1)(B) and other provisions differentiate between attorneys and prevailing parties, and treat attorneys on par with other service providers, in a manner that forecloses the conclusion that attorneys have a right to direct payment of subsection (d)(1)(A) awards. Nor is the necessity of such payments established by the SSA provisions on which Ratliff relies. That SSA fees awards are payable directly to a prevailing claimant's attorney, see 42 U. S. C. § 406(b)(1)(A), undermines Ratliff's case by showing that Congress knows how to create a direct fee requirement where it desires to do so. Given the stark contrast between the language of the SSA and EAJA provisions, the Court is reluctant to interpret subsection (d)(1)(A) to contain a direct fee requirement absent clear textual evidence that such a requirement applies. Such evidence is not supplied by a 1985 EAJA amendment requiring that, "where the claimant's attorney receives fees for the same work under both [42 U. S. C. § 406(b) and 28 U. S. C. § 2412(d)], the . . . attorney [must] refun[d] to the claimant the amount of the smaller fee." See note following § 2412. Ratliff's argument that this recognition that an attorney will sometimes "receiv[e]" § 2412(d) fees suggests that subsection (d)(1)(A) should be construed to incorporate the same direct payments to attorneys that the SSA expressly authorizes gives more weight to "recei[pt]" than the term can bear: The ensuing reference to the attorney's obligation to "refund" the smaller fee to the claimant demonstrates that the award belongs to the claimant in the first place.

Moreover, Ratliff's reading is irreconcilable with the textual differences between the two Acts. The fact that the Government, until 2006, frequently paid EAJA fees awards directly to attorneys in SSA cases in which the prevailing party had assigned the attorney her rights in the award does not alter the Court's interpretation of the EAJA's fees provision. That some such cases involved a prevailing party with outstanding federal debts is unsurprising, given that it was not until 2005 that the TOP was modified to require offsets against attorney's fees awards. And as Ratliff admits, the Government has since discontinued the direct payment practice except in cases where the plaintiff does not owe a federal debt and has assigned her right to fees to the attorney. Finally, the Court's conclusion is buttressed by cases interpreting and applying 42 U. S. C. § 1988, which contains language virtually identical to § 2412(d)(1)(A)'s. See, *e. g.*, *Evans* v. *Jeff D.*, 475 U. S. 717, 730–732, and n. 19. Pp. 593–598.

540 F. 3d 800, reversed and remanded.

THOMAS, J., delivered the opinion for a unanimous Court. SOTOMAYOR, J., filed a concurring opinion, in which STEVENS and GINSBURG, JJ., joined, *post*, p. 598.

Anthony A. Yang argued the cause for petitioner. With him on the briefs were *Solicitor General Kagan*, *Assistant Attorney General West*, *Deputy Solicitor General Stewart*, *William Kanter*, and *Michael E. Robinson.*

James D. Leach argued the cause for respondent. With him on the brief were *Scott L. Nelson* and *Stephen B. Kinnaird.**

JUSTICE THOMAS delivered the opinion of the Court.

Section 204(d) of the Equal Access to Justice Act (EAJA), codified in 28 U. S. C. § 2412(d), provides in pertinent part that "a court shall award to a prevailing party . . . fees and other expenses . . . in any civil action . . . brought by or against the United States . . . unless the court finds that the position of the United States was substantially justified."

**Charles L. Martin*, *Barbara Jones*, and *Jon C. Dubin* filed a brief for the National Organization of Social Security Claimants' Representatives et al. as *amici curiae* urging affirmance.

We consider whether an award of "fees and other expenses" to a "prevailing party" under § 2412(d) is payable to the litigant or to his attorney. We hold that a § 2412(d) fees award is payable to the litigant and is therefore subject to a Government offset to satisfy a pre-existing debt that the litigant owes the United States.

I

This case arises out of proceedings in which a Social Security claimant, Ruby Willow Kills Ree, prevailed on a claim for benefits against the United States. Respondent Catherine Ratliff was Kills Ree's attorney in those proceedings. The District Court granted Kills Ree's unopposed motion for a § 2412(d) fees award in the amount of $2,112.60. Before the United States paid the fees award, however, it discovered that Kills Ree owed the Government a debt that predated the District Court's approval of the award. Accordingly, the United States sought an administrative offset against the fees award to satisfy part of that debt.

The Government's authority to use administrative offsets is statutory. See 31 U. S. C. §§ 3711(a), 3716(a) (authorizing an agency whose debt collection attempts are unsuccessful to "collect the claim by administrative offset").[1] Congress has subjected to offset all "funds payable by the United States," § 3701(a)(1), to an individual who owes certain delinquent federal debts, see § 3701(b), unless, as relevant here, payment is exempted by statute, see § 3716(e)(2). No such

[1] Section 3701 defines an administrative offset as "withholding funds payable by the United States" to the debtor. § 3701(a)(1). An agency may effect such an offset by cooperating with another agency to withhold such funds, or by notifying the Treasury Department of the debt so Treasury may include it in Treasury's centralized offset program. See 31 CFR §§ 285.5(d)(2), 901.3(b)(1), (c) (2009). Alternatively, the Treasury Department may attempt an administrative offset after receiving notice from a creditor agency that a legally enforceable nontax debt has become more than 180 days delinquent. See 31 U. S. C. § 3716(c)(6); 31 CFR §§ 285.5(d)(1), 901.3(b)(1).

exemption applies to attorney's fees awards under 28 U. S. C. § 2412(d)(1)(A) (hereinafter subsection (d)(1)(A)), which are otherwise subject to offset, see 31 CFR § 285.5(e)(1) (2009), and which, as of January 2005, are covered by the Treasury Offset Program (TOP) operated by the Treasury Department's Financial Management Service (FMS). See Brief for Petitioner 4 (explaining TOP's extension to cover so-called " 'miscellaneous' " payments that include attorney's fees payments the Treasury Department makes on behalf of federal agencies).[2]

In this case, the Government, relying on the TOP, notified Kills Ree that the Government would apply her § 2412(d) fees award to offset a portion of her outstanding federal debt. Ratliff intervened to challenge the offset on the grounds that § 2412(d) fees belong to a litigant's attorney and thus may not be used to offset or otherwise satisfy a litigant's federal debts. The District Court held that because § 2412(d) directs that fees be awarded to the prevailing party, not to her attorney, Ratliff lacked standing to challenge the Government's proposed offset. See No. CIV. 06–5070–RHB, 2007 WL 6894710, *1 (D SD, May 10, 2007).

The Court of Appeals for the Eighth Circuit reversed. 540 F. 3d 800 (2008). It held that under Circuit precedent, "EAJA attorneys' fees are awarded to prevailing parties' attorneys." *Id.*, at 802. The Court of Appeals recognized that its decision did not accord with a "literal interpretation of the EAJA," *ibid.*, and exacerbated a split among the Courts of Appeals, compare *id.*, at 801–802, with, *e. g.*, *Reeves*

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[2] Respondent Ratliff argues for the first time in her merits brief before this Court that the 2005 amendments to the FMS regulations exempt the EAJA fees award in this case from administrative offset against Kills Ree's outstanding federal debt. See Brief for Respondent 8, 46 (citing 31 CFR § 285.5(e)(5)). We need not decide this question because Ratliff did not raise the regulations as a bar to offset in her brief in opposition to the Government's petition for a writ of certiorari, see this Court's Rule 15.2, or in the proceedings below.

v. *Astrue*, 526 F. 3d 732, 733 (CA11 2008); *Manning* v. *Astrue*, 510 F. 3d 1246, 1249–1251 (CA10 2007); *FDL Technologies, Inc.* v. *United States*, 967 F. 2d 1578, 1580 (CA Fed. 1992); *Panola Land Buying Assn.* v. *Clark*, 844 F. 2d 1506, 1510–1511 (CA11 1988).[3] We granted certiorari. 557 U. S. 965 (2009).

II

Subsection (d)(1)(A) directs that courts "shall *award to a prevailing party* . . . fees and other expenses . . . incurred by that party." (Emphasis added.) We have long held that the term "prevailing party" in fee statutes is a "term of art" that refers to the prevailing litigant. See, *e. g.*, *Buckhannon Board & Care Home, Inc.* v. *West Virginia Dept. of Health and Human Resources*, 532 U. S. 598, 603 (2001). This treatment reflects the fact that statutes that award attorney's fees to a prevailing party are exceptions to the "'American Rule'" that each *litigant* "bear [his] own attorney's fees." *Id.*, at 602 (citing *Key Tronic Corp.* v. *United States*, 511 U. S. 809, 819 (1994)). Nothing in EAJA supports a different reading. Cf. *Arthur Andersen LLP* v. *Carlisle*, 556 U. S. 624, 630, n. 4 (2009) (where Congress employs "identical words and phrases within the same statute," they are presumed to carry "the same meaning" (internal quotation marks omitted)). Indeed, other subsections within § 2412(d) underscore that the term "prevailing party" in subsection (d)(1)(A) carries its usual and settled meaning—prevailing litigant. Those other subsections clearly distinguish the party who receives the fees award (the litigant) from the attorney who performed the work that generated the fees. See, *e. g.*, § 2412(d)(1)(B) (hereinafter subsection (d)(1)(B)) (the "prevailing party" must apply for the fees award and

[3] The split exists in the Social Security context because the Social Security Act (SSA), 49 Stat. 620, as amended, 42 U. S. C. § 301 *et seq.*, provides for payment of attorney's fees awards directly to counsel, see § 406(b)(1)(A), and until 2006 the Government in many cases treated fees awards under EAJA the same way, see Reply Brief for Petitioner 13–14.

"sho[w]" that he "is a prevailing party and is eligible to receive an award" by, among other things, submitting "an itemized statement *from any attorney . . . representing or appearing in behalf of the party*" that details the attorney's hourly rate and time spent on the case (emphasis added)); see also Part III, *infra.*

Ratliff nonetheless asserts that subsection (d)(1)(A)'s use of the verb "award" renders § 2412(d) fees payable directly to a prevailing party's attorney and thus protects the fees from a Government offset against the prevailing party's federal debts. See Brief for Respondent 11–19 (arguing that subsection (d)(1)(A)'s use of the word "'award'" "expressly incorporates a critical distinction" between the right to an "'award'" of fees and the right to "'receiv[e]'" the fees). We disagree.

The transitive verb "'award'" has a settled meaning in the litigation context: It means "[t]o give or assign *by* sentence or judicial determination." Black's Law Dictionary 125 (5th ed. 1979) (emphasis added); see also Webster's Third New International Dictionary 152 (1993) ("to give *by* judicial decree" (emphasis added)). The plain meaning of the word "award" in subsection (d)(1)(A) is thus that the court shall "give or assign by . . . judicial determination" to the "prevailing party" (here, Ratliff's client Kills Ree) attorney's fees in the amount sought and substantiated under, *inter alia*, subsection (d)(1)(B).

Ratliff's contrary argument does not withstand scrutiny. According to Ratliff, subsection (d)(1)(B), which uses "the noun 'award'" to mean a "'decision,'" requires us to construe subsection (d)(1)(A) (which uses "award" as a verb) to mean that "[o]nly the prevailing party may receive the *award* (the decision granting fees), but only the attorney who earned the *fee* (the payment asked or given for professional services) is entitled to receive it." Brief for Respondent 16, 15 (emphasis in original; some internal quotation marks and footnote omitted). This argument ignores the settled definitions

above, and even the definitions Ratliff proffers, because each makes clear that the verb "award" in subsection (d)(1)(A) means to "give *by* the decision of a law court" or to "grant . . . *by* judicial decree," not simply to "give a decision" itself. *Id.*, at 16, and n. 39 (emphasis added; internal quotation marks omitted). We thus agree with the Government that under the statutory language here, the "judicial decision is the *means* by which the court confers a right to payment upon the prevailing party; it is not itself the *thing* that the court gives (or orders the defendant to give) to the party." Reply Brief for Petitioner 4 (emphasis in original; citing *Hewitt* v. *Helms*, 482 U. S. 755, 761 (1987) (explaining that "[i]n all civil litigation, the judicial decree is not the end but the means")). This settled and natural construction of the operative statutory language is reflected in our cases. See, *e. g.*, *Scarborough* v. *Principi*, 541 U. S. 401, 405 (2004) ("EAJA authorizes the *payment* of fees *to* a prevailing party" (emphasis added)).

Ratliff's final textual argument—that subsection (d)(2)(A)'s reference to "attorney fees" itself establishes that the fees are payable to the prevailing party's attorney, see Brief for Respondent 19–22—proves far too much. The fact that the statute awards to the prevailing party fees in which her attorney may have a beneficial interest or a contractual right does not establish that the statute "awards" the fees directly to the attorney. For the reasons we have explained, the statute's plain text does the opposite—it "awards" the fees to the litigant, and thus subjects them to a federal administrative offset if the litigant has outstanding federal debts.

III

In an effort to avoid EAJA's plain meaning, Ratliff argues that other provisions of EAJA, combined with the SSA and the Government's practice of paying some EAJA fees awards directly to attorneys in Social Security cases, render § 2412(d) at least ambiguous on the question presented here,

and that these other provisions resolve the ambiguity in her favor. Again we disagree. Even accepting § 2412(d) as ambiguous on the question presented, the provisions and practices Ratliff identifies do not alter our conclusion that EAJA fees are payable to litigants and are thus subject to offset where a litigant has outstanding federal debts.

To begin with, § 2412(d)(1)'s provisions differentiate between attorneys and prevailing parties, and treat attorneys on par with other service providers, in a manner that forecloses the conclusion that attorneys have a right to direct payment of subsection (d)(1)(A) awards. As noted above, subsection (d)(1)(B) requires the prevailing party to submit a fee application showing that she is otherwise "eligible to receive an award" and, as a complement to that requirement, compels the prevailing party to submit "an itemized statement *from any attorney . . . representing or appearing in behalf of the party*" that details the attorney's hourly rate and time the attorney spent on the case. (Emphasis added.) This language would make little sense if, as Ratliff contends, § 2412(d)'s "prevailing party" language effectively refers to the prevailing litigant's attorney. Subsection (d)(1)(B) similarly makes clear that the "prevailing party" (not her attorney) is the recipient of the fees award by requiring the *prevailing party* to demonstrate that *her* net worth falls within the range the statute requires for fees awards. And EAJA's cost provision further underscores the point. That provision uses language identical to that in the attorney's fees provision to allow prevailing parties to recover "the reasonable expenses of expert witnesses" and "any study, analysis, engineering report, test, or project" necessary to prepare "the party's case," § 2412(d)(2)(A), yet Ratliff does not argue that it makes costs payable directly to the vendors who provide the relevant services.

Nor do the SSA provisions on which Ratliff relies establish that subsection (d)(1)(A) fees awards are payable to prevailing parties' attorneys. It is true that the SSA makes fees

awards under that statute payable directly to a prevailing claimant's attorney. See 42 U. S. C. § 406(b)(1)(A) (providing that where a claimant "who was represented before the court by an attorney" obtains a favorable judgment, "the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of" the benefits award and may certify the full amount of the statutory fees award "*for payment to such attorney* out of, and not in addition to, the amount of" the claimant's benefits award (emphasis added)). But the SSA's express authorization of such payments undermines Ratliff's case insofar as it shows that Congress knows how to make fees awards payable directly to attorneys where it desires to do so. Given the stark contrast between the SSA's express authorization of direct payments to attorneys and the absence of such language in subsection (d)(1)(A), we are reluctant to interpret the latter provision to contain a direct fee requirement absent clear textual evidence supporting such an interpretation.

Ratliff contends that Congress' 1985 amendments to § 206(b) of EAJA supply just such evidence, at least in Social Security cases. See § 3(2), 99 Stat. 186, note following 28 U. S. C. § 2412, p. 1309 (Saving Provision). The 1985 amendments address the fact that Social Security claimants may be eligible to receive fees awards under both the SSA and EAJA, and clarify the procedure that attorneys and their clients must follow to prevent the windfall of an unauthorized double recovery of fees for the same work. Section 206(b) provides that no violation of law occurs "if, where the claimant's attorney receives fees for the same work under both [42 U. S. C. § 406(b) and 28 U. S. C. § 2412(d)], the claimant's attorney refunds to the claimant the amount of the smaller fee." According to Ratliff, the fact that § 206(b) recognizes, or at least assumes, that an attorney will sometimes "receiv[e]" fees under 28 U. S. C. § 2412(d) suggests that we should construe subsection (d)(1)(A) to incorporate the

same direct payments to attorneys that the SSA expressly authorizes.

This argument gives more weight to § 206(b)'s reference to attorney "recei[pt]" of fees than the reference can bear. Section 206(b)'s ensuing reference to the attorney's obligation to "refun[d]" the amount of the smaller fee to the claimant, which reference suggests that the award belongs to the claimant in the first place, alone undercuts Ratliff's reading of "receives" as implying an initial statutory payment to the attorney.[4] And Ratliff's reading is in any event irreconcilable with the textual differences between EAJA and the SSA we discuss above. Thus, even accepting Ratliff's argument that subsection (d)(1)(A) is ambiguous, the statutory provisions she cites resolve any ambiguity in favor of treating subsection (d)(1)(A) awards as payable to the prevailing litigant, and thus subject to offset where the litigant has relevant federal debts.

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[4] Ratliff argues that fees awarded under 42 U. S. C. § 406(b) can never be "'refund[ed]'" in this sense because SSA fees are "*never* paid initially to the client." Brief for Respondent 14 (emphasis in original). That is not accurate. As we have explained, Social Security claimants and attorneys normally enter into contingent-fee agreements that are subject to judicial "review for reasonableness." *Gisbrecht* v. *Barnhart*, 535 U. S. 789, 809 (2002). Where the court allows a fee, § 406(b) permits the Commissioner to collect the approved fee out of the client's benefit award and to certify the fee for "payment to such attorney out of" that award. § 406(b)(1)(A). In such cases, the attorney would "refun[d]" the fee to the client in the event that the attorney also receives a (larger) EAJA award, because the attorney "receive[d]" the SSA fee from the client's funds. Similarly inaccurate is Ratliff's suggestion that our construction of EAJA § 206(b)'s reference to "refun[d]" would preclude attorneys from collecting any fees from a prevailing party until both SSA and EAJA payments are awarded. Our construction does not alter or preclude what we have recognized as courts' common practice of awarding EAJA fees at the time a court remands a case to the Social Security Administration (Administration) for benefits proceedings. Such awards often allow attorneys to collect EAJA fees months before any fees are awarded under 42 U. S. C. § 406(b), because § 406(b) fees cannot be determined until the Administration enters a final benefits ruling. See *Shalala* v. *Schaefer*, 509 U. S. 292, 295–302 (1993).

The Government's history of paying EAJA awards directly to attorneys in certain cases does not compel a different conclusion. The Government concedes that until 2006, it "frequently paid EAJA fees in Social Security cases directly to attorneys." Reply Brief for Petitioner 13. But this fact does not alter our interpretation of subsection (d)(1)(A)'s "prevailing party" language or the Government's rights and obligations under the statute. As the Government explains, it most often paid EAJA fees directly to attorneys in cases in which the prevailing party had assigned its rights in the fees award to the attorney (which assignment would not be necessary if the statute rendered the fees award payable to the attorney in the first instance). The fact that some such cases involved a prevailing party with outstanding federal debts is unsurprising given that it was not until 2005 that the Treasury Department modified the TOP to require offsets against "miscellaneous" payments such as attorney's fees awards. And as Ratliff admits, the Government has since continued the direct payment practice only in cases where "the plaintiff does not owe a debt to the government and assigns the right to receive the fees to the attorney." Brief for Respondent 28 (boldface deleted). The Government's decision to continue direct payments only in such cases is easily explained by the 2005 amendments to the TOP, and nothing about the Government's past payment practices altered the statutory text that governs this case or estopped the Government from conforming its payment practices to the Treasury Department's revised regulations. For all of these reasons, neither EAJA nor the SSA supports Ratliff's reading of subsection (d)(1)(A).

Our cases interpreting and applying 42 U. S. C. § 1988, which contains language virtually identical to the EAJA pro vision we address here,[5] buttress this conclusion. Our

[5] Section 1988(b) provides that in actions covered by the statute and subject to exceptions not relevant here, "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee."

most recent cases applying § 1988(b)'s "prevailing party" language recognize the practical reality that attorneys are the beneficiaries and, almost always, the ultimate recipients of the fees that the statute awards to "prevailing part[ies]." See, *e. g.*, *Venegas* v. *Mitchell*, 495 U. S. 82, 86 (1990). But these cases emphasize the nonstatutory (contractual and other assignment-based) rights that typically confer upon the attorney the entitlement to payment of the fees award the statute confers on the prevailing litigant. As noted above, these kinds of arrangements would be unnecessary if, as Ratliff contends, statutory fees language like that in § 1988(b) and EAJA provides attorneys with a statutory right to direct payment of awards. Hence our conclusion that "the party, rather than the lawyer," *id.*, at 87, is "entitle[d] to receive the fees" under § 1988(b), *id.*, at 88, and that the statute "controls what the losing defendant must pay, not what the prevailing plaintiff must pay his lawyer," *id.*, at 90; see also *Evans* v. *Jeff D.*, 475 U. S. 717, 730–732, and n. 19 (1986) (explaining that the "language of [§ 1988] . . . bestow[s] on the 'prevailing party' (generally plaintiffs) a statutory eligibility for a discretionary award of attorney's fees" and does *not* "besto[w] fee awards upon attorneys" themselves (emphasis deleted; footnote omitted)). These conclusions apply with equal force to the functionally identical statutory language here.

* * *

We reverse the Court of Appeals' judgment and remand the case for further proceedings consistent with this opinion.

It is so ordered.

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

I join the Court's opinion because I agree that the text of the Equal Access to Justice Act (EAJA) and our precedents compel the conclusion that an attorney's fees award under 28

U. S. C. § 2412(d) is payable to the prevailing litigant rather than the attorney. The EAJA does not legally obligate the Government to pay a prevailing litigant's attorney, and the litigant's obligation to pay her attorney is controlled not by the EAJA but by contract and the law governing that contract. That conclusion, however, does not answer the question whether Congress intended the Government to deduct moneys from EAJA fees awards to offset a litigant's preexisting and unrelated debt, as the Treasury Department began to do only in 2005 pursuant to its authority under the Debt Collection Improvement Act of 1996 (DCIA). In my view, it is likely both that Congress did not consider that question and that, had it done so, it would not have wanted EAJA fees awards to be subject to offset. Because such offsets undercut the effectiveness of the EAJA and cannot be justified by reference to the DCIA's text or purpose, it seems probable that Congress would have made, and perhaps will in the future make, the opposite choice if clearly presented with it.

In enacting the EAJA, Congress found "that certain individuals, partnerships, corporations, and labor and other organizations may be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense involved in securing the vindication of their rights in civil actions and in administrative proceedings." § 202(a), 94 Stat. 2325, note following 5 U. S. C. § 504, p. 684 (Congressional Findings). As we have often recognized, "the specific purpose of the EAJA is to eliminate for the average person the financial disincentive to challenge unreasonable governmental actions." *Commissioner* v. *Jean*, 496 U. S. 154, 163 (1990); see also *Scarborough* v. *Principi*, 541 U. S. 401, 406 (2004) (by "expressly authoriz[ing] attorney's fees awards against the Federal Government," Congress sought "'to eliminate the barriers that prohibit small businesses and individuals from securing vindication of their rights in civil actions and administrative proceedings

brought by or against the Federal Government' " (quoting H. R. Rep. No. 96–1005, p. 9 (1979))); *Sullivan* v. *Hudson*, 490 U. S. 877, 883 (1989) (the EAJA was designed to address the problem that " '[f]or many citizens, the costs of securing vindication of their rights and the inability to recover attorney fees preclude resort to the adjudicatory process' " (quoting S. Rep. No. 96–253, p. 5 (1979))). EAJA fees awards, which average only $3,000 to $4,000 per case, have proved to be a remarkably efficient way of improving access to the courts for the statute's intended beneficiaries, including thousands of recipients of Social Security and veteran's benefits each year.[1] Brief for Respondent 4–5; see also *Jean*, 496 U. S., at 164, nn. 12–13.

The EAJA's admirable purpose will be undercut if lawyers fear that they will never actually receive attorney's fees to which a court has determined the prevailing party is entitled. The point of an award of attorney's fees, after all, is to enable a prevailing litigant to pay her attorney. See, *e. g.*, *Missouri* v. *Jenkins*, 491 U. S. 274, 285 (1989) ("We . . . take as our starting point the self-evident proposition that the 'reasonable attorney's fee' provided by [42 U. S. C. § 1988] should compensate" for "the work product of an attorney"); *Hensley* v. *Eckerhart*, 461 U. S. 424, 435 (1983) ("Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee"). We have accordingly acknowledged that in litigants' motions for attorney's fees, "the real parties in interest are their attorneys." *Gisbrecht* v. *Barnhart*, 535 U. S. 789, 798, n. 6 (2002). Subjecting EAJA fees awards to administrative offset for a litigant's debts will unquestionably make it more difficult for persons

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[1] The EAJA makes fee awards available to challenge Government action under a wide range of statutes, but, as respondent notes, the vast majority of EAJA awards are made in these two contexts, with Social Security cases representing the lion's share. Brief for Respondent 4–5; Brief for National Organization of Social Security Claimants' Representatives et al. as *Amici Curiae* 22–23.

of limited means to find attorneys to represent them. See, *e. g.*, Brief for National Organization of Social Security Claimants' Representatives et al. as *Amici Curiae* 25 (hereinafter NOSSCR Brief).

In its arguments before this Court, the Government resists this self-evident conclusion, but each of the three reasons it proffers is unpersuasive. First, the Government suggests that because EAJA fees awards are limited to those circumstances in which the Government's position is not "substantially justified," 28 U. S. C. § 2412(d)(1)(A), no lawyer can rely on an EAJA fees award when deciding to take a case, so the possibility of an offset eliminating the award will play no additional role in the lawyer's decision.[2] Reply Brief for Petitioner 16–17. But it is common sense that increasing the risk that an attorney will not receive a fees award will inevitably decrease the willingness of attorneys to undertake representation in these kinds of cases.

Second, the Government contends that any disincentive the fear of administrative offset may create is mitigated in the Social Security context by the Social Security Act's independent provision authorizing a fees award payable directly to the attorney. See *id.*, at 17–18 (citing 42 U. S. C. § 406(b)(1)(A)). But as the Government acknowledges, the "EAJA's fee-shifting provisions are potentially more generous than [the Social Security Act's] in at least three respects": (1) A court may not award attorney's fees under the Social Security Act, but may under the EAJA, when the claimant wins only a procedural victory and does not obtain

[2] In its brief, the Government downplays the frequency with which fees awards under the EAJA are made. At oral argument, respondent's counsel represented that EAJA fees awards are made in 42% of Social Security cases in which the claimant prevails and in 70% of all veteran's benefits cases filed. Tr. of Oral Arg. 42–43. The Government did not contest the number for Social Security cases but suggested that the percentage of veteran's benefits cases resulting in EAJA awards is closer to 50% or 60%. *Id.*, at 52. Under either estimate, these are hardly vanishing odds of success for an attorney deciding whether to take a client's case.

any past-due benefits; (2) fees under the Social Security Act are limited to a percentage of benefits awarded, while EAJA fees are calculated under the lodestar method by examining the attorney's reasonable hours expended and her reasonable hourly rate; and (3) in contrast to the Social Security Act, fees may be awarded under the EAJA in addition to, rather than out of, the benefits awarded. Brief for Petitioner 6–7. EAJA awards thus provide an important additional incentive for attorneys to undertake Social Security cases.

Finally, the Government argues that lawyers can easily determine at the outset whether a potential client owes the Government a debt and can then assist the client in establishing a written repayment plan that would prevent an offset. Reply Brief for Petitioner 18. At oral argument, however, the Government acknowledged that it was not aware of any instance in which this has happened in the five years since it began subjecting EAJA fees awards to administrative offset. Tr. of Oral Arg. 12–13. It is not difficult to understand why. Helping a client establish a repayment plan would be a time-consuming endeavor uncompensated by any fee-shifting provision, and a client who needs such assistance is unlikely to have the funds to pay the attorney for that service. If the Government is instead suggesting that a lawyer can simply decline to represent a prospective client once she knows of the client's debtor status, that suggestion only proves my point. Cf. NOSSCR Brief 25 (describing deterrent effect of offsets on representation).

In the end, the Government has no compelling response to the fact that today's decision will make it more difficult for the neediest litigants to find attorneys to represent them in cases against the Government. I "find it difficult to ascribe to Congress an intent to throw" an EAJA litigant "a lifeline that it knew was a foot short. . . . Given the anomalous nature of this result, and its frustration of the very purposes behind the EAJA itself, Congress cannot lightly be assumed to have intended it." *Sullivan*, 490 U. S., at 890.

The Government suggests that it is possible to glean such intent from the fact that Congress did not expressly exempt EAJA awards from administrative offset under the DCIA. Reply Brief for Petitioner 19–20; 31 U. S. C. §3716(c)(1)(C) (specifying certain federal payments that are not subject to administrative offset); see also 31 CFR §285.5(e)(2) (2009) (identifying payments that are not subject to administrative offset because of a statutory exemption). If "application of the offset program to such awards will make it more difficult for Social Security claimants or other litigants to find attorneys," the Government contends, the "provisions that govern the offset program indicate that Congress is willing to bear that cost." Reply Brief for Petitioner 20. The history of these provisions indicates otherwise. For more than two decades after the EAJA was enacted in 1980, the Commissioner of Social Security "consistently paid" EAJA fee awards directly to the attorney, not the prevailing party. *Stephens ex rel. R. E.* v. *Astrue*, 565 F. 3d 131, 135 (CA4 2009); see also *Bryant* v. *Commissioner of Social Security*, 578 F. 3d 443, 446 (CA6 2009); cf. *ante*, at 591, n. 3, 597. "In fact, the Commissioner created a direct deposit system for attorneys and issued [Internal Revenue Service] 1099 forms directly to the attorneys who received awards, noting the awards as taxable attorney income." *Stephens*, 565 F. 3d, at 135. Not until 2005, when the Treasury Department extended the offset program to cover "miscellaneous" federal payments, including "fees," did the Commissioner cease paying EAJA fees awards directly to attorneys and adopt the position that the awards were appropriately considered the property of the prevailing party. *Id.*, at 136 (internal quotation marks omitted); see also *Bryant*, 578 F. 3d, at 446; *ante*, at 589–590, 597. Congress therefore had no reason to include a specific exemption of EAJA fees awards (in the Social Security context or otherwise) from the offset program when it enacted the DCIA in 1996.

I am further reluctant to conclude that Congress would want EAJA fees awards to be offset for a prevailing litigant's unrelated debts because it is not likely to effectuate the DCIA's purpose of "maximiz[ing] collections of delinquent debts owed to the Government by ensuring quick action to enforce recovery of debts and the use of all appropriate collection tools." § 31001(b)(1), 110 Stat. 1321–358. This purpose would be better served if claimants are able to find attorneys to help them secure the benefits they are rightfully owed in the first place, thereby making available a source of funds to permit repayment of the claimants' Government debts at all. See NOSSCR Brief 32; see also 31 U. S. C. § 3716(c)(3)(A) (after initial $9,000 annual exemption, Social Security benefits are subject to administrative offset).

While I join the Court's opinion and agree with its textual analysis, the foregoing persuades me that the practical effect of our decision "severely undermines the [EAJA's] estimable aim. . . . The Legislature has just cause to clarify beyond debate" whether this effect is one it actually intends. *Bartlett* v. *Strickland*, 556 U. S. 1, 44 (2009) (GINSBURG, J., dissenting).

Syllabus

DOLAN *v.* UNITED STATES

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

No. 09–367. Argued April 20, 2010—Decided June 14, 2010

Petitioner Dolan pleaded guilty to assault resulting in serious bodily injury and entered into a plea agreement, which stated that the District Court could order restitution for his victim. Dolan's presentence report also noted that restitution was required, but did not recommend an amount because of a lack of information on hospital costs and lost wages. The Mandatory Victims Restitution Act provides that "if the victim's losses are not ascertainable by the date that is 10 days prior to sentencing," the court "shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing." 18 U. S. C. § 3664(d)(5). On July 30, the District Court held a sentencing hearing and imposed a sentence of imprisonment and supervised release. On August 8, the court entered a judgment, stating that restitution was "applicable" but leaving open the amount of restitution given that no information had yet "been received regarding possible restitution payments." On October 5, 67 days later, an addendum documenting the restitution amount was added to the presentence report. The court did not set a hearing until February 4, about three months after the 90-day deadline had expired. At the hearing, Dolan argued that because that deadline had passed, the law no longer authorized restitution. Disagreeing, the court ordered restitution, and the Tenth Circuit affirmed.

Held: A sentencing court that misses the 90-day deadline nonetheless retains the power to order restitution—at least where, as here, that court made clear prior to the deadline's expiration that it would order restitution, leaving open (for more than 90 days) only the amount. Pp. 609–621.

(a) To determine the consequences of a missed deadline where, as here, the statute does not specify them, this Court looks to the statutory language, to the relevant context, and to what they reveal about the deadline's purposes. A "jurisdictional" deadline's expiration prevents a court from permitting or taking the action to which the statute attached the deadline. The prohibition is absolute. It cannot be waived or extended for equitable reasons. See *John R. Sand & Gravel Co.* v. *United States*, 552 U. S. 130, 133–134. Other deadlines are "claims-processing rules," which do not limit a court's jurisdiction, but regulate the timing of motions or claims brought before the court. Un-

less a party points out that another litigant has missed such a deadline, the party forfeits the deadline's protection. See, *e. g.*, *Kontrick* v. *Ryan*, 540 U. S. 443, 454–456. In other instances, a deadline seeks speed by creating a time-related directive that is legally enforceable but does not deprive the judge or other public official of the power to take the action even if the deadline is missed. See, *e. g.*, *United States* v. *Montalvo-Murillo*, 495 U. S. 711, 722. In light of its language, context, and purposes, the statute at issue sets forth this third kind of limitation. The fact that a sentencing court misses the 90-day deadline, even through its own or the Government's fault, does not deprive the court of the power to order restitution. Pp. 609–611.

(b) Several considerations lead to this conclusion. First, where, as here, a statute "does not specify a consequence for noncompliance with" its "timing provisions," "federal courts will not" ordinarily "impose their own coercive sanction." *United States* v. *James Daniel Good Real Property*, 510 U. S. 43, 63. A statute's use of "shall" alone, see § 3664(d)(5), does not necessarily bar judges from taking the action to which the missed deadline refers. Second, the statute places primary weight on, and emphasizes the importance of, imposing restitution upon those convicted of certain federal crimes. See § 3663A. Third, the statute's procedural provisions reinforce this substantive purpose. They reveal that the statute seeks speed primarily to help crime victims secure prompt restitution, not to provide defendants with certainty as to the amount of their liability. Fourth, to read the statute as depriving the sentencing court of the power to order restitution would harm the victims, who likely bear no responsibility for the deadline's being missed and whom the statute seeks to benefit. That kind of harm to third parties provides a strong indication that Congress did not intend a missed deadline to work a forfeiture. See *Brock* v. *Pierce County*, 476 U. S. 253, 262. Fifth, the Court has interpreted similar statutes, such as the Bail Reform Act of 1984, similarly. See *Montalvo-Murillo*, *supra*, at 721. Sixth, the defendant normally can mitigate potential harm by telling the court that he fears the deadline will be, or just has been, missed, and the court will likely set a timely hearing or take other statutorily required action. Pp. 611–616.

(c) This Court has not understated the potential harm to a defendant of a missed deadline. Petitioner claims that because the sentence will not be a "final judgment" for appeal purposes without a definitive determination of the restitution amount, to delay that determination beyond the deadline is to delay his ability to appeal. But a defendant who knows that restitution will be ordered and is aware of the amount can usually avoid additional delay by asking for a timely hearing; if the court refuses, he could seek mandamus. And in the unlikely instance that delay causes the defendant prejudice, he remains free to ask the appel-

late court to take that fact and any other equitable considerations into account on review. This does not mean that the Court accepts petitioner's premise that a sentencing judgment is not "final" until the restitution amount is determined. Although that question need not be decided here, strong arguments favor the appealability of the initial judgment irrespective of the delay in determining the restitution amount. A judgment imposing "'discipline'" may still be "freighted with sufficiently substantial indicia of finality to support an appeal." *Corey* v. *United States*, 375 U. S. 169, 174. And several statutes say that a "judgment of conviction" that "includes" "imprisonment" is a "final judgment." *E. g.*, 18 U. S. C. §3582(b). Moreover, §3664(*o*) provides that a "sentence that imposes an order of restitution," such as the later restitution order here, "is a final judgment." Even assuming that the rule of lenity could be applied to a statutory time provision in the criminal context, here there is no statutory ambiguity sufficiently grievous to warrant its application in this case. *Muscarello* v. *United States*, 524 U. S. 125, 139. Pp. 616–621.

571 F. 3d 1022, affirmed.

BREYER, J., delivered the opinion of the Court, in which THOMAS, GINSBURG, ALITO, and SOTOMAYOR, JJ., joined. ROBERTS, C. J., filed a dissenting opinion, in which STEVENS, SCALIA, and KENNEDY, JJ., joined, *post*, p. 621.

Pamela S. Karlan, by appointment of the Court, 559 U. S. 1003, argued the cause for petitioner. With her on the briefs were *Jeffrey L. Fisher*, *Amy Howe*, *Kevin K. Russell*, *Sara N. Sanchez*, and *Thomas C. Goldstein*.

Toby J. Heytens argued the cause for the United States. On the brief were *Solicitor General Kagan*, *Assistant Attorney General Breuer*, *Deputy Solicitor General Dreeben*, and *Eric D. Miller*.*

JUSTICE BREYER delivered the opinion of the Court.

This case concerns the remedy for missing a statutory deadline. The statute in question focuses upon mandatory restitution for victims of crimes. It provides that "the court

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**Jonathan L. Marcus*, *Barbara E. Bergman*, and *Peter Goldberger* filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae* urging reversal.

Paul G. Cassell filed a brief for the National Crime Victim Law Institute as *amicus curiae* urging affirmance.

shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing." 18 U. S. C. § 3664(d)(5). We hold that a sentencing court that misses the 90-day deadline nonetheless retains the power to order restitution—at least where, as here, the sentencing court made clear prior to the deadline's expiration that it would order restitution, leaving open (for more than 90 days) only the amount.

I

On February 8, 2007, petitioner Brian Dolan pleaded guilty to a federal charge of assault resulting in serious bodily injury. 18 U. S. C. §§ 113(a)(6), 1153; App. 17. He entered into a plea agreement that stated that "restitution . . . may be ordered by the Court." *Id.*, at 18. The presentence report, provided to the court by the end of May, noted that restitution was required. But, lacking precise information about hospital costs and lost wages, it did not recommend a restitution amount. *Id.*, at 27.

On July 30, the District Court held Dolan's sentencing hearing. The judge sentenced Dolan to 21 months' imprisonment along with 3 years of supervised release. *Id.*, at 38. The judge, aware that restitution was "mandatory," said that there was "insufficient information on the record at this time regarding possible restitution payments that may be owed," that he would "leave that matter open, pending the receipt of additional information," and that Dolan could "anticipate that such an award will be made in the future." *Id.*, at 39–40. A few days later (August 8) the court entered a judgment, which, among other things, stated:

> "Pursuant to the Mandatory Restitution Act, restitution is applicable; however, no information has been received regarding possible restitution payments that may be owed. Therefore, the Court will not order restitution at this time." *Id.*, at 49 (boldface deleted).

The probation office later prepared an addendum to the presentence report, dated October 5, which reflected the views of the parties, and which the judge later indicated he had received. *Id.*, at 54. The addendum documents the "total amount of restitution" due in the case (about $105,000). *Id.*, at 52. Its date, October 5, is 67 days after Dolan's July 30 sentencing and 23 days before the statute's "90 days after sentencing" deadline would expire. § 3664(d)(5).

The sentencing court nonetheless set a restitution hearing for February 4, 2008—about three months after the 90-day deadline expired. As far as the record shows, no one asked the court for an earlier hearing. At the hearing, Dolan pointed out that the 90-day deadline had passed. *Id.*, at 54–55. And he argued that the law no longer authorized the court to order restitution. *Id.*, at 60–64.

The court disagreed and ordered restitution. See Memorandum Opinion and Restitution Order in No. CR 06–02173–RB (D NM, Apr. 24, 2008), App. to Pet. for Cert. 47a. The Court of Appeals affirmed. 571 F. 3d 1022 (CA10 2009). And, in light of differences among the Courts of Appeals, we granted Dolan's petition for certiorari on the question. Compare *United States* v. *Cheal*, 389 F. 3d 35 (CA1 2004) (recognizing court's authority to enter restitution order past 90 days), and *United States* v. *Balentine*, 569 F. 3d 801 (CA8 2009) (same), with *United States* v. *Maung*, 267 F. 3d 1113 (CA11 2001) (finding no such authority), and *United States* v. *Farr*, 419 F. 3d 621 (CA7 2005) (same).

II

A

There is no doubt in this case that the court missed the 90-day statutory deadline "for the final determination of the victim's losses." § 3664(d)(5). No one has offered any excuse for the court's doing so. Nor did any party seek an extension or "tolling" of the 90 days for equitable or for other reasons. All the information needed to determine the

requisite restitution amount was available before the 90-day period had ended. Thus, the question before us concerns the consequences of the missed deadline where, as here, the statute does not specify them.

In answering this kind of question, this Court has looked to statutory language, to the relevant context, and to what they reveal about the purposes that a time limit is designed to serve. The Court's answers have varied depending upon the particular statute and time limit at issue. Sometimes we have found that the statute in question imposes a "jurisdictional" condition upon, for example, a court's authority to hear a case, to consider pleadings, or to act upon motions that a party seeks to file. See, *e. g.*, *Bowles* v. *Russell*, 551 U. S. 205 (2007). But cf. *Kontrick* v. *Ryan*, 540 U. S. 443, 455 (2004) (finding bankruptcy rule did not show legislative intent to "delineat[e] the classes of cases" and "persons" properly "within a court's adjudicatory authority"); see also *Reed Elsevier, Inc.* v. *Muchnick*, 559 U. S. 154, 160–161 (2010) (discussing use of term "jurisdictional"). The expiration of a "jurisdictional" deadline prevents the court from permitting or taking the action to which the statute attached the deadline. The prohibition is absolute. The parties cannot waive it, nor can a court extend that deadline for equitable reasons. See *John R. Sand & Gravel Co.* v. *United States*, 552 U. S. 130, 133–134 (2008).

In other instances, we have found that certain deadlines are more ordinary "claims-processing rules," rules that do not limit a court's jurisdiction, but rather regulate the timing of motions or claims brought before the court. Unless a party points out to the court that another litigant has missed such a deadline, the party forfeits the deadline's protection. See, *e. g.*, *Kontrick* v. *Ryan*, *supra*, at 454–456 (60-day bankruptcy rule deadline for creditor's objection to debtor discharge); *Eberhart* v. *United States*, 546 U. S. 12, 19 (2005) *(per curiam)* (7-day criminal rule deadline for filing motion for a new trial).

In still other instances, we have found that a deadline seeks speed by creating a time-related directive that is legally enforceable but does not deprive a judge or other public official of the power to take the action to which the deadline applies if the deadline is missed. See, *e. g.*, *United States* v. *Montalvo-Murillo*, 495 U. S. 711, 722 (1990) (missed deadline for holding bail detention hearing does not require judge to release defendant); *Brock* v. *Pierce County*, 476 U. S. 253, 266 (1986) (missed deadline for making final determination as to misuse of federal grant funds does not prevent later recovery of funds); *Barnhart* v. *Peabody Coal Co.*, 537 U. S. 149, 171–172 (2003) (missed deadline for assigning industry retiree benefits does not prevent later award of benefits).

After examining the language, the context, and the purposes of the statute, we conclude that the provision before us sets forth this third kind of limitation. The fact that a sentencing court misses the statute's 90-day deadline, even through its own fault or that of the Government, does not deprive the court of the power to order restitution.

B

Several considerations lead us to this conclusion. *First*, where, as here, a statute "does not specify a consequence for noncompliance with" its "timing provisions," "federal courts will not in the ordinary course impose their own coercive sanction." *United States* v. *James Daniel Good Real Property*, 510 U. S. 43, 63 (1993); see also *Montalvo-Murillo*, *supra*, at 717–721. Cf., *e. g.*, Speedy Trial Act of 1974, 18 U. S. C. § 3161(c)(1); § 3162(a)(2) (statute specifying that missed 70-day deadline requires dismissal of indictment); *Zedner* v. *United States*, 547 U. S. 489, 507–509 (2006) ("The sanction for a violation of the Act is dismissal").

We concede that the statute here uses the word "shall," § 3664(d)(5), but a statute's use of that word alone has not always led this Court to interpret statutes to bar judges (or other officials) from taking the action to which a missed stat-

utory deadline refers. See, *e. g.*, *Montalvo-Murillo*, *supra*, at 718–719 (use of word "shall" in context of bail hearing makes duty "mandatory" but does not mean that the "sanction for breach" is "loss of all later powers to act"); *Brock*, *supra*, at 262 (same in context of misuse of federal funds); *Barnhart*, *supra*, at 158–163 (same in context of benefits assignments). See also *Regions Hospital* v. *Shalala*, 522 U. S. 448, 459, n. 3 (1998) (same in respect to federal official's reporting date).

Second, the statute's text places primary weight upon, and emphasizes the importance of, imposing restitution upon those convicted of certain federal crimes. Amending an older provision that left restitution to the sentencing judge's discretion, the statute before us (entitled "The Mandatory Victims Restitution Act of 1996") says "*[n]otwithstanding any other provision of law*, when sentencing a defendant convicted of [a specified] offense . . . , the court *shall* order . . . that the defendant make restitution to the victim of the offense." § 3663A(a)(1) (emphasis added); cf. § 3663(a)(1) (stating that a court "may" order restitution when sentencing defendants convicted of other specified crimes). The Act goes on to provide that restitution shall be ordered in the "full amount of each victim's losses" and "without consideration of the economic circumstances of the defendant." § 3664(f)(1)(A).

Third, the Act's procedural provisions reinforce this substantive purpose, namely, that the statute seeks primarily to ensure that victims of a crime receive full restitution. To be sure speed is important. The statute requires a sentencing judge to order the probation office to prepare a report providing "a complete accounting of the losses to each victim, any restitution owed pursuant to a plea agreement, and information relating to the economic circumstances of each defendant." § 3664(a). The prosecutor, after consulting with all identified victims, must "promptly provide" a listing of the amount subject to restitution "*not later than 60 days*

prior to the date initially set for sentencing." § 3664(d)(1) (emphasis added). And the provision before us says:

> "If the victim's losses are not ascertainable by the date that is 10 days prior to sentencing, the attorney for the Government or the probation officer shall so inform the court, and the court shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing." § 3664(d)(5).

But the statute seeks speed primarily to help the victims of crime and only secondarily to help the defendant. Thus, in the sentence following the language we have just quoted, the statute continues:

> "If the victim subsequently discovers further losses, the victim shall have 60 days after discovery of those losses in which to petition the court for an amended restitution order." *Ibid.*

The sentence imposes no time limit on the victim's subsequent discovery of losses. Consequently, a court might award restitution for those losses long after the original sentence was imposed and the 90-day time limit has expired. That fact, along with the Act's main substantive objectives, is why we say that the Act's efforts to secure speedy determination of restitution is *primarily* designed to help victims of crime secure prompt restitution rather than to provide defendants with certainty as to the amount of their liability. Cf. S. Rep. No. 104–179, p. 20 (1995) (recognizing "the need for finality and certainty in the sentencing process," but also stating that the "sole due process interest of the defendant being protected . . . is the right not to be sentenced on the basis of invalid premises or inaccurate information"); see also *ibid.* ("[J]ustice cannot be considered served until full restitution is made").

Fourth, to read the statute as depriving the sentencing court of the power to order restitution would harm those—the victims of crime—who likely bear no responsibility for

the deadline's being missed and whom the statute also seeks to benefit. Cf. § 3664(g)(1) ("No victim shall be required to participate in any phase of a restitution order"). The potential for such harm—to third parties—normally provides a strong indication that Congress did not intend a missed deadline to work a forfeiture, here depriving a court of the power to award restitution to victims. See *Brock*, 476 U. S., at 261–262 (parties concede and court assumes that official can "proceed after the deadline" where "inaction" would hurt third party); see also 3 N. Singer & J. Singer, Sutherland on Statutory Construction § 57:19, pp. 73–74 (7th ed. 2008) (hereinafter Singer, Statutory Construction) (missing a deadline does not remove power to exercise a duty where there is no "language denying performance after a specified time," and especially "where a mandatory construction might do great injury to persons not at fault, as in a case where slight delay on the part of a public officer might prejudice private rights or the public interest" (footnote omitted)).

Fifth, we have previously interpreted similar statutes similarly. In *Montalvo-Murillo*, 495 U. S. 711, for example, we considered the Bail Reform Act of 1984, which states that a "judicial officer shall hold a hearing" to determine whether to grant bail to an arrested person and that "hearing shall be held *immediately upon the person's first appearance* before the judicial officer." (A continuance of up to five days may also be granted.) 18 U. S. C. § 3142(f) (emphasis added). The judicial officer missed this deadline, but the Court held that the judicial officer need not release the detained person. Rather, "once the Government discovers that the time limits have expired, it may [still] ask for a prompt detention hearing and make its case to detain based upon the requirements set forth in the statute." 495 U. S., at 721.

The Court reasoned that "a failure to comply" with the hearing deadline "does not so subvert the procedural scheme . . . as to invalidate the hearing." *Id.*, at 717. Missing the deadline did not diminish the strength of the Government's

interest in preventing release to avert the likely commission of crimes—the very objective of the Act. *Id.*, at 720. Nor would mandatory release of the detained person "proportion-[ately]" repair the "inconvenience and uncertainty a timely hearing would have spared him." *Id.*, at 721.

Here, as in *Montalvo-Murillo*, neither the language nor the structure of the statute requires denying the victim restitution in order to remedy a missed hearing deadline. As in *Montalvo-Murillo*, doing so would defeat the basic purpose of the Mandatory Victims Restitution Act. And, here, as in *Montalvo-Murillo*, that remedy does not "proportion-[ately]" repair the harm caused the defendant through delay, particularly where, as here, the defendant "knew about restitution," including the likely amount, well before expiration of the 90-day time limit. App. 62. Indeed, our result here follows from *Montalvo-Murillo a fortiori*, for here delay at worst postpones the day of financial reckoning. In *Montalvo-Murillo*, delay postponed a constitutionally guaranteed bail hearing with the attached risk that the defendant would remain improperly confined in jail. See 495 U. S., at 728 (STEVENS, J., dissenting) (noting the seriousness "of the deprivation of liberty that physical detention imposes").

Nor does *Montalvo-Murillo* stand alone. The Court there found support in similar cases involving executive officials charged with carrying out mandatory public duties in a timely manner. See *id.*, at 717–718 (citing *French* v. *Edwards*, 13 Wall. 506, 511 (1872); *Brock*, *supra*, at 260). Those cases, in turn, are consistent with numerous similar decisions made by courts throughout the Nation. See, *e. g.*, *Taylor* v. *Department of Transp.*, 260 N. W. 2d 521, 522–523 (Iowa 1977); *Hutchinson* v. *Ryan*, 154 Kan. 751, 756–757, 121 P. 2d 179, 182 (1942); *State* v. *Industrial Comm'n*, 233 Wis. 461, 466, 289 N. W. 769, 771 (1940); see also 3 Singer, Statutory Construction § 57:19, at 74 (citing cases).

Sixth, the defendant normally can mitigate any harm that a missed deadline might cause—at least if, as here, he ob-

tains the relevant information regarding the restitution amount before the 90-day deadline expires. A defendant who fears the deadline will be (or just has been) missed can simply tell the court, which will then likely set a timely hearing or take other statutorily required action. See § 3664(d)(4) (providing that "court may require additional documentation or hear testimony"); § 3664(d)(5). Though a deliberate failure of the sentencing court to comply with the statute seems improbable, should that occur, the defendant can also seek mandamus. See All Writs Act, 28 U. S. C. § 1651(a); *La Buy* v. *Howes Leather Co.*, 352 U. S. 249 (1957). Cf. *Brock*, *supra*, at 260, n. 7 (noting availability of district court action to compel agency compliance with time-related directive).

C

Petitioner Dolan, however, believes we have understated the harm to a defendant that a missed deadline can cause. To show this he makes a three-part argument: (1) A defendant cannot appeal a sentence unless it is part of a "final judgment"; (2) a judgment setting forth a sentence is not "final" until it contains a definitive determination of the amount of restitution; and (3) to delay the determination of the amount of restitution beyond the 90-day deadline is to delay the defendant's ability to appeal for more than 90 days—perhaps to the point where his due process rights are threatened. Brief for Petitioner 28–33.

The critical problem with this argument lies in its third step. As we have said, a defendant who, like petitioner here, knows that restitution will be ordered and is aware of the restitution amount prior to the expiration of the 90-day deadline can usually avoid additional delay simply by pointing to the statute and asking the court to grant a timely hearing. That did not happen here. And that minimal burden on the defendant is a small cost relative to the prospect of depriving innocent crime victims of their due restitution.

(Should the court still refuse, the defendant could seek mandamus—which we believe will rarely be necessary.)

Even in the unlikely instances where that delay does cause the defendant prejudice—perhaps by depriving him of evidence to rebut the claimed restitution amount—the defendant remains free to ask the court to take that fact into account upon review. That inquiry might also consider the reason for the delay and the party responsible for its cause, *i. e.*, whether the Government or the victim. Cf., *e. g.*, *United States* v. *Stevens*, 211 F. 3d 1, 4–6 (CA2 2000) (tolling 90-day deadline for defendant's bad-faith delay); *United States* v. *Terlingo*, 327 F. 3d 216, 218–223 (CA3 2003) (same). Adopting the dissent's approach, by contrast, would permit a defendant's bad-faith delay to prevent a timely order of restitution, potentially allowing the defendant to manipulate whether restitution could be awarded at all. But since we are not presented with such a case here, we need not decide whether, or how, such potential harm or equitable considerations should be taken into consideration.

In focusing upon the argument's third step, we do not mean to imply that we accept the second premise, *i. e.*, that a sentencing judgment is not "final" until it contains a definitive determination of the amount of restitution. To the contrary, strong arguments favor the appealability of the initial judgment irrespective of the delay in determining the restitution amount. The initial judgment here imposed a sentence of imprisonment and supervised release, and stated that restitution would be awarded. This Court has previously said that a judgment that imposes "discipline" may still be "freighted with sufficiently substantial indicia of finality to support an appeal." *Corey* v. *United States*, 375 U. S. 169, 174, 175 (1963) (internal quotation marks omitted). And the Solicitor General points to statutes that say that a "judgment of conviction" that "includes" a "sentence to imprisonment" is a "final judgment." 18 U. S. C. §3582(b). So is a judgment that imposes supervised release (which can

be imposed only in conjunction with a sentence of imprisonment). *Ibid.;* § 3583(a). So is a judgment that imposes a fine. § 3572(c). See Tr. of Oral Arg. 33–34.

Moreover, § 3664(*o*) provides that a "sentence that imposes an order of restitution," such as the later restitution order here, "is a final judgment." Thus, it is not surprising to find instances where a defendant has appealed from the entry of a judgment containing an initial sentence that includes a term of imprisonment; that same defendant has subsequently appealed from a later order setting forth the final amount of restitution; and the Court of Appeals has consolidated the two appeals and decided them together. See, *e. g., United States* v. *Stevens*, *supra; United States* v. *Maung*, 267 F. 3d, at 1117; cf. *United States* v. *Cheal*, 389 F. 3d, at 51–53.

That the defendant can appeal from the earlier sentencing judgment makes sense, for otherwise the statutory 90-day restitution deadline, even when complied with, could delay appeals for up to 90 days. Defendants, that is, would be forced to wait three months before seeking review of their conviction when they could ordinarily do so within 14 days. See Fed. Rule App. Proc. 4(b). Nonetheless, in light of the fact that the interaction of restitution orders with appellate time limits could have consequences extending well beyond cases like the present case (where there was no appeal from the initial conviction and sentence), we simply note the strength of the arguments militating against the second step of petitioner's argument without deciding whether or when a party can, or must, appeal. We leave all such matters for another day.

The dissent, however, creates a rule that could adversely affect not just restitution, but other sentencing practices beyond the narrow circumstances presented here. Consider, for example, a judge who (currently lacking sufficient information) wishes to leave open, say, the amount of a fine, or a special condition of supervised release. In the dissent's view, the entry of any such judgment would immediately de-

prive the judge of the authority later to fill in that blank, in the absence of a statute specifically providing otherwise. See *post*, at 622–624 (opinion of ROBERTS, C. J.). Thus, the sentencing judge would either have to (1) forgo the specific dollar amount or potential condition, or (2) wait to enter any judgment until all of the relevant information is at hand. The former alternative would sometimes deprive judges of the power to enter components of a sentence they may consider essential. The latter alternative would require the defendant to wait—perhaps months—before taking an appeal.

As we have pointed out, our precedents do not currently place the sentencing judge in any such dilemma. See *supra*, at 611–612, 614–615. And we need not now depart from those precedents when *this* case does not require us to do so; when the issue has not been adequately briefed; when the lower court had no opportunity to consider the argument (which the petitioner may well have forfeited); and when the rule would foreclose the current practices of some district courts and unnecessarily cabin the discretion they properly exercise over scheduling and sentencing matters. Cf., *e. g.*, *Stevens*, *supra*, at 3; *Cheal*, *supra*, at 47 (illustrating district court practices).

Certainly there is no need to create this rule in the context of restitution, for provisions to which the dissent refers are silent about whether restitution can or cannot be ordered after an initial sentencing. See, *e. g.*, §§ 3551(b), (c) ("A sanction authorized by [criminal forfeiture and restitution statutes] may be imposed in addition to the [rest of the] sentence"); § 3663A(c)(1) (mandatory orders of restitution "shall apply in all sentencing proceedings [for specified offenses]"). And even on the dissent's theory, the statute elsewhere provides the necessary substantive authorization: "Notwithstanding any other provision of law, when sentencing a defendant convicted of [a specified] offense . . . , *the court shall order . . . that the defendant make restitution to the victim*

of the offense." § 3663A(a)(1) (emphasis added). The dissent cannot explain why a *separate* statutory provision regarding procedures as to when a "court shall set a date for the final determination of the victim's losses," § 3664(d)(5), automatically divests a court of this distinct substantive authority. While of course that provision does not "plainly" confer "power to act after sentencing," *post*, at 625 (emphasis deleted), neither does it "plainly" remove it or require that all sentencing matters be concluded at one point in time. (And the dissent's assertion, see *post*, at 626—that it uses the term "authority" not in its "jurisdictional" sense, but rather in the sense that a court lacks "authority" to "impose a sentence above the . . . maximum"—introduces a tenuous analogy that may well confuse this Court's precedents regarding the term "jurisdictional." See *supra*, at 610–611.)

In any event, unless one reads the relevant statute's 90-day deadline as an ironclad limit upon the judge's authority to make a final determination of the victim's losses, the statute before us itself provides adequate authority to do what the sentencing judge did here—essentially fill in an amount-related blank in a judgment that made clear that restitution was "applicable." App. 49 (boldface deleted). Since the sentencing judge's later order did not "correct" an "error" in the sentence, Rule 35 does not apply. Compare Fed. Rule Crim. Proc. 35(a) with *post*, at 622–623. Hence the dissent's claim that there is no *other* statute that creates authority (even were we to assume all else in its favor, which we do not) is merely to restate the question posed in this case, not to answer it.

Moreover, the dissent's reading creates a serious statutory anomaly. It reads the statute as permitting a sentencing judge to order restitution for a "victim" who "subsequently discovers further losses" a month, a year, or 10 years after entry of the original judgment, while at the same time depriving that judge of the power to award restitution to a victim whose "losses are not ascertainable" within 90 days.

Compare § 3664(d)(5) (first sentence) with § 3664(d)(5) (second sentence). How is that a sensible reading of a statute that makes restitution mandatory for victims?

Finally, petitioner asks us to apply the "rule of lenity" in favor of his reading of the statute. Dolan has not provided us with an example of an instance in which the "rule of lenity" has been applied to a statutory time provision in the criminal context. See *United States* v. *Wiltberger*, 5 Wheat. 76 (1820) (applying rule in interpreting substantive criminal statute); *Bifulco* v. *United States*, 447 U. S. 381, 387, 400 (1980) (applying rule in interpreting "penalties"). But, assuming for argument's sake that the rule might be so applied, and after considering the statute's text, structure, and purpose, we nonetheless cannot find a statutory ambiguity sufficiently "grievous" to warrant its application in this case. *Muscarello* v. *United States*, 524 U. S. 125, 139 (1998) (internal quotation marks omitted). See *Caron* v. *United States*, 524 U. S. 308, 316 (1998) (rejecting application of rule where the "ambiguous" reading "is an implausible reading of the congressional purpose").

For these reasons, the judgment of the Court of Appeals for the Tenth Circuit is

Affirmed.

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

The statute at issue in this case provides that "[i]f the victim's losses are not ascertainable [at least] 10 days prior to sentencing, . . . the court shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing." 18 U. S. C. § 3664(d)(5). Under the Court's view, failing to meet the 90-day deadline has no consequence whatever. The Court reads the statute as if it said "the court shall set a date for the final determination of the victim's losses, *at any time* after sentencing." I respectfully dissent.

I

In the absence of § 3664(d)(5), any order of restitution must be imposed at sentencing, if it is to be imposed at all. Restitution "may be imposed in addition to [a] sentence" of probation, fine, or imprisonment only if it is authorized under § 3556. See §§ 3551(b)–(c). Section 3556, in turn, authorizes courts to order restitution "*in imposing a sentence* on a defendant" (emphasis added), pursuant to yet other provisions requiring such orders to be made "*when sentencing* a defendant," §§ 3663(a)(1)(A), (c)(1), 3663A(a)(1) (emphasis added). The mandatory restitution provisions of § 3663A "apply in all *sentencing proceedings* for convictions of" certain crimes. § 3663A(c)(1) (emphasis added). And the court "at the time of sentencing" must "state in open court the reasons for its imposition of the particular sentence"—including its reasons for "not order[ing] restitution" if it fails to do so. § 3553(c).

These provisions authorize restitution orders *at* sentencing. They confer no authority to order restitution *after* sentencing has concluded. When Congress permits courts to impose criminal penalties at some time *other* than sentencing, it does so explicitly. See, *e. g.,* § 3552(b) (provisional sentence during a study period); § 3582(d) (authorizing certain penalties "in imposing a sentence . . . or at any time thereafter"); § 3583(e) (permitting extension of supervised release); §§ 4244(d)–(e) (provisional sentencing for the mentally ill); see also Fed. Rules Crim. Proc. 32.2(b)(2)(B), (4)(A) (presentencing forfeiture orders); cf. *Corey* v. *United States*, 375 U. S. 169 (1963) (appeals from provisional and final sentences authorized by law).

Once a sentence has been imposed, moreover, it is final, and the trial judge's authority to modify it is narrowly circumscribed. We have stated that "the trial courts had no such authority" prior to the adoption of Rule 35, *United States* v. *Addonizio*, 442 U. S. 178, 189, and n. 16 (1979), and

Congress has since revoked the broad authority to correct illegal sentences originally set forth in that Rule. See Sentencing Reform Act of 1984, Pub. L. 98–473, § 215(b), 98 Stat. 2015–2016; see also Historical Notes on 1984 Amendments to Rule 35, 18 U. S. C. A., p. 605 (2008). Today, an error may be corrected by the trial court only if it is "clear," and only within 14 days after the sentence is announced. Rules 35(a), (c). The Rule of Criminal Procedure allowing extensions of time expressly provides that "[t]he court may not extend the time to take any action under Rule 35, except as stated in that rule." Rule 45(b)(2). This Court has reiterated that time limits made binding under Rule 35 "may not be extended," *Addonizio, supra,* at 189, and that Rule 45(b)(2) creates "inflexible" "claim-processing rules," *Eberhart* v. *United States,* 546 U. S. 12, 19 (2005) (*per curiam*).

Thus, if the trial court fails to impose a mandatory term of imprisonment, see, *e. g.,* § 924(c)(1)(A), or a mandatory fine, see, *e. g.,* 21 U. S. C. § 844(a), or a mandatory order of restitution, see 18 U. S. C. § 3663A, the Government cannot simply ask it to impose the correct sentence later. If the error is clear, and raised within 14 days, it might be corrected under Rule 35. Otherwise, the Government must appeal, and seek resentencing on remand. §§ 3742(b)(1), (g).

Section 3664(d)(5) is a limited exception to these bedrock rules. It permits a trial court to go forward with sentencing while delaying any restitution order for up to 90 days. This provision is meaningful precisely because restitution must otherwise be ordered at sentencing, and because sentences are otherwise final unless properly corrected. If trial courts had power to amend their sentences at any time, § 3664(d)(5) would be unnecessary.

Here, however, the District Court failed to make use of its limited authority under § 3664(d)(5). Dolan was sentenced on July 30, 2007. The court declined to order restitution at that time or to set a date for a future restitution order.

App. 35, 39–40; see also *id.*, at 49.[1] The 90-day period elapsed on October 28. At no time did the Government seek timely relief, whether under Rule 35 or by appeal. Cf. *Corey*, *supra*, at 174; *Berman* v. *United States*, 302 U. S. 211, 212 (1937). Nor did it assert any claim that the deadline had been lawfully extended or equitably tolled, an issue that I agree is not before us, see *ante*, at 609, 617. But on April 24, 2008—269 days after sentencing, and after Dolan had already been released from prison—the District Court nonetheless ordered $104,649.78 in restitution. App. to Pet. for Cert. 32a, 47a.

I cannot see where that court obtained authority to add additional terms to Dolan's sentence. That is the step the Court misses when it searches for the "remedy" for a violation of § 3664(d)(5). *Ante*, at 607. The rule is that a trial court cannot alter a sentence after the time of sentencing. Section 3664(d)(5) is a limited exception to that rule. If the limits are exceeded the exception does not apply, and the general rule takes over—the sentence cannot be changed to add a restitution provision. Section 3664(d)(5) is self-executing: It grants authority subject to a deadline, and if the deadline is not met, the authority is no longer available.

The Court appears to reason that § 3664(d)(5) confers the authority to add a restitution provision for at least 90 days, and that once the camel's nose of some permitted delay sneaks under the tent, any further delay is permissible. *Ante*, at 609–610, 611. But that is not what § 3664(d)(5) says. It provides 90 days for a final determination of the victims' losses, not a free pass to impose restitution whenever the trial court gets around to it. The court had no more power to order restitution 269 days after sentencing than it did to order an additional term of imprisonment and send Dolan back to prison.

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[1] Whether that date must itself be set at sentencing is not before us. The order setting the date plainly cannot be entered 182 days after sentencing, as happened here. See App. 3–4.

II

A

To avoid this conclusion, the Court runs through a series of irrelevancies that cannot trump the clear statutory text. It notes, for example, that § 3663A provides that " '[*n*]*otwithstanding any other provision of law*, when sentencing a defendant convicted of [a specified] offense . . . , the court *shall* order . . . that the defendant make restitution to the victim of the offense.' " *Ante*, at 612 (quoting § 3663A(a)(1); emphasis in Court's opinion). But the issue before us is *when* restitution should be ordered, so the language the Court should underscore is "*when sentencing.*" This provision plainly confers no power to act *after* sentencing. Any such power attaches only by virtue of § 3663A(d), which incorporates the procedures of § 3664, including the limited 90-day exception. See also § 3556 ("The procedures under section 3664 shall apply to all orders of restitution under this section").

The Court puts greater emphasis on its reading of the statute's purpose, namely to provide restitution to victims of crime. Certainly that was a purpose Congress sought to promote. But "no legislation pursues its purposes at all costs," and "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*).

Congress had to balance against the interest in restitution the contrary interest in promptly determining the defendant's sentence. The balance struck was clearly set forth in the statute: determine the victim's losses by a date "not to exceed 90 days after sentencing." § 3664(d)(5). Whether or not that limit was "*primarily* designed to help victims of crime," *ante*, at 613, it does not cease to be law when invoked by defendants.

Nor can the Court find any support in the second sentence of § 3664(d)(5). See *ante*, at 620–621. That provision ad-

dresses a distinct issue—what to do about newly discovered losses—and sets a higher "good cause" standard. The fact that Congress struck the balance between restitution and finality differently in that context does not justify overriding the balance it struck here.

The Court also analogizes the 90-day limit to other provisions discussed in our precedents, most of which have nothing to do with the rights of criminal defendants (for whom procedural protections are of heightened importance), let alone the finality of criminal sentencing. The cited cases are said to establish that an official's "failure to meet [a] deadline" does not always deprive that official of "power to act beyond it." *Regions Hospital* v. *Shalala*, 522 U. S. 448, 459, n. 3 (1998). But the failure to comply with § 3664(d)(5) does not deprive anyone of anything: The trial court never had the general authority to alter sentences once imposed, in the way that the administrative agencies in the cited cases were said to have general regulatory authority. The trial court's authority to add a restitution provision to an otherwise final sentence was conferred by the very provision that limited that authority. Section 3664(d)(5) did not take away anything that might persist in the absence of § 3664(d)(5).[2]

Even more perplexing is the Court's suggestion that references to the authority of trial courts necessarily implicate questions of jurisdiction. *Ante*, at 620. To say that a court lacks authority to order belated restitution does not use "authority" in a jurisdictional sense, see *Arbaugh* v. *Y & H Corp.*, 546 U. S. 500, 511 (2006), but only in the same sense in which a court lacks "authority" to impose a sentence above the statutory maximum. Such action is an error of law, reversible on appeal, but it is not jurisdictional. As in *United*

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[2] *United States* v. *Montalvo-Murillo*, 495 U. S. 711 (1990), is equally inapposite: The statute in that case rested the lower court's authority on whether a bail hearing had been held at all (it had), whereas here the only statutory condition is whether the losses were determined within 90 days of sentencing (they were not).

Student Aid Funds, Inc. v. *Espinosa*, 559 U. S. 260, 271 (2010), compliance with § 3664(d)(5) is "not a limitation on the . . . court's jurisdiction," but it is a statutory "precondition to obtaining a [particular] order." Here that condition was not satisfied.

B

In the end, the Court does not appear to need § 3664(d)(5) at all. It instead suggests that we abandon the bedrock rules that sentences once imposed are final, and that the only exceptions are ones *Congress* chooses to allow (and Congress has allowed various ones). The Court instead proposes a *judicial* power to alter sentences, apparently at any time. But if a trial court can "leave open, say, the amount of a fine," *ante*, at 618, why not, say, the number of years? Thus, after a defendant like Dolan has served his entire sentence—and who knows how long after?—a court might still order additional imprisonment, additional restitution, an additional fine, or an additional condition of supervised release. See *ante*, at 618–619.

The Court cites no authority in support of such "fill in th[e] blank" sentencing, other than two cases implicated in the Circuit split below. *Ante*, at 619. Prior to the enactment of § 3664(d)(5), however, it was widely recognized that the requirement to impose restitution "when sentencing" meant that "[r]estitution must be determined *at the time* of sentencing," and could not be left open after sentencing had concluded. Federal Judicial Center, J. Wood, Guideline Sentencing: An Outline of Appellate Case Law on Selected Issues, p. 300 (Sept. 2002) (emphasis added; citing *United States* v. *Porter*, 41 F. 3d 68, 71 (CA2 1994); *United States* v. *Ramilo*, 986 F. 2d 333, 335–336 (CA9 1993); *United States* v. *Prendergast*, 979 F. 2d 1289, 1293 (CA8 1992); *United States* v. *Sasnett*, 925 F. 2d 392, 398–399 (CA11 1991)).

The Court finds Rule 35(a) inapplicable because the District Court was not "'correct[ing]'" a clear error in the sentence. *Ante*, at 620. True enough; but that is why the

Government should *lose*. The limitation of Rule 35(a) to clear errors, corrected within 14 days of sentencing, does not leave trial courts free to make *other* changes to sentences whenever they choose. Rule 35(a) only makes sense against a background rule that trial courts cannot change sentences at will.

The same is true of § 3552(b), which empowers a court that does not wish to delay sentencing but "desires more information than is otherwise available to it" to impose a provisional sentence during a 120-day study period. That statute would be largely unnecessary if a trial court could do the same by order.

In *Addonizio*, 442 U. S., at 189, we thought it noncontroversial that a sentence once imposed is final, subject to such exceptions as Congress has allowed. Contrary to the Court's suggestion, *ante*, at 619, Dolan invoked that principle both here and below. See, *e. g.*, Brief for Petitioner 13, 15–18, 20, 29, 33, and n. 14, 36, 48, and n. 19; Reply Brief for Petitioner 1, 5–8; Appellant's Opening Brief in No. 08–2104 (CA10), pp. 12–13 (citing *United States* v. *Blackwell*, 81 F. 3d 945, 949 (CA10 1996), for the proposition that a "district court does not have inherent authority to modify a sentence"). That the Court finds it necessary to question that principle—indeed, to accuse this dissent of "creat[ing] th[e] rule," *ante*, at 619—highlights how misguided its decision is.

To counter the effects of its opinion and to restore some semblance of finality to sentencing, the Court advises defendants to seek mandamus—a remedy we have described as "drastic and extraordinary," "reserved for really extraordinary causes," and one of "the most potent weapons in the judicial arsenal." *Cheney* v. *United States Dist. Court for D. C.*, 542 U. S. 367, 380 (2004) (internal quotation marks omitted). What an odd procedure the Court contemplates! A defendant, who should have received a harsher sentence, is to invoke the drastic and extraordinary remedy of mandamus, to make sure he gets it. That is not how sentencing

errors are corrected: If the trial court fails to order the appropriate sentence, the Government must appeal to correct it. It did not do so here, and that ends the case. *Greenlaw* v. *United States*, 554 U. S. 237, 244–245 (2008).

Moreover, the Court's mandamus remedy only helps defendants who know they are in danger of an increased sentence. So the Court imposes another rule, namely that the trial court must explicitly "leave open" the precise sentence at the time of sentencing, *ante*, at 618, or must make clear, "prior to the deadline's expiration[,] that it *would* order restitution" at some indeterminate time, *ante*, at 608 (emphasis added). But what if the court does not make the crucial announcement at sentencing, or "prior to the deadline's expiration"? Are these judicially created deadlines to be taken more seriously than those imposed by Congress? Or are we just back at the beginning, asking what the "remedy" should be for failing to meet the relevant deadline?

The Court's suggestion to require notice of intent to augment the sentence at *some* future date may be a good idea. But an even better one might be to set a particular date—say, 90 days after sentencing—on which the parties could base their expectations. That was Congress's choice, and it should be good enough for us.

* * *

The District Court in this case failed to order mandatory restitution in sentencing Dolan. That was wrong. But two wrongs do not make a right, and that mistake gave the court no authority to amend Dolan's sentence later, beyond the 90 days allowed to add a sentencing term requiring restitution.

I am mindful of the fact that when a trial court blunders, the victims may suffer. Consequences like that are the unavoidable result of having a system of rules. If no one appeals a mistaken ruling on the amount of restitution (or whether restitution applies at all), finality will necessarily obstruct the victims' full recovery.

It is up to Congress to balance the competing interests in recovery and finality. Where—as here—it has done so clearly, the "judicial inquiry is complete." *Barnhart* v. *Sigmon Coal Co.*, 534 U. S. 438, 462 (2002) (internal quotation marks omitted).

Syllabus

HOLLAND *v.* FLORIDA

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

No. 09–5327. Argued March 1, 2010—Decided June 14, 2010

Petitioner Holland was convicted of first-degree murder and sentenced to death in Florida state court. After the State Supreme Court affirmed on direct appeal and denied collateral relief, Holland filed a *pro se* federal habeas corpus petition, which was approximately five weeks late under the 1-year statute of limitations set forth in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U. S. C. § 2244(d). The record facts reveal, *inter alia*, that Holland's court-appointed attorney, Bradley Collins, had failed to file a timely federal petition, despite Holland's many letters emphasizing the importance of doing so; that Collins apparently did not do the research necessary to find out the proper filing date, despite the fact that Holland had identified the applicable legal rules for him; that Collins failed to inform Holland in a timely manner that the State Supreme Court had decided his case, despite Holland's many pleas for that information; and that Collins failed to communicate with Holland over a period of years, despite Holland's pleas for responses to his letters. Meanwhile, Holland repeatedly requested that the state courts and the Florida bar remove Collins from his case. Based on these and other record facts, Holland asked the Federal District Court to toll the AEDPA limitations period for equitable reasons. It refused, holding that he had not demonstrated the due diligence necessary to invoke equitable tolling. Affirming, the Eleventh Circuit held that, regardless of diligence, Holland's case did not constitute "extraordinary circumstances." Specifically, it held that when a petitioner seeks to excuse a late filing based on his attorney's unprofessional conduct, that conduct, even if grossly negligent, cannot justify equitable tolling absent proof of bad faith, dishonesty, divided loyalty, mental impairment, or the like.

Held:

1. Section 2244(d), the AEDPA statute of limitations, is subject to equitable tolling in appropriate cases. Pp. 645–652.

(a) Several considerations support the Court's holding. First, because AEDPA's "statute of limitations defense . . . is not 'jurisdictional,'" *Day* v. *McDonough*, 547 U. S. 198, 205, 213, it is subject to a "rebuttable presumption" in *favor* "of equitable tolling," *Irwin* v. *Department of Veterans Affairs*, 498 U. S. 89, 95–96. That presump-

tion's strength is reinforced here by the fact that "equitable principles" have traditionally "governed" substantive habeas law. *Munaf* v. *Geren*, 553 U. S. 674, 693, and the fact that Congress enacted AEDPA after *Irwin* and therefore was likely aware that courts, when interpreting AEDPA's timing provisions, would apply the presumption, see, *e. g.*, *Merck & Co.* v. *Reynolds*, 559 U. S. 633, 648. Second, § 2244(d) differs significantly from the statutes at issue in *United States* v. *Brockamp*, 519 U. S. 347, 350–352, and *United States* v. *Beggerly*, 524 U. S. 38, 49, in which the Court held that *Irwin*'s presumption had been overcome. For example, unlike the subject matters at issue in those cases—tax collection and land claims—AEDPA's subject matter, habeas corpus, pertains to an area of the law where equity finds a comfortable home. See *Munaf*, *supra*, at 693. *Brockamp*, *supra*, at 352, distinguished. Moreover, AEDPA's limitations period is neither unusually generous nor unusually complex. Finally, the Court disagrees with respondent's argument that equitable tolling undermines AEDPA's basic purpose of eliminating delays in the federal habeas review process, see, *e. g.*, *Day*, *supra*, at 205–206. AEDPA seeks to do so without undermining basic habeas corpus principles and by harmonizing the statute with prior law, under which a petition's timeliness was always determined under equitable principles. See, *e. g.*, *Slack* v. *McDaniel*, 529 U. S. 473, 483. Such harmonization, along with the Great Writ's importance as the only writ explicitly protected by the Constitution, counsels hesitancy before interpreting AEDPA's silence on equitable tolling as congressional intent to close courthouse doors that a strong equitable claim would keep open. Pp. 645–649.

(b) The Eleventh Circuit's *per se* standard is too rigid. A "petitioner" is "entitled to equitable tolling" if he shows "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way" and prevented timely filing. *Pace* v. *DiGuglielmo*, 544 U. S. 408, 418. Such "extraordinary circumstances" are not limited to those that satisfy the Eleventh Circuit's test. Courts must often "exercise [their] equity powers . . . on a case-by-case basis," *Baggett* v. *Bullitt*, 377 U. S. 360, 375, demonstrating "flexibility" and avoiding "mechanical rules," *Holmberg* v. *Armbrecht*, 327 U. S. 392, 396, in order to "relieve hardships . . . aris[ing] from a hard and fast adherence" to more absolute legal rules, *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U. S. 238, 248. The Court's cases recognize that equity courts can and do draw upon decisions made in other similar cases for guidance, exercising judgment in light of precedent, but with awareness of the fact that specific circumstances, often hard to predict, could warrant special treatment in an appropriate case. *Coleman* v. *Thompson*, 501 U. S. 722, 753, distinguished. No pre-existing rule of law or precedent demands the Eleventh Circuit's rule. That rule is difficult to reconcile

with more general equitable principles in that it fails to recognize that, at least sometimes, an attorney's unprofessional conduct can be so egregious as to create an extraordinary circumstance warranting equitable tolling, as several other federal courts have specifically held. Although equitable tolling is not warranted for "a garden variety claim of excusable neglect," *Irwin*, *supra*, at 96, this case presents far more serious instances of attorney misconduct than that. Pp. 649–652.

2. While the record facts suggest that this case may well present "extraordinary" circumstances, the Court does not state its conclusion absolutely because more proceedings may be necessary. The District Court incorrectly rested its ruling not on a lack of such circumstances, but on a lack of diligence. Here, Holland diligently pursued his rights by writing Collins numerous letters seeking crucial information and providing direction, by repeatedly requesting that Collins be removed from his case, and by filing his own *pro se* habeas petition on the day he learned his AEDPA filing period had expired. Because the District Court erroneously concluded that Holland was not diligent, and because the Court of Appeals erroneously relied on an overly rigid *per se* approach, no lower court has yet considered whether the facts of this case indeed constitute extraordinary circumstances sufficient to warrant equitable tolling. The Eleventh Circuit may determine on remand whether such tolling is appropriate, or whether an evidentiary hearing and other proceedings might indicate that the State should prevail. Pp. 652–654.

539 F. 3d 1334, reversed and remanded.

BREYER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and STEVENS, KENNEDY, GINSBURG, and SOTOMAYOR, JJ., joined. ALITO, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 654. SCALIA, J., filed a dissenting opinion, in which THOMAS, J., joined as to all but Part I, *post*, p. 660.

Todd G. Scher, by appointment of the Court, 558 U. S. 1075, argued the cause and filed briefs for petitioner.

Scott D. Makar, Solicitor General of Florida, argued the cause for respondent. With him on the brief were *Bill McCollum*, Attorney General, *Louis F. Hubener*, Chief Deputy Solicitor General, *Craig D. Feiser*, *Timothy D. Osterhaus*, *Courtney Brewer*, and *Ronald A. Lathan*, Deputy Solicitors General, *Carolyn M. Snurkowski*, Assistant Deputy Attorney General, *Candance M. Sabella*, Chief Assistant Attorney

General, and *Sandra S. Jaggard* and *Lisa-Marie Lerner*, Assistant Attorneys General.*

JUSTICE BREYER delivered the opinion of the Court.

We here decide that the timeliness provision in the federal habeas corpus statute is subject to equitable tolling. See Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U. S. C. § 2244(d). We also consider its application in this case. In the Court of Appeals' view, when a petitioner seeks to excuse a late filing on the basis of his attorney's unprofessional conduct, that conduct, even if it is "negligent" or "grossly negligent," cannot "rise to the level of egregious attorney misconduct" that would warrant equitable tolling unless the petitioner offers "proof of bad faith, dishonesty, divided loyalty, mental impairment or so forth." 539 F. 3d 1334, 1339 (CA11 2008) *(per curiam)*. In our view, this standard is too rigid. See *Irwin* v. *Department of Vet-*

**Larry Yackle*, *Steven R. Shapiro*, *John Holdridge*, *Brian Stull*, *Randall C. Marshall*, and *Maria Kayanan* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the State of Texas et al. by *James C. Ho*, Solicitor General of Texas, *Greg Abbott*, Attorney General, *C. Andrew Weber*, First Assistant Attorney General, *Eric J. R. Nichols*, Deputy Attorney General, *Edward L. Marshall*, Assistant Attorney General, and *James P. Sullivan*, Assistant Solicitor General, and by the Attorneys General for their respective States as follows: *Troy King* of Alabama, *John W. Suthers* of Colorado, *Joseph R. Biden III* of Delaware, *Mark J. Bennett* of Hawaii, *Lawrence G. Wasden* of Idaho, *Lisa Madigan* of Illinois, *Gregory F. Zoeller* of Indiana, *Tom Miller* of Iowa, *Steve Six* of Kansas, *Jack Conway* of Kentucky, *James D. "Buddy" Caldwell* of Louisiana, *Chris Koster* of Missouri, *Jon Bruning* of Nebraska, *Catherine Cortez Masto* of Nevada, *Gary K. King* of New Mexico, *Thomas W. Corbett, Jr.*, of Pennsylvania, *Marty J. Jackley* of South Dakota, *Robert E. Cooper, Jr.*, of Tennessee, *Mark L. Shurtleff* of Utah, *Robert M. McKenna* of Washington, and *Bruce A. Salzburg* of Wyoming; and for the Criminal Justice Legal Foundation by *Kent S. Scheidegger*.

Briefs of *amici curiae* were filed for Eleven Legal Historians by *William F. Sheehan;* and for Legal Ethics Professors et al. by *Lawrence J. Fox*, *pro se*, *William L. Carr*, and *Susan D. Reece Martyn*, *pro se*.

erans Affairs, 498 U. S. 89, 96 (1990); see also *Lawrence* v. *Florida*, 549 U. S. 327, 336 (2007). We therefore reverse the judgment of the Court of Appeals and remand for further proceedings.

I

AEDPA states that "[a] 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court." § 2244(d)(1). It also says that "[t]he time during which a properly filed application for State post-conviction . . . review" is "pending shall not be counted" against the 1-year period. § 2244(d)(2).

On January 19, 2006, Albert Holland filed a *pro se* habeas corpus petition in the Federal District Court for the Southern District of Florida. Both Holland (the petitioner) and the State of Florida (the respondent) agree that, unless equitably tolled, the statutory limitations period applicable to Holland's petition expired approximately five weeks before the petition was filed. See Brief for Respondent 9, and n. 7; Brief for Petitioner 5, and n. 4. Holland asked the District Court to toll the limitations period for equitable reasons. We shall set forth in some detail the record facts that underlie Holland's claim.

A

In 1997, Holland was convicted of first-degree murder and sentenced to death. The Florida Supreme Court affirmed that judgment. *Holland* v. *State*, 773 So. 2d 1065 (2000). On *October 1, 2001*, this Court denied Holland's petition for certiorari. 534 U. S. 834. And on that date—the date that our denial of the petition ended further direct review of Holland's conviction—the 1-year AEDPA limitations clock began to run. See 28 U. S. C. § 2244(d)(1)(A); *Jimenez* v. *Quarterman*, 555 U. S. 113, 119 (2009).

Thirty-seven days later, on *November 7, 2001*, Florida appointed attorney Bradley Collins to represent Holland in all

state and federal postconviction proceedings. Cf. Fla. Stat. §§ 27.710, 27.711(2) (2007). By *September 19, 2002*—316 days after his appointment and 12 days before the 1-year AEDPA limitations period expired—Collins, acting on Holland's behalf, filed a motion for postconviction relief in the state trial court. Cf. Brief for Respondent 9, n. 7. That filing automatically stopped the running of the AEDPA limitations period, § 2244(d)(2), with, as we have said, 12 days left on the clock.

For the next three years, Holland's petition remained pending in the state courts. During that time, Holland wrote Collins letters asking him to make certain that all of his claims would be preserved for any subsequent federal habeas corpus review. Collins wrote back, stating, "I would like to reassure you that we are aware of state time-limitations and federal exhaustion requirements." App. 55. He also said that he would "presen[t] . . . to the . . . federal courts" any of Holland's claims that the state courts denied. *Ibid.* In a second letter Collins added, "should your Motion for Post-Conviction Relief be denied" by the state courts, "your state habeas corpus claims will then be ripe for presentation in a petition for writ of habeas corpus in federal court." *Id.*, at 61.

In mid-May 2003, the state trial court denied Holland relief, and Collins appealed that denial to the Florida Supreme Court. Almost two years later, in February 2005, the Florida Supreme Court heard oral argument in the case. See 539 F. 3d, at 1337. But during that 2-year period, relations between Collins and Holland began to break down. Indeed, between April 2003 and January 2006, Collins communicated with Holland only three times—each time by letter. See No. 1:06–cv–20182–PAS (SD Fla., Apr. 27, 2007), p. 7, n. 6 (hereinafter District Court opinion), App. 91, n. 6.

Holland, unhappy with this lack of communication, twice wrote to the Florida Supreme Court, asking it to remove Collins from his case. In the second letter, filed on June 17,

2004, he said that he and Collins had experienced "a complete breakdown in communication." App. 160. Holland informed the court that Collins had "not kept [him] updated on the status of [his] capital case" and that Holland had "not seen or spoken to" Collins "since April 2003." *Id.*, at 150. He wrote, "Mr. Collins has abandoned [me]" and said, "[I have] no idea what is going on with [my] capital case on appeal." *Id.*, at 152. He added that "Collins has never made any reasonable effort to establish any relationship of trust or confidence with [me]," *id.*, at 155, and stated that he "does not trust" or have "any confidence in Mr. Collin's ability to represent [him]," *id.*, at 152. Holland concluded by asking that Collins be "dismissed (removed) off his capital case" or that he be given a hearing in order to demonstrate Collins' deficiencies. *Id.*, at 155, 161. The State responded that Holland could not file any *pro se* papers with the court while he was represented by counsel, including papers seeking new counsel. *Id.*, at 42–45. The Florida Supreme Court agreed and denied Holland's requests. *Id.*, at 46.

During this same period Holland wrote various letters to the Clerk of the Florida Supreme Court. In the last of these he wrote, "[I]f I had a competent, conflict-free, postconviction, appellate attorney representing me, I would not have to write you this letter. I'm not trying to get on your nerves. I just would like to know *exactly* what is happening with my case on appeal to the Supreme Court of Florida." *Id.*, at 147. During that same time period, Holland also filed a complaint against Collins with the Florida Bar Association, but the complaint was denied. *Id.*, at 65–67.

Collins argued Holland's appeal before the Florida Supreme Court on February 10, 2005. 539 F. 3d, at 1337. Shortly thereafter, Holland wrote to Collins emphasizing the importance of filing a timely petition for habeas corpus in federal court once the Florida Supreme Court issued its ruling. Specifically, on March 3, 2005, Holland wrote:

"Dear Mr. Collins, P. A.:

> "How are you? Fine I hope.
>
> "I write this letter to ask that you please write me back, as soon as possible to let me know what the status of my case is on appeal to the Supreme Court of Florida.
>
> "If the Florida Supreme Court denies my [postconviction] and State Habeas Corpus appeals, *please file my 28 U. S. C. 2254 writ of Habeas Corpus petition, before my deadline to file it runs out (expires).*
>
> "Thank you very much.
>
> "Please have a nice day." App. 210 (emphasis added).

Collins did not answer this letter.

On June 15, 2005, Holland wrote again:

> "Dear Mr. Collins:
>
> "How are you? Fine I hope.
>
> "On March 3, 2005 I wrote you a letter, asking that you let me know the status of my case on appeal to the Supreme Court of Florida.
>
> "Also, *have you begun preparing my 28 U. S. C. § 2254 writ of Habeas Corpus petition? Please let me know, as soon as possible.*
>
> *"Thank you."* *Id.*, at 212 (emphasis added).

But again, Collins did not reply.

Five months later, in November 2005, the Florida Supreme Court affirmed the lower court decision denying Holland relief. *Holland* v. *State*, 916 So. 2d 750 *(per curiam)*. Three weeks after that, on *December 1, 2005*, the court issued its mandate, making its decision final. 539 F. 3d, at 1337. At that point, the AEDPA federal habeas clock again began to tick—with 12 days left on the 1-year meter. See *Coates* v. *Byrd*, 211 F. 3d 1225 (CA11 2000) *(per curiam)* (AEDPA clock restarts when state court completes postconviction review); *Lawrence*, 549 U. S. 327 (same). Twelve days later, on *December 13, 2005*, Holland's AEDPA time limit expired.

B

Four weeks after the AEDPA time limit expired, on January 9, 2006, Holland, still unaware of the Florida Supreme Court ruling issued in his case two months earlier, wrote Collins a third letter:

> "Dear Mr. Bradley M. Collins:
>
> "How are you? Fine I hope.
>
> "I write this letter to ask that you please let me know the status of my appeals before the Supreme Court of Florida. Have my appeals been decided yet?
>
> "Please send me the [necessary information] . . . so that I can determine when the deadline will be to file my 28 U. S. C. Rule 2254 Federal Habeas Corpus Petition, in accordance with all United States Supreme Court and Eleventh Circuit case law and applicable 'Antiterrorism and Effective Death Penalty Act,' if my appeals before the Supreme Court of Florida are denied.
>
> "Please be advised that I want to preserve my privilege to federal review of all of my state convictions and sentences.
>
> "Mr. Collins, would you please also inform me, as to which United States District Court my 28 U. S. C. Rule 2254 Federal Habeas Corpus Petition will have to be timely filed in and that court's address?
>
> "Thank you very much." App. 214.

Collins did not answer.

Nine days later, on January 18, 2006, Holland, working in the prison library, learned for the first time that the Florida Supreme Court had issued a final determination in his case and that its mandate had issued—five weeks prior. 539 F. 3d, at 1337. He immediately wrote out his own *pro se* federal habeas petition and mailed it to the Federal District Court for the Southern District of Florida the next day. *Ibid.* The petition begins by stating,

> "Comes now Albert R. Holland, Jr., a Florida death row inmate and states that court appointed counsel has failed to undertake timely action to seek Federal Review in my case by filing a 28 U. S. C. Rule 2254 Petition for Writ of Habeas Corpus on my behalf." App. 181.

It then describes the various constitutional claims that Holland hoped to assert in federal court.

The same day that he mailed that petition, Holland received a letter from Collins telling him that Collins intended to file a petition for certiorari in this Court from the State Supreme Court's most recent ruling. Holland answered immediately:

> "Dear Mr. Bradley M. Collins:
>
> . . . . .
>
> "Since recently, the Supreme Court of Florida has denied my [postconviction] and state writ of Habeas Corpus Petition. I am left to understand that you are planning to seek certiorari on these matters.
>
> "It's my understanding that the AEDPA time limitations is not tolled during discretionary appellate reviews, such as certiorari applications resulting from denial of state post conviction proceedings.
>
> "Therefore, I advise you *not* to file certiorari if doing so affects or jeopardizes my one year *grace* period as prescribed by the AEDPA.
>
> "Thank you very much." *Id.*, at 216 (some emphasis deleted).

Holland was right about the law. See *Coates*, *supra*, at 1226–1227 (AEDPA not tolled during pendency of petition for certiorari from judgment denying state postconviction review); accord, *Lawrence* v. *Florida*, 421 F. 3d 1221, 1225 (CA11 2005), aff'd, 549 U. S., at 331–336.

On January 26, 2006, Holland tried to call Collins from prison. But he called collect and Collins' office would not accept the call. App. 218. Five days later, Collins wrote to

Holland and told him for the very first time that, as Collins understood AEDPA law, the limitations period applicable to Holland's federal habeas application had in fact expired in 2000—*before* Collins had begun to represent Holland. Specifically, Collins wrote:

> "Dear Mr. Holland:
>
> "I am in receipt of your letter dated January 20, 2006 concerning operation of AEDPA time limitations. One hurdle in our upcoming efforts at obtaining federal habeas corpus relief will be that the one-year statutory time frame for filing such a petition began to run after the case was affirmed on October 5, 2000 [when your] Judgment and Sentence . . . were affirmed by the Florida Supreme Court. However, it was not until November 7, 2001, that I received the Order appointing me to the case. As you can see, *I was appointed about a year after your case became final*. . . .
>
> "[T]he AEDPA time-period [thus] had run before my appointment and therefore before your [postconviction] motion was filed." *Id.*, at 78–79 (emphasis added).

Collins was wrong about the law. As we have said, Holland's 1-year limitations period did not begin to run until *this* Court denied Holland's petition for certiorari from the state courts' denial of relief on direct review, which occurred on October 1, 2001. See 28 U. S. C. § 2244(d)(1)(A); *Jimenez*, 555 U. S., at 119; *Bond* v. *Moore*, 309 F. 3d 770, 774 (CA11 2002). And when Collins was appointed (on November 7, 2001) the AEDPA clock therefore had 328 days left to go.

Holland immediately wrote back to Collins, pointing this out.

> "Dear Mr. Collins:
>
> "I received your letter dated January 31, 2006. You are incorrect in stating that 'the one-year statutory time frame for filing my 2254 petition began to run after my case was affirmed on October 5, 2000, by the Florida

> Supreme Court.' As stated on page three of [the recently filed] Petition for a writ of certiorari, October 1, 2001 is when the United States Supreme Court denied my initial petition for writ of certiorari and that is when my case became final. That meant that the time would be tolled once I filed my [postconviction] motion in the trial court.
>
> "Also, Mr. Collins you never told me that my time ran out (expired). I told you to timely file my 28 U. S. C. 2254 Habeas Corpus Petition before the deadline, so that I would not be time-barred.
>
> "You never informed me of oral arguments or of the Supreme Court of Florida's November 10, 2005 decision denying my postconviction appeals. You never kept me informed about the status of my case, although you told me that you would immediately inform me of the court's decision as soon as you heard anything.
>
> "Mr. Collins, I filed a motion on January 19, 2006 [in federal court] to preserve my rights, because I did not want to be time-barred. Have you heard anything about the aforesaid motion? Do you know what the status of aforesaid motion is?
>
> "Mr. Collins, please file my 2254 Habeas Petition immediately. Please do not wait any longer, even though it will be untimely filed at least it will be filed without wasting anymore time. (valuable time).
>
> "Again, please file my 2254 Petition at once.
>
> "Your letter is the first time that you have ever mentioned anything to me about my time had run out, before you were appointed to represent me, and that my one-year started to run on October 5, 2000.
>
> "Please find out the status of my motion that I filed on January 19, 2006 and let me know.
>
> "Thank you very much." App. 222–223.

Collins did not answer this letter. Nor did he file a federal habeas petition as Holland requested.

On March 1, 2006, Holland filed another complaint against Collins with the Florida Bar Association. See Record, Doc. 41, Exh. 1, p. 8. This time the bar asked Collins to respond, which he did, through his own attorney, on March 21. *Id.*, at 2. And the very next day, over three months after Holland's AEDPA statute of limitations had expired, Collins mailed a proposed federal habeas petition to Holland, asking him to review it. See *id.*, Doc. 20, Exh. W.

But by that point Holland had already filed a *pro se* motion in the District Court asking that Collins be dismissed as his attorney. App. 192. The State responded to that request by arguing once again that Holland could not file a *pro se* motion seeking to have Collins removed while he was represented by counsel, *i. e.*, represented by Collins. See *id.*, at 47–51. But this time the court considered Holland's motion, permitted Collins to withdraw from the case, and appointed a new lawyer for Holland. See Record, Docs. 9–10, 17–18, 22. And it also received briefing on whether the circumstances of the case justified the equitable tolling of the AEDPA limitations period for a sufficient period of time (approximately five weeks) to make Holland's petition timely.

C

After considering the briefs, the Federal District Court held that the facts did not warrant equitable tolling and that consequently Holland's petition was untimely. The court, noting that Collins had prepared numerous filings on Holland's behalf in the state courts, and suggesting that Holland was a difficult client, intimated, but did not hold, that Collins' professional conduct in the case was at worst merely "negligent." See District Court opinion 7–8, App. 90–93. But the court rested its holding on an alternative rationale: It wrote that, even if Collins' "behavior could be characterized as an 'extraordinary circumstance,'" Holland "did not seek any help from the court system to find out the date [the] mandate issued denying his state habeas petition, nor

did he seek aid from 'outside supporters.'" *Id.*, at 8, App. 92. Hence, the court held, Holland did not "demonstrate" the "due diligence" necessary to invoke "equitable tolling." *Ibid.*

On appeal, the Eleventh Circuit agreed with the District Court that Holland's habeas petition was untimely. The Court of Appeals first agreed with Holland that "'[e]quitable tolling can be applied to . . . AEDPA's statutory deadline.'" 539 F. 3d, at 1338 (quoting *Helton* v. *Secretary for Dept. of Corrections*, 259 F. 3d 1310, 1312 (CA11 2001)). But it also held that equitable tolling could not be applied in a case, like Holland's, that involves no more than "[p]ure professional negligence" on the part of a petitioner's attorney because such behavior can never constitute an "extraordinary circumstance." 539 F. 3d, at 1339. The court wrote:

> "We will assume that Collins's alleged conduct is negligent, even grossly negligent. But in our view, no allegation of lawyer negligence or of failure to meet a lawyer's standard of care—in the absence of an allegation and proof of bad faith, dishonesty, divided loyalty, mental impairment or so forth on the lawyer's part—can rise to the level of egregious attorney misconduct that would entitle Petitioner to equitable tolling." *Ibid.*

Holland made "no allegation" that Collins had made a "knowing or reckless factual misrepresentation," or that he exhibited "dishonesty," "divided loyalty," or "mental impairment." *Ibid.* Hence, the court held, equitable tolling was *per se* inapplicable to Holland's habeas petition. The court did not address the District Court's ruling with respect to Holland's diligence.

Holland petitioned for certiorari. Because the Court of Appeals' application of the equitable tolling doctrine to instances of professional misconduct conflicts with the approach taken by other Circuits, we granted the petition. Compare 539 F. 3d 1334 (case below) with, *e. g.*, *Baldayaque*

v. *United States*, 338 F. 3d 145, 152–153 (CA2 2003) (applying a less categorical approach); *Spitsyn* v. *Moore*, 345 F. 3d 796, 801–802 (CA9 2003) (same).

II

We have not decided whether AEDPA's statutory limitations period may be tolled for equitable reasons. See *Lawrence*, 549 U. S., at 336; *Pace* v. *DiGuglielmo*, 544 U. S. 408, 418, n. 8 (2005). Now, like all 11 Courts of Appeals that have considered the question, we hold that § 2244(d) is subject to equitable tolling in appropriate cases. See *Neverson* v. *Farquharson*, 366 F. 3d 32, 41 (CA1 2004); *Smith* v. *McGinnis*, 208 F. 3d 13, 17 (CA2 2000) *(per curiam); Miller* v. *New Jersey Dept. of Corrections*, 145 F. 3d 616, 617 (CA3 1998); *Harris* v. *Hutchinson*, 209 F. 3d 325, 329–330 (CA4 2000); *Davis* v. *Johnson*, 158 F. 3d 806, 810 (CA5 1998); *McClendon* v. *Sherman*, 329 F. 3d 490, 492 (CA6 2003); *Taliani* v. *Chrans*, 189 F. 3d 597, 598 (CA7 1999); *Moore* v. *United States*, 173 F. 3d 1131, 1134 (CA8 1999); *Calderon* v. *United States Dist. Ct. for Central Dist. of Cal.*, 128 F. 3d 1283, 1289 (CA9 1997); *Miller* v. *Marr*, 141 F. 3d 976, 978 (CA10 1998); *Sandvik* v. *United States*, 177 F. 3d 1269, 1272 (CA11 1999) *(per curiam)*.

We base our conclusion on the following considerations. First, the AEDPA "statute of limitations defense . . . is not 'jurisdictional.'" *Day* v. *McDonough*, 547 U. S. 198, 205 (2006). It does not set forth "an inflexible rule requiring dismissal whenever" its "clock has run." *Id.*, at 208. See also *id.*, at 213 (SCALIA, J., dissenting) ("We have repeatedly stated that the enactment of time-limitation periods such as that in § 2244(d), without further elaboration, produces defenses that are nonjurisdictional and thus subject to waiver and forfeiture" (citing cases)); Brief for Respondent 22 (describing AEDPA limitations period as "non-jurisdictional").

We have previously made clear that a nonjurisdictional federal statute of limitations is normally subject to a "rebut-

table presumption" in *favor* "of equitable tolling." *Irwin*, 498 U. S., at 95–96; see also *Young* v. *United States*, 535 U. S. 43, 49 (2002) ("It is hornbook law that limitations periods are 'customarily subject to "equitable tolling"'" (quoting *Irwin*, *supra*, at 95)).

In the case of AEDPA, the presumption's strength is reinforced by the fact that "'equitable principles'" have traditionally "'governed'" the substantive law of habeas corpus, *Munaf* v. *Geren*, 553 U. S. 674, 693 (2008), for we will "not construe a statute to displace courts' traditional equitable authority absent the 'clearest command,'" *Miller* v. *French*, 530 U. S. 327, 340 (2000) (quoting *Califano* v. *Yamasaki*, 442 U. S. 682, 705 (1979)). The presumption's strength is yet further reinforced by the fact that Congress enacted AEDPA after this Court decided *Irwin* and therefore was likely aware that courts, when interpreting AEDPA's timing provisions, would apply the presumption. See, *e. g.*, *Merck & Co.* v. *Reynolds*, 559 U. S. 633, 648 (2010).

Second, the statute here differs significantly from the statutes at issue in *United States* v. *Brockamp*, 519 U. S. 347 (1997), and *United States* v. *Beggerly*, 524 U. S. 38 (1998), two cases in which we held that *Irwin*'s presumption had been overcome. In *Brockamp*, we interpreted a statute of limitations that was silent on the question of equitable tolling as foreclosing application of that doctrine. But in doing so we emphasized that the statute at issue (1) "se[t] forth its time limitations in unusually emphatic form"; (2) used "highly detailed" and "technical" language "that, linguistically speaking, cannot easily be read as containing implicit exceptions"; (3) "reiterate[d] its limitations several times in several different ways"; (4) related to an "underlying subject matter," nationwide tax collection, with respect to which the practical consequences of permitting tolling would have been substantial; and (5) would, if tolled, "require tolling, not only procedural limitations, but also substantive limitations on the amount of recovery—a kind of tolling for which we . . . found

no direct precedent." 519 U. S., at 350–352. And in *Beggerly* we held that *Irwin*'s presumption was overcome where (1) the 12-year statute of limitations at issue was "unusually generous" and (2) the underlying claim "deal[t] with ownership of land" and thereby implicated landowners' need to "know with certainty what their rights are, and the period during which those rights may be subject to challenge." 524 U. S., at 48–49.

By way of contrast, AEDPA's statute of limitations, unlike the statute at issue in *Brockamp*, does not contain language that is "unusually emphatic," nor does it "reiterat[e]" its time limitation. Neither would application of equitable tolling here affect the "substance" of a petitioner's claim. Moreover, in contrast to the 12-year limitations period at issue in *Beggerly*, AEDPA's limitations period is not particularly long. And unlike the subject matters at issue in both *Brockamp* and *Beggerly*—tax collection and land claims—AEDPA's subject matter, habeas corpus, pertains to an area of the law where equity finds a comfortable home. See *Munaf*, *supra*, at 693. In short, AEDPA's 1-year limit reads like an ordinary, run-of-the-mill statute of limitations. See *Calderon*, *supra*, at 1288.

Respondent, citing *Brockamp*, argues that AEDPA should be interpreted to foreclose equitable tolling because the statute sets forth "explicit exceptions to its basic time limits" that do "not include 'equitable tolling.'" 519 U. S., at 351; see Brief for Respondent 27. The statute does contain multiple provisions relating to the events that *trigger* its running. See § 2244(d)(1); *Clay* v. *United States*, 537 U. S. 522, 529 (2003); see also *Cada* v. *Baxter Healthcare Corp.*, 920 F. 2d 446, 450 (CA7 1990) ("We must . . . distinguish between the *accrual* of the plaintiff's claim and the *tolling* of the statute of limitations . . . "); *Wims* v. *United States*, 225 F. 3d 186, 190 (CA2 2000) (same); *Wolin* v. *Smith Barney Inc.*, 83 F. 3d 847, 852 (CA7 1996) (same). And we concede that it is silent as to equitable tolling while containing one provision

that expressly refers to a different kind of tolling. See § 2244(d)(2) (stating that "[t]he time during which" a petitioner has a pending request for state postconviction relief "shall not be counted toward" his "period of limitation" under AEDPA). But the fact that Congress *expressly* referred to tolling during state collateral review proceedings is easily explained without rebutting the presumption in favor of equitable tolling. A petitioner cannot bring a federal habeas claim without first exhausting state remedies—a process that frequently takes longer than one year. See *Rose* v. *Lundy*, 455 U. S. 509 (1982); § 2254(b)(1)(A). Hence, Congress had to explain how the limitations statute accounts for the time during which such state proceedings are pending. This special need for an express provision undermines any temptation to invoke the interpretive maxim *inclusio unius est exclusio alterius* (to include one item (*i. e.*, suspension during state-court collateral review) is to exclude other similar items (*i. e.*, equitable tolling)). See *Young*, *supra*, at 53 (rejecting claim that an "express tolling provision, appearing in the same subsection as the [limitations] period, demonstrates a statutory intent *not* to toll the [limitations] period").

Third, and finally, we disagree with respondent that equitable tolling undermines AEDPA's basic purposes. We recognize that AEDPA seeks to eliminate delays in the federal habeas review process. See *Day*, 547 U. S., at 205–206; *Miller-El* v. *Cockrell*, 537 U. S. 322, 337 (2003). But AEDPA seeks to do so without undermining basic habeas corpus principles and while seeking to harmonize the new statute with prior law, under which a petition's timeliness was always determined under equitable principles. See *Slack* v. *McDaniel*, 529 U. S. 473, 483 (2000) ("AEDPA's present provisions . . . incorporate earlier habeas corpus principles"); see also *Day*, 547 U. S., at 202, n. 1; *id.*, at 214 (SCALIA, J., dissenting); 2 R. Hertz & J. Liebman, Federal Habeas Corpus Practice and Procedure § 24.2, pp. 1123–1136 (5th ed. 2005).

When Congress codified new rules governing this previously judicially managed area of law, it did so without losing sight of the fact that the "writ of habeas corpus plays a vital role in protecting constitutional rights." *Slack*, 529 U. S., at 483. It did not seek to end every possible delay at all costs. Cf. *id.*, at 483–488. The importance of the Great Writ, the only writ explicitly protected by the Constitution, Art. I, § 9, cl. 2, along with congressional efforts to harmonize the new statute with prior law, counsels hesitancy before interpreting AEDPA's statutory silence as indicating a congressional intent to close courthouse doors that a strong equitable claim would ordinarily keep open.

For these reasons we conclude that neither AEDPA's textual characteristics nor the statute's basic purposes "rebut" the basic presumption set forth in *Irwin*. And we therefore join the Courts of Appeals in holding that § 2244(d) is subject to equitable tolling.

III

We have previously made clear that a "petitioner" is "entitled to equitable tolling" only if he shows "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way" and prevented timely filing. *Pace*, 544 U. S., at 418 (emphasis deleted). In this case, the "extraordinary circumstances" at issue involve an attorney's failure to satisfy professional standards of care. The Court of Appeals held that, where that is so, even attorney conduct that is "grossly negligent" can never warrant tolling absent "bad faith, dishonesty, divided loyalty, mental impairment or so forth on the lawyer's part." 539 F. 3d, at 1339. But in our view, the Court of Appeals' standard is too rigid.

We have said that courts of equity "must be governed by rules and precedents no less than the courts of law." *Lonchar* v. *Thomas*, 517 U. S. 314, 323 (1996) (internal quotation marks omitted). But we have also made clear that often the "exercise of a court's equity powers . . . must be

made on a case-by-case basis." *Baggett* v. *Bullitt*, 377 U. S. 360, 375 (1964). In emphasizing the need for "flexibility," for avoiding "mechanical rules," *Holmberg* v. *Armbrecht*, 327 U. S. 392, 396 (1946), we have followed a tradition in which courts of equity have sought to "relieve hardships which, from time to time, arise from a hard and fast adherence" to more absolute legal rules, which, if strictly applied, threaten the "evils of archaic rigidity," *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U. S. 238, 248 (1944). The "flexibility" inherent in "equitable procedure" enables courts "to meet new situations [that] demand equitable intervention, and to accord all the relief necessary to correct . . . particular injustices." *Ibid.* (permitting postdeadline filing of bill of review). Taken together, these cases recognize that courts of equity can and do draw upon decisions made in other similar cases for guidance. Such courts exercise judgment in light of prior precedent, but with awareness of the fact that specific circumstances, often hard to predict in advance, could warrant special treatment in an appropriate case.

We recognize that, in the context of procedural default, we have previously stated, without qualification, that a petitioner "must 'bear the risk of attorney error.'" *Coleman* v. *Thompson*, 501 U. S. 722, 752–753 (1991). But *Coleman* was "a case about federalism," *id.*, at 726, in that it asked whether *federal* courts may excuse a petitioner's failure to comply with a *state court's* procedural rules, notwithstanding the state court's determination that its own rules had been violated. Equitable tolling, by contrast, asks whether federal courts may excuse a petitioner's failure to comply with *federal* timing rules, an inquiry that does not implicate a state court's interpretation of state law. Cf. *Lawrence*, 549 U. S., at 341 (GINSBURG, J., dissenting). Holland does not argue that his attorney's misconduct provides a substantive ground for relief, cf. § 2254(i), nor is this a case that asks whether AEDPA's statute of limitations should be recognized at all, cf. *Day*, *supra*, at 209. Rather, this case asks

how equity should be applied once the statute is recognized. And given equity's resistance to rigid rules, we cannot read *Coleman* as requiring a *per se* approach in this context.

In short, no pre-existing rule of law or precedent demands a rule like the one set forth by the Eleventh Circuit in this case. That rule is difficult to reconcile with more general equitable principles in that it fails to recognize that, at least sometimes, professional misconduct that fails to meet the Eleventh Circuit's standard could nonetheless amount to egregious behavior and create an extraordinary circumstance that warrants equitable tolling. And, given the long history of judicial application of equitable tolling, courts can easily find precedents that can guide their judgments. Several lower courts have specifically held that unprofessional attorney conduct may, in certain circumstances, prove "egregious" and can be "extraordinary" even though the conduct in question may not satisfy the Eleventh Circuit's rule. See, *e. g.*, *Nara* v. *Frank*, 264 F. 3d 310, 320 (CA3 2001) (ordering hearing as to whether client who was "effectively abandoned" by lawyer merited tolling); *Calderon*, 128 F. 3d, at 1289 (allowing tolling where client was prejudiced by a last minute change in representation that was beyond his control); *Baldayaque*, 338 F. 3d, at 152–153 (finding that where an attorney failed to perform an essential service, to communicate with the client, and to do basic legal research, tolling could, under the circumstances, be warranted); *Spitsyn*, 345 F. 3d, at 800–802 (finding that "extraordinary circumstances" may warrant tolling where lawyer denied client access to files, failed to prepare a petition, and did not respond to his client's communications); *United States* v. *Martin*, 408 F. 3d 1089, 1096 (CA8 2005) (client entitled to equitable tolling where his attorney retained files, made misleading statements, and engaged in similar conduct).

We have previously held that "a garden variety claim of excusable neglect," *Irwin*, 498 U. S., at 96, such as a simple "miscalculation" that leads a lawyer to miss a filing deadline,

Lawrence, supra, at 336, does not warrant equitable tolling. But the case before us does not involve, and we are not considering, a "garden variety claim" of attorney negligence. Rather, the facts of this case present far more serious instances of attorney misconduct. And, as we have said, although the circumstances of a case must be "extraordinary" before equitable tolling can be applied, we hold that such circumstances are not limited to those that satisfy the test that the Court of Appeals used in this case.

IV

The record facts that we have set forth in Part I of this opinion suggest that this case may well be an "extraordinary" instance in which petitioner's attorney's conduct constituted far more than "garden variety" or "excusable neglect." To be sure, Collins failed to file Holland's petition on time and appears to have been unaware of the date on which the limitations period expired—two facts that, alone, might suggest simple negligence. But, in these circumstances, the record facts we have elucidated suggest that the failure amounted to more: Here, Collins failed to file Holland's federal petition on time despite Holland's many letters that repeatedly emphasized the importance of his doing so. Collins apparently did not do the research necessary to find out the proper filing date, despite Holland's letters that went so far as to identify the applicable legal rules. Collins failed to inform Holland in a timely manner about the crucial fact that the Florida Supreme Court had decided his case, again despite Holland's many pleas for that information. And Collins failed to communicate with his client over a period of years, despite various pleas from Holland that Collins respond to his letters.

A group of teachers of legal ethics tells us that these various failures violated fundamental canons of professional responsibility, which require attorneys to perform reasonably competent legal work, to communicate with their clients, to

implement clients' reasonable requests, to keep their clients informed of key developments in their cases, and never to abandon a client. See Brief for Legal Ethics Professors et al. as *Amici Curiae* (describing ethical rules set forth in case law, the Restatements of Agency, the Restatement (Third) of the Law Governing Lawyers (1998), and in the ABA Model Rules of Professional Conduct (2009)). And in this case, the failures seriously prejudiced a client who thereby lost what was likely his single opportunity for federal habeas review of the lawfulness of his imprisonment and of his death sentence.

We do not state our conclusion in absolute form, however, because more proceedings may be necessary. The District Court rested its ruling not on a lack of extraordinary circumstances, but rather on a lack of diligence—a ruling that respondent does not defend. See Brief for Respondent 38, n. 19; Tr. of Oral Arg. 43, 52. We think that the District Court's conclusion was incorrect. The diligence required for equitable tolling purposes is "'reasonable diligence,'" see, *e. g.*, *Lonchar*, 517 U. S., at 326, not "'"maximum feasible diligence,"'" *Starns* v. *Andrews*, 524 F. 3d 612, 618 (CA5 2008) (quoting *Moore* v. *Knight*, 368 F. 3d 936, 940 (CA7 2004)). Here, Holland not only wrote his attorney numerous letters seeking crucial information and providing direction; he also repeatedly contacted the state courts, their clerks, and the Florida State Bar Association in an effort to have Collins—the central impediment to the pursuit of his legal remedy—removed from his case. And, the *very day* that Holland discovered that his AEDPA clock had expired due to Collins' failings, Holland prepared his own habeas petition *pro se* and promptly filed it with the District Court.

Because the District Court erroneously relied on a lack of diligence, and because the Court of Appeals erroneously relied on an overly rigid *per se* approach, no lower court has yet considered in detail the facts of this case to determine whether they indeed constitute extraordinary circumstances

sufficient to warrant equitable relief. We are "[m]indful that this is a court of final review and not first view." *Adarand Constructors, Inc.* v. *Mineta*, 534 U. S. 103, 110 (2001) *(per curiam)* (internal quotation marks omitted). And we also recognize the prudence, when faced with an "equitable, often fact-intensive" inquiry, of allowing the lower courts "to undertake it in the first instance." *Gonzalez* v. *Crosby*, 545 U. S. 524, 540 (2005) (STEVENS, J., dissenting). Thus, because we conclude that the District Court's determination must be set aside, we leave it to the Court of Appeals to determine whether the facts in this record entitle Holland to equitable tolling, or whether further proceedings, including an evidentiary hearing, might indicate that respondent should prevail.

The judgment below is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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

This case raises two broad questions: first, whether the statute of limitations set out in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U. S. C. § 2244(d), is subject to equitable tolling; and second, assuming an affirmative answer to the first question, whether petitioner in this particular case has alleged facts that are sufficient to satisfy the "extraordinary circumstances" prong of the equitable tolling test. I agree with the Court's conclusion that equitable tolling is available under AEDPA. I also agree with much of the Court's discussion concerning whether equitable tolling is available on the facts of this particular case. In particular, I agree that the Court of Appeals erred by essentially limiting the relevant inquiry to the question whether "gross negligence" of counsel may be an extraordinary circumstance warranting equitable tolling. As the Court makes clear, petitioner in this case has alleged

certain facts that go well beyond any form of attorney negligence, see *ante,* at 636–637, 652, and the Court of Appeals does not appear to have asked whether those particular facts provide an independent basis for tolling. Accordingly, I concur in the Court's decision to reverse the judgment below and remand so that the lower courts may properly apply the correct legal standard.

Although I agree that the Court of Appeals applied the *wrong* standard, I think that the majority does not do enough to explain the *right* standard. It is of course true that equitable tolling requires "extraordinary circumstances," but that conclusory formulation does not provide much guidance to lower courts charged with reviewing the many habeas petitions filed every year. I therefore write separately to set forth my understanding of the principles governing the availability of equitable tolling in cases involving attorney misconduct.

I

"Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Pace* v. *DiGuglielmo,* 544 U. S. 408, 418 (2005). The dispute in this case concerns whether and when attorney misconduct amounts to an "extraordinary circumstance" that stands in a petitioner's way and prevents the petitioner from filing a timely petition. I agree with the majority that it is not practical to attempt to provide an exhaustive compilation of the kinds of situations in which attorney misconduct may provide a basis for equitable tolling. In my view, however, it is useful to note that several broad principles may be distilled from this Court's precedents.

First, our prior cases make it abundantly clear that attorney negligence is not an extraordinary circumstance warranting equitable tolling. In *Lawrence* v. *Florida,* 549 U. S. 327, 336 (2007), the Court expressly rejected the petitioner's

contention that "his counsel's mistake in miscalculating the limitations period entitle[d] him to equitable tolling." "Attorney miscalculation," the Court held, "is simply not sufficient to warrant equitable tolling, *particularly in the postconviction context where prisoners have no constitutional right to counsel.*" *Id.*, at 336–337 (citing *Coleman* v. *Thompson*, 501 U. S. 722, 756–757 (1991); emphasis added).

The basic rationale for *Lawrence*'s holding is that the mistakes of counsel are constructively attributable to the client, at least in the postconviction context. The *Lawrence* Court's reliance on *Coleman* is instructive. In *Coleman*, the Court addressed whether attorney error provided cause for a procedural default based on a late filing. See 501 U. S., at 752. Because "[t]here is no constitutional right to an attorney in state postconviction proceedings," the Court explained, "a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings." *Ibid.* In such circumstances, the Court reasoned, there was "'no inequity in requiring [the petitioner] to bear the risk of attorney error that results in a procedural default.'" *Ibid.* (quoting *Murray* v. *Carrier*, 477 U. S. 478, 488 (1986)); accord, *Coleman*, 501 U. S., at 753 ("'[C]ause' under the cause and prejudice test must be something *external* to the petitioner, something that cannot fairly be attributed to him"); *ibid.* ("Attorney ignorance or inadvertence is not 'cause' because the attorney is the petitioner's agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must 'bear the risk of attorney error'"); *id.*, at 754 (what matters is whether "the error [of counsel] must be seen as an external factor, *i. e.*, 'imputed to the State'"); *ibid.* ("In the absence of a constitutional violation, the petitioner bears the risk in federal habeas for all attorney errors made in the course of the representation"); *id.*, at 757 ("Because Coleman had no right to counsel to pursue his appeal in state habeas, any attorney error that led to the default of Coleman's claims in state court cannot constitute cause to excuse the default

in federal habeas"). As *Lawrence* makes clear, the same analysis applies when a petitioner seeks equitable tolling based on attorney error in the postconviction context. See 549 U. S., at 336–337 (citing *Coleman*).

While *Lawrence* addressed an allegation of attorney miscalculation, its rationale fully applies to other forms of attorney negligence. Instead of miscalculating the filing deadline, for example, an attorney could compute the deadline correctly but forget to file the habeas petition on time, mail the petition to the wrong address, or fail to do the requisite research to determine the applicable deadline. In any case, however, counsel's error would be constructively attributable to the client.

Second, the mere fact that a missed deadline involves "gross negligence" on the part of counsel does not by itself establish an extraordinary circumstance. As explained above, the principal rationale for disallowing equitable tolling based on ordinary attorney miscalculation is that the error of an attorney is constructively attributable to the client and thus is not a circumstance beyond the litigant's control. See *Lawrence*, *supra*, at 336–337; *Coleman*, *supra*, at 752–754; see also *Powell* v. *Davis*, 415 F. 3d 722, 727 (CA7 2005); *Johnson* v. *McBride*, 381 F. 3d 587, 589–590 (CA7 2004); *Harris* v. *Hutchinson*, 209 F. 3d 325, 330 (CA4 2000). That rationale plainly applies regardless of whether the attorney error in question involves ordinary or gross negligence. See *Coleman*, 501 U. S., at 754 ("[I]t is not the gravity of the attorney's error that matters, but that it constitutes a violation of petitioner's right to counsel, so that the error must be seen as an external factor, *i. e.*, 'imputed to the State'"); *id.*, at 752 (rejecting the contention that "[t]he late filing was . . . the result of attorney error of sufficient magnitude to excuse the default in federal habeas").

Allowing equitable tolling in cases involving *gross* rather than *ordinary* attorney negligence would not only fail to

make sense in light of our prior cases; it would also be impractical in the extreme. Missing the statute of limitations will generally, if not always, amount to negligence, see *Lawrence*, 549 U. S., at 336, and it has been aptly said that gross negligence is ordinary negligence with a vituperative epithet added. Therefore, if gross negligence may be enough for equitable tolling, there will be a basis for arguing that tolling is appropriate in almost every counseled case involving a missed deadline. See *ibid.* (argument that attorney miscalculation is an extraordinary circumstance, if credited, "would essentially equitably toll limitations periods for every person whose attorney missed a deadline"). This would not just impose a severe burden on the district courts; it would also make the availability of tolling turn on the highly artificial distinction between gross and ordinary negligence. That line would be hard to administer, would needlessly consume scarce judicial resources, and would almost certainly yield inconsistent and often unsatisfying results. See *Baldayaque* v. *United States*, 338 F. 3d 145, 155 (CA2 2003) (Jacobs, J., concurring) (noting that the "distinction between ordinary and extraordinary attorney malpractice . . . is elusive, hard to apply, and counterintuitive").

Finally, it is worth noting that a rule that distinguishes between ordinary and gross attorney negligence for purposes of the equitable tolling analysis would have demonstrably "inequitable" consequences. For example, it is hard to see why a habeas petitioner should be effectively penalized just because his counsel was negligent rather than grossly negligent, or why the State should be penalized just because petitioner's counsel was grossly negligent rather than moderately negligent. Regardless of how one characterizes counsel's deficient performance in such cases, the petitioner is not personally at fault for the untimely filing, attorney error is a but-for cause of the late filing, and the governmental interest in enforcing the statutory limitations period is the same.

II

Although attorney negligence, however styled, does not provide a basis for equitable tolling, the AEDPA statute of limitations may be tolled if the missed deadline results from attorney misconduct that is not constructively attributable to the petitioner. In this case, petitioner alleges facts that amount to such misconduct. See *ante*, at 652 (acknowledging that ordinary attorney negligence does not warrant equitable tolling, but observing that "the facts of this case present far more serious instances of attorney misconduct"). In particular, he alleges that his attorney essentially " 'abandoned' " him, as evidenced by counsel's near-total failure to communicate with petitioner or to respond to petitioner's many inquiries and requests over a period of several years. See *ante*, at 636–637. Petitioner also appears to allege that he made reasonable efforts to terminate counsel due to his inadequate representation and to proceed *pro se*, and that such efforts were successfully opposed by the State on the perverse ground that petitioner failed to act through appointed counsel. See *ante*, at 637; Brief for Petitioner 50–51 (stating that petitioner filed "two *pro se* motions in the Florida Supreme Court to remove Collins as counsel (one of which, if granted, would have allowed [petitioner] to proceed *pro se*)" (emphasis deleted)).

If true, petitioner's allegations would suffice to establish extraordinary circumstances beyond his control. Common sense dictates that a litigant cannot be held constructively responsible for the conduct of an attorney who is not operating as his agent in any meaningful sense of that word. See *Coleman*, *supra*, at 754 (relying on "well-settled principles of agency law" to determine whether attorney error was attributable to client); *Baldayaque*, *supra*, at 154 (Jacobs, J., concurring) ("[W]hen an 'agent acts in a manner completely adverse to the principal's interest,' the 'principal is not charged with [the] agent's misdeeds' "). That is particularly so if the litigant's reasonable efforts to terminate the attor-

ney's representation have been thwarted by forces wholly beyond the petitioner's control. The Court of Appeals apparently did not consider petitioner's abandonment argument or assess whether the State improperly prevented petitioner from either obtaining new representation or assuming the responsibility of representing himself. Accordingly, I agree with the majority that the appropriate disposition is to reverse and remand so that the lower courts may apply the correct standard to the facts alleged here.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins as to all but Part I, dissenting.

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) establishes a 1-year limitations period for state prisoners to seek federal habeas relief, subject to several specific exceptions. 28 U. S. C. § 2244(d). The Court concludes that this time limit is also subject to equitable tolling, even for attorney errors that are ordinarily attributable to the client. And it rejects the Court of Appeals' conclusion that Albert Holland is not entitled to tolling, without explaining why the test that court applied was wrong or what rule it should have applied instead. In my view § 2244(d) leaves no room for equitable exceptions, and Holland could not qualify even if it did.

I

The Court is correct, *ante,* at 645–646, that we ordinarily presume federal limitations periods are subject to equitable tolling unless tolling would be inconsistent with the statute. *Young* v. *United States,* 535 U. S. 43, 49 (2002). That is especially true of limitations provisions applicable to actions that are traditionally governed by equitable principles—a category that includes habeas proceedings. See *id.,* at 50. If § 2244(d) merely created a limitations period for federal habeas applicants, I agree that applying equitable tolling would be appropriate.

But § 2244(d) does much more than that, establishing a detailed scheme regarding the filing deadline that addresses an array of contingencies. In an ordinary case, the clock starts when the state-court judgment becomes final on direct review. § 2244(d)(1)(A).[1] But the statute delays the start date—thus effectively tolling the limitations period—in cases where (1) state action unlawfully impeded the prisoner from filing his habeas application, (2) the prisoner asserts a constitutional right newly recognized by this Court and made retroactive to collateral cases, or (3) the factual predicate for the prisoner's claim could not previously have been discovered through due diligence. § 2244(d)(1)(B)–(D). It also expressly tolls the limitations period during the pendency of a properly filed application for state collateral relief. § 2244(d)(2). Congress, in short, has considered and accounted for specific circumstances that in its view excuse an applicant's delay.

The question, therefore, is not whether § 2244(d)'s time bar is subject to tolling, but whether it is consistent with

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[1] Title 28 U. S. C. § 2244(d) provides:

"(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

"(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

"(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

"(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

"(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

"(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection."

§ 2244(d) for federal courts to toll the time bar for *additional* reasons beyond those Congress included.

In my view it is not. It is fair enough to infer, when a statute of limitations says nothing about equitable tolling, that Congress did not displace the default rule. But when Congress has *codified* that default rule and specified the instances where it applies, we have no warrant to extend it to other cases. See *United States* v. *Beggerly*, 524 U. S. 38, 48–49 (1998). Unless the Court believes § 2244(d) contains an implicit, across-the-board exception that subsumes (and thus renders unnecessary) § 2244(d)(1)(B)–(D) and (d)(2), it must rely on the untenable assumption that when Congress enumerated the events that toll the limitations period—with no indication the list is merely illustrative—it implicitly authorized courts to add others as they see fit. We should assume the opposite: that by specifying situations in which an equitable principle applies to a specific requirement, Congress has displaced courts' discretion to develop ad hoc exceptions. Cf. *Lonchar* v. *Thomas*, 517 U. S. 314, 326–328 (1996).

The Court's responses are unpersuasive. It brushes aside § 2244(d)(1)(B)–(D), apparently because those subdivisions merely delay the *start* of the limitations period but do not suspend a limitations period already underway. *Ante*, at 647–648. But the Court does not explain why that distinction makes any difference,[2] and we have described a rule

[2] The Court cites several Court of Appeals cases that support its triggering-tolling distinction, *ante*, at 647, but no case of ours that does so. *Clay* v. *United States*, 537 U. S. 522, 529 (2003), described § 2244(d)(1)(A) as containing "triggers" for the limitations period, but it did not distinguish delaying the start of the limitations period from tolling. The Court of Appeals cases the Court cites, *Cada* v. *Baxter Healthcare Corp.*, 920 F. 2d 446, 450 (CA7 1990), *Wolin* v. *Smith Barney Inc.*, 83 F. 3d 847, 852 (CA7 1996), and *Wims* v. *United States*, 225 F. 3d 186, 190 (CA2 2000), rely on a distinction between accrual rules and tolling that we have since disregarded, see *TRW Inc.* v. *Andrews*, 534 U. S. 19, 27, 29 (2001).

that forestalls the start of a limitations period as "effectively allow[ing] for equitable tolling." *Beggerly*, *supra*, at 48.

The Court does address § 2244(d)(2), which undeniably provides for poststart tolling, but dismisses it on the basis that Congress had to resolve a contradiction between § 2244(d)'s 1-year time bar and the rule of *Rose* v. *Lundy*, 455 U. S. 509 (1982), that a federal habeas application cannot be filed while state proceedings are pending. But there is no contradiction to resolve unless, in the absence of a statutory tolling provision, equitable tolling would *not* apply to a state prisoner barred from filing a federal habeas application while he exhausts his state remedies. The Court offers no reason why it would not, and our holding in *Young*, 535 U. S., at 50–51, that tolling was justified by the Government's inability to pursue a claim because of the Bankruptcy Code's automatic stay, 11 U. S. C. § 362, suggests that it would.[3]

II

A

Even if § 2244(d) left room for equitable tolling in some situations, tolling surely should not excuse the delay here. Where equitable tolling is available, we have held that a litigant is entitled to it only if he has diligently pursued his rights and—the requirement relevant here—if "'some extraordinary circumstance stood in his way.'" *Lawrence* v.

[3] The Court reads *Young* as support for disregarding the specific tolling provisions Congress included in § 2244(d). *Ante*, at 648. But in the pertinent passage, *Young* explained only that the inclusion of an express tolling rule in a *different* provision regarding a *different* limitations period, 11 U. S. C. § 507(a)(8)(A)(ii) (2000 ed.)—albeit a provision within the same subparagraph as the provision at issue, § 507(a)(8)(A)(i)—did not rebut the presumption of equitable tolling. See 535 U. S., at 53. Moreover, *Young* stressed that § 507(a)(8)(A)(ii) authorized tolling in instances where equity would *not* have allowed it, which reinforced the presumption in favor of tolling. *Ibid.* Here, the Court does not suggest that any of § 2244(d)'s exceptions go beyond what equity would have allowed.

Florida, 549 U. S. 327, 336 (2007) (quoting *Pace* v. *DiGuglielmo*, 544 U. S. 408, 418 (2005)). Because the attorney is the litigant's agent, the attorney's acts (or failures to act) within the scope of the representation are treated as those of his client, see *Link* v. *Wabash R. Co.*, 370 U. S. 626, 633–634, and n. 10 (1962), and thus such acts (or failures to act) are necessarily not extraordinary circumstances.

To be sure, the rule that an attorney's acts and oversights are attributable to the client is relaxed where the client has a constitutional right to effective assistance of counsel. Where a State is constitutionally obliged to provide an attorney but fails to provide an effective one, the attorney's failures that fall below the standard set forth in *Strickland* v. *Washington*, 466 U. S. 668 (1984), are chargeable to the State, not to the prisoner. See *Murray* v. *Carrier*, 477 U. S. 478, 488 (1986). But where the client has no right to counsel—which in habeas proceedings he does not—the rule holding him responsible for his attorney's acts applies with full force. See *Coleman* v. *Thompson*, 501 U. S. 722, 752–754 (1991).[4] Thus, when a state habeas petitioner's appeal is filed too late because of attorney error, the petitioner is out of luck—no less than if he had proceeded *pro se* and neglected to file the appeal himself.[5]

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[4] The Court dismisses *Coleman* as "a case about federalism" and therefore inapposite here. *Ante*, at 650 (internal quotation marks omitted). I fail to see how federalism concerns are not implicated by ad hoc exceptions to the statute of limitations for attempts to overturn state-court convictions. In any event, *Coleman* did not invent, but merely applied, the already established principle that an attorney's acts are his client's. See 501 U. S., at 754.

[5] That Holland's counsel was appointed, rather than, like counsel in *Coleman*, retained, see Brief for Respondent in *Coleman* v. *Thompson*, O. T. 1990, No. 89–7662, pp. 33–34, 40, is irrelevant. The Sixth Amendment right to effective assistance of counsel, we have held, applies even to an attorney the defendant himself hires. See *Cuyler* v. *Sullivan*, 446 U. S. 335, 342–345 (1980). The basis for *Coleman* was not that Coleman had hired his own counsel, but that the State owed him no obligation to pro-

Congress could, of course, have included errors by state-appointed habeas counsel as a basis for delaying the limitations period, but it did not. Nor was that an oversight: Section 2244(d)(1)(B) expressly allows tolling for state-created impediments that prevent a prisoner from filing his application, but *only if* the impediment violates the Constitution or federal law.

If there were any doubt that equitable tolling is unavailable under § 2244(d) to excuse attorney error, we eliminated it in *Lawrence*. The petitioner there asserted that his attorney's miscalculation of the limitations period for federal habeas applications caused him to miss the filing deadline. The attorney's error stemmed from his mistaken belief that—contrary to Circuit precedent (which we approved in *Lawrence*)—the limitations period is tolled during the pendency of a petition for certiorari from a state postconviction proceeding. 549 U. S., at 336; see also Brief for Petitioner in *Lawrence* v. *Florida*, O. T. 2006, No. 05–8820, pp. 31, 36. Assuming, *arguendo*, that equitable tolling could ever apply to § 2244(d), we held that such attorney error did not warrant it, especially since the petitioner was not constitutionally entitled to counsel. *Lawrence*, *supra*, at 336–337.

Faithful application of *Lawrence* should make short work of Holland's claim. Although Holland alleges a wide array of misconduct by his counsel, Bradley Collins, the only pertinent part appears extremely similar, if not identical, to the attorney's error in *Lawrence*. The relevant time period extends at most from November 10, 2005—when the Florida Supreme Court affirmed the denial of Holland's state habeas petition[6]—to December 15, 2005, the latest date on which

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vide one. See 501 U. S., at 754. It would be utterly perverse, of course, to penalize the State for *providing* habeas petitioners with representation, when the State could avoid equitable tolling by providing none at all.

[6] The Florida Supreme Court did not issue its mandate, and the limitations period did not resume, see *Lawrence*, 549 U. S., at 331, until December 1, 2005. But once the Florida Supreme Court issued its decision (with

§ 2244(d)'s limitations period could have expired.[7] Within that period, Collins could have alerted Holland to the Florida Supreme Court's decision, and either Collins or Holland himself could have filed a timely federal habeas application. Collins did not do so, but instead filed a petition for certiorari several months later.

Why Collins did not notify Holland or file a timely federal application for him is unclear, but none of the plausible explanations would support equitable tolling. By far the most likely explanation is that Collins made exactly the same mistake as the attorney in *Lawrence*—*i. e.*, he assumed incorrectly that the pendency of a petition for certiorari in this Court seeking review of the denial of Holland's state habeas petition would toll AEDPA's time bar under § 2244(d)(2). In December 2002, Collins had explained to Holland by letter that if his state habeas petition was denied *and* this Court denied certiorari in that proceeding, Holland's claims "*will then be ripe* for presentation in a petition for writ of habeas corpus in federal court." App. 61 (emphasis added). Holland himself interprets that statement as proof that, at that time, "Collins was under the belief that [Holland's] time to file his federal habeas petition would continue to be tolled until this Court denied certiorari" in his state postconviction proceeding. Pet. for Cert. 12, n. 10. That misunderstanding would entirely account for Collins's conduct—filing a certiorari petition instead of a habeas application, and waiting nearly three months to do so. But it would also be insufficient, as *Lawrence* held it was, to warrant tolling.

The other conceivable explanations for Collins's failure fare no better. It may be that Collins believed—as he ex-

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the mandate still to come), Collins could have notified Holland, who in turn could have filed a *pro se* federal application.

[7] The parties dispute when Holland's state habeas petition was filed, and thus when the limitations period expired. Brief for Petitioner 4–5, and n. 4; Brief for Respondent 8, 9, n. 7. The discrepancy is immaterial, but I give Holland the benefit of the doubt.

plained to Holland in a January 2006 letter, after Holland had informed him that a certiorari petition in a state postconviction proceeding would not stop the clock—that the certiorari petition in Holland's *direct* appeal also did not toll the time bar. Consequently, Collins wrote, Holland's time to file a federal application had expired even before Collins was appointed. App. 78–79. As the Court explains, *ante*, at 641, this view too was wrong, but it is no more a basis for equitable tolling than the attorney's misunderstanding in *Lawrence*.

Or it may be that Collins (despite what he wrote to Holland) correctly understood the rule but simply neglected to notify Holland; perhaps he missed the state court's ruling in his mail, or perhaps it simply slipped his mind. Such an oversight is unfortunate, but it amounts to "garden variety" negligence, not a basis for equitable tolling. *Irwin* v. *Department of Veterans Affairs*, 498 U. S. 89, 96 (1990). Surely it is no more extraordinary than the attorney's error in *Lawrence*, which rudimentary research and arithmetic would have avoided.

The Court insists that Collins's misconduct goes beyond garden-variety neglect and mine-run miscalculation. *Ante*, at 651–652. But the only differences it identifies had no effect on Holland's ability to file his federal application on time. The Court highlights Collins's nonresponsiveness while Holland's state postconviction motions were still pending. *Ante*, at 652. But even taken at face value, Collins's silence *prior* to November 10, 2005, did not prevent Holland from filing a timely federal application once the Florida courts were finished with his case. The Court also appears to think significant Collins's correspondence with Holland in January 2006, *after* the limitations period had elapsed. *Ante*, at 639–643, 652. But unless Holland can establish that the time bar should be tolled due to events *before* December 15, 2005, any misconduct by Collins after the limitations period elapsed is irrelevant. Even if Collins's conduct be-

fore November 10 and after December 15 was "extraordinary," Holland has not shown that it "stood in his way and prevented timely filing." *Lawrence*, 549 U. S., at 336 (internal quotation marks omitted).

For his part, Holland now asserts that Collins did not merely forget to keep his client informed, but deliberately deceived him. As the Court of Appeals concluded, however, Holland did not allege deception in seeking equitable tolling below. See 539 F. 3d 1334, 1339 (CA11 2008) *(per curiam)*.[8] In any event, the deception of which he complains consists only of Collins's assurance early in the representation that he would protect Holland's ability to assert his claims in federal court, see App. 55, 62, coupled with Collins's later failure to do so. That, of course, does not by itself amount to deception, and Holland offers no evidence that Collins meant to mislead him. Moreover, Holland can hardly claim to have been caught off guard. Collins's failures to respond to Holland's repeated requests for information *before* the State Supreme Court ruled gave Holland even greater reason to suspect that Collins had fallen asleep at the switch. Holland indeed was under no illusion to the contrary, as his repeated efforts to replace Collins reflect.[9]

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[8] Holland insists that he did allege deception below, see Brief for Petitioner 31, n. 29, but cites only a conclusory allegation in an unrelated motion (a motion for appointment of new counsel). See App. 194. His reply to the State's response to the order to show cause, drafted by new counsel, did not allege deception. 1 Record, Doc. 35.

[9] The concurrence argues that Holland's allegations suffice because they show, if true, that Collins "essentially 'abandoned' " Holland by failing to respond to Holland's inquiries, and therefore ceased to act as Holland's agent. *Ante*, at 659 (ALITO, J., concurring in part and concurring in judgment). But Collins's failure to communicate has no bearing unless it ended the agency relationship before the relevant window. The concurrence does not explain why it would—does not contend, for example, that Collins's conduct amounted to disloyalty or renunciation of his role, which *would* terminate Collins's authority, see Restatement (Second) of Agency §§ 112, 118 (1957). Collins's alleged nonresponsiveness did not help Hol-

B

Despite its insistence that *Lawrence* does not control this case, the Court does not actually hold that Holland is entitled to equitable tolling. It concludes only that the Eleventh Circuit applied the wrong rule and remands the case for a re-do. That would be appropriate if the Court identified a legal error in the Eleventh Circuit's analysis and set forth the proper standard it should have applied.

The Court does neither. It rejects as "too rigid," *ante*, at 649, the Eleventh Circuit's test—which requires, beyond ordinary attorney negligence, "an allegation and proof of bad faith, dishonesty, divided loyalty, mental impairment or so forth on the lawyer's part," 539 F. 3d, at 1339. But the Court never explains why that "or so forth" test, which explicitly leaves room for other kinds of egregious attorney error, is insufficiently elastic.

Moreover, even if the Eleventh Circuit had adopted an entirely inflexible rule, it is simply untrue that, as the Court appears to believe, *ante*, at 649–650, all general rules are *ipso facto* incompatible with equity. We have rejected that canard before, see, *e. g.*, *Grupo Mexicano de Desarrollo, S. A.* v. *Alliance Bond Fund, Inc.*, 527 U. S. 308, 321–322 (1999), and we have relied on the existence of general rules regarding equitable tolling in particular, see, *e. g.*, *Young*, 535 U. S., at 53. As we observed in rejecting ad hoc equitable

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land's cause, but it was no more "adverse to [Holland's] interest" or "beyond [Holland's] control," *ante*, at 659–660 (internal quotation marks omitted), and thus no more a basis for holding Holland harmless from the consequences of his counsel's conduct, than mine-run attorney mistakes, cf. *Irwin* v. *Department of Veterans Affairs*, 498 U. S. 89, 96 (1990). The concurrence also relies upon Holland's requests to replace Collins with new appointed counsel. But if those requests could prevent imputing Collins's acts to Holland, every habeas applicant who unsuccessfully asks for a new state-provided lawyer (but who does not seek to proceed *pro se* when that request is denied) would not be bound by his attorney's subsequent acts.

restrictions on habeas relief, "the alternative is to use each equity chancellor's conscience as a measure of equity, which alternative would be as arbitrary and uncertain as measuring distance by the length of each chancellor's foot." *Lonchar*, 517 U. S., at 323.

Consistent with its failure to explain the error in the Eleventh Circuit's test, the Court offers almost no clue about what test that court should have applied. The Court unhelpfully advises the Court of Appeals that its test is too narrow, with no explanation besides the assertion that its test left out cases where tolling might be warranted, and no precise indication of what those cases might be. *Ante*, at 651 ("[A]t least sometimes, professional misconduct that fails to meet the Eleventh Circuit's standard could nonetheless amount to egregious behavior and create an extraordinary circumstance that warrants equitable tolling"). The Court says that "courts can easily find precedents that can guide their judgments," *ibid.*, citing several Court of Appeals opinions that (in various contexts) permit tolling for attorney error—but notably omitting opinions that disallow it, such as the Seventh Circuit's opinion in *Powell* v. *Davis*, 415 F. 3d 722, 727 (2005), which would have "guide[d] . . . judgmen[t]" precisely where this court arrived: "[A]ttorney misconduct, whether labeled negligent, grossly negligent, or willful, is attributable to the client and thus is not a circumstance beyond a petitioner's control that might excuse an untimely petition," *ibid.* (internal quotation marks omitted).

The only thing the Court offers that approaches substantive instruction is its implicit approval of "fundamental canons of professional responsibility," articulated by an ad hoc group of legal-ethicist *amici* consisting mainly of professors of that least analytically rigorous and hence most subjective of law-school subjects, legal ethics. *Ante*, at 652. The Court does not even try to justify importing into equity the "prevailing professional norms" we have held implicit in the right to counsel, *Strickland*, 466 U. S., at 688. In his habeas

action Holland has no right to counsel. I object to this transparent attempt to smuggle *Strickland* into a realm the Sixth Amendment does not reach.

C

The Court's refusal to articulate an intelligible rule regarding the only issue actually before us stands in sharp contrast to its insistence on deciding an issue that is *not* before us: whether Holland satisfied the second prerequisite for equitable tolling by demonstrating that he pursued his rights diligently, see *Pace*, 544 U. S., at 418–419. As the Court admits, only the District Court addressed that question below; the Eleventh Circuit had no need to reach it. More importantly, it is not even arguably included within the question presented, which concerns only whether an attorney's gross negligence can constitute an "extraordinary circumstance" of the kind we have held essential for equitable tolling. Pet. for Cert. i. Whether tolling is *ever* available is fairly included in that question, but whether Holland has overcome an additional, independent hurdle to tolling is not.

The Court offers no justification for deciding this distinct issue. The closest it comes is its observation that the State "does not defend" the District Court's ruling regarding diligence. *Ante*, at 653. But the State had no reason to do so—any more than it had reason to address the merits of Holland's habeas claims. Nor, contrary to the Court's implication, has the State conceded the issue. The footnote of the State's brief which the Court cites did just the opposite: After observing that only the extraordinary-circumstance prong of the equitable-tolling test is at issue, the State (perhaps astutely apprehensive that the Court might ignore that fact) added that "to the extent the Court considers the matter" of Holland's diligence, "[r]espondent relies on the findings of the district court below." Brief for Respondent 38, n. 19. The Court also cites a statement by the State's counsel at oral argument, Tr. of Oral Arg. 43, and Holland's coun-

sel's characterization of it as a concession, *id.*, at 52. But the remark, in context, shows only that the State does not dispute diligence *in this Court*, where the only issue is extraordinary circumstances:

> "Well, that goes to the issue . . . of diligence, of course, which is not the issue we're looking at. We're looking at the extraordinary circumstances, not the diligence. . . .
> "[W]e'll concede diligence for the moment . . . ." *Id.*, at 43.

Notwithstanding the Court's confidence that the District Court was wrong, it is not even clear that Holland acted with the requisite diligence. Although Holland repeatedly contacted Collins and the state courts, there were other reasonable measures Holland could have pursued. For example, as we suggested in *Pace*, *supra*, at 416—decided while Holland's state habeas petition was still pending—Holland might have filed a "'protective'" federal habeas application and asked the District Court to stay the federal action until his state proceedings had concluded. He also presumably could have checked the court records in the prison's writ room—from which he eventually learned of the state court's decision, 539 F. 3d, at 1337—on a more regular basis. And he could have sought permission from the state courts to proceed *pro se* and thus remove Collins from the equation.[10] This is not to

[10] Holland made many *pro se* filings in state court (which were stricken because Holland was still represented), and he sought to have new counsel appointed in Collins's place, but did not seek to proceed *pro se*. The Court does not dispute this, nor does Holland. The most he asserts is that one of the *pro se* motions he filed, if granted, would have *entitled* him to proceed *pro se*, see Brief for Petitioner 50–51—an assertion he appears not to have made in the District Court, see 1 Record, Doc. 35, at 15. The concurrence equates that assertion with an allegation that he actually sought to litigate his case on his own behalf. *Ante*, at 659. It is not the same. The filing Holland refers to, see Brief for Petitioner 12, and n. 13, like his earlier filings, requested that Collins be *replaced* by new counsel. App. 149–163. The motion also asked for a hearing pursuant to *Nelson* v.

say the District Court was correct to conclude Holland was not diligent; but the answer is not as obvious as the Court would make it seem.

* * *

The Court's impulse to intervene when a litigant's lawyer has made mistakes is understandable; the temptation to tinker with technical rules to achieve what appears a just result is often strong, especially when the client faces a capital sentence. But the Constitution does not empower federal courts to rewrite, in the name of equity, rules that Congress has made. Endowing unelected judges with that power is irreconcilable with our system, for it "would literally place the whole rights and property of the community under the arbitrary will of the judge," arming him with "a despotic and sovereign authority," 1 J. Story, Commentaries on Equity Jurisprudence § 19, p. 19 (14th ed. 1918). The danger is doubled when we disregard our own precedent, leaving only our own consciences to constrain our discretion. Because both the statute and *stare decisis* foreclose Holland's claim, I respectfully dissent.

State, 274 So. 2d 256, 259 (Fla. App. 1973), to show Collins's poor performance, App. 149–150, but that did not amount to a request to proceed *pro se*. *Nelson* held that a defendant *facing trial* who seeks to discharge his court-appointed counsel for ineffectiveness is entitled to a hearing to determine if new counsel is required. 274 So. 2d, at 259. If the defendant fails to make that showing, but "continues to demand a dismissal of his court appointed counsel," *Nelson* explained that a "trial judge may in his discretion discharge counsel and require the defendant to proceed to trial without representation by court appointed counsel." *Ibid.;* see also *Hardwick* v. *State*, 521 So. 2d 1071, 1074–1075 (Fla. 1988). There is no reason why requesting that procedure in state habeas proceedings should be construed as a request to proceed *pro se*. Holland, unlike a defendant still facing trial, did not need permission to fire Collins, since there was no right to representation to waive. Once his request for a new attorney was denied, Holland himself could have informed Collins that his services were no longer required.

Syllabus

NEW PROCESS STEEL, L. P. *v.* NATIONAL LABOR RELATIONS BOARD

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

No. 08–1457. Argued March 23, 2010—Decided June 17, 2010

The Taft-Hartley Act increased the size of the National Labor Relations Board (Board) from three members to five, see 29 U. S. C. § 153(a), and amended § 3(b) of the National Labor Relations Act to increase the Board's quorum requirement from two members to three and to allow the Board to delegate its authority to groups of at least three members, see § 153(b). In December 2007, the Board—finding itself with only four members and expecting two more vacancies—delegated, *inter alia*, its powers to a group of three members. On December 31, one group member's appointment expired, but the others proceeded to issue Board decisions for the next 27 months as a two-member quorum of a three-member group. Two of those decisions sustained unfair labor practice complaints against petitioner, which sought review, challenging the two-member Board's authority to issue orders. The Seventh Circuit ruled for the Government, concluding that the two members constituted a valid quorum of a three-member group to which the Board had legitimately delegated its powers.

Held: Section 3(b) requires that a delegee group maintain a membership of three in order to exercise the delegated authority of the Board. Pp. 679–688.

(a) The first sentence of § 3(b), the so-called delegation clause, authorizes the Board to delegate its powers only to a "group of three or more members." This clause is best read to require that the delegee group *maintain* a membership of three in order for the delegation to remain valid. First, that is the only way to harmonize and give meaningful effect to all of § 3(b)'s provisions: (1) the delegation clause; (2) the vacancy clause, which provides that "[a] vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board"; (3) the Board quorum requirement, which mandates that "three members of the Board shall, at all times, constitute a quorum of the Board"; and (4) the group quorum provision, which provides that "two members shall constitute a quorum" of any delegee group. This reading is consonant with the Board quorum requirement of three participating members "at all times," and it gives material effect to the delegation clause's three-member rule. It also permits the vacancy

clause to operate to provide that vacancies do not impair the Board's ability to take action, so long as the quorum is satisfied. And it does not render inoperative the group quorum provision, which continues to authorize a properly constituted three-member delegee group to issue a decision with only two members participating when one is disqualified from a case. The Government's contrary reading allows two members to act as the Board *ad infinitum*, dramatically undercutting the Board quorum requirement's significance by allowing its permanent circumvention. It also diminishes the delegation clause's three-member requirement by permitting a *de facto* two-member delegation. By allowing the Board to include a third member in the group for only one minute before her term expires, this approach also gives no meaningful effect to the command implicit in both the delegation clause and the Board quorum requirement that the Board's full power be vested in no fewer than three members. Second, had Congress intended to authorize two members to act on an ongoing basis, it could have used straightforward language. The Court's interpretation is consistent with the Board's longstanding practice of reconstituting a delegee group when one group member's term expired. Pp. 679–683.

(b) The Government's several arguments against the Court's interpretation—that the group quorum requirement and vacancy clause together permit two members of a three-member group to constitute a quorum even when there is no third member; that the vacancy clause establishes that a vacancy in the *group* has no effect; and that reading the statute to authorize the Board to act with only two members advances the congressional objective of Board efficiency—are unconvincing. Pp. 683–687.

564 F. 3d 840, reversed and remanded.

STEVENS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, THOMAS, and ALITO, JJ., joined. KENNEDY, J., filed a dissenting opinion, in which GINSBURG, BREYER, and SOTOMAYOR, JJ., joined, *post*, p. 689.

Sheldon E. Richie argued the cause for petitioner. With him on the briefs were *Joseph W. Ambash*, *Justin F. Keith*, *Mark E. Solomons*, and *Laura Metcoff Klaus*.

Deputy Solicitor General Katyal argued the cause for respondent. With him on the brief were *Solicitor General Kagan*, *Sarah E. Harrington*, *Ronald Meisburg*, *John H.*

Ferguson, Linda Dreeben, David Habenstreit, and *Ruth E. Burdick.**

JUSTICE STEVENS delivered the opinion of the Court.

The Taft-Hartley Act, enacted in 1947, increased the size of the National Labor Relations Board (Board) from three members to five. See 29 U. S. C. § 153(a). Concurrent with that change, the Taft-Hartley Act amended § 3(b) of the National Labor Relations Act (NLRA) to increase the quorum requirement for the Board from two members to three, and to allow the Board to delegate its authority to groups of at least three members. See § 153(b). The question in this case is whether, following a delegation of the Board's powers to a three-member group, two members may continue to exercise that delegated authority once the group's (and the Board's) membership falls to two. We hold that two remaining Board members cannot exercise such authority.

I

As 2007 came to a close, the Board found itself with four members and one vacancy. It anticipated two more vacancies at the end of the year, when the recess appointments of Members Kirsanow and Walsh were set to expire, which would leave the Board with only two members—too few to meet the Board's quorum requirement, § 153(b). The four sitting members decided to take action in an effort to preserve the Board's authority to function. On December 20, 2007, the Board made two delegations of its authority, effec-

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*Briefs of *amici curiae* urging reversal were filed for the Chamber of Commerce of the United States of America by *Marshall B. Babson, Christine M. Fitzgerald, Robin S. Conrad,* and *Shane B. Kawka;* and for the Michigan Regional Council of Carpenters by *Dennis M. Devaney* and *Jeffrey D. Wilson.*

Lynn K. Rhinehart, James B. Coppess, and *Laurence Gold* filed a brief for the American Federation of Labor and Congress of Industrial Organizations as *amicus curiae* urging affirmance.

tive as of midnight December 28, 2007. First, the Board delegated to the general counsel continuing authority to initiate and conduct litigation that would normally require case-by-case approval of the Board. See Minute of Board Action (Dec. 20, 2007), App. to Brief for Petitioner 4a–5a (hereinafter Board Minutes). Second, the Board delegated "to Members Liebman, Schaumber and Kirsanow, as a three-member group, all of the Board's powers, in anticipation of the adjournment of the 1st Session of the 110th Congress." *Id.*, at 5a. The Board expressed the opinion that its action would permit the remaining two members to exercise the powers of the Board "after [the] departure of Members Kirsanow and Walsh, because the remaining Members will constitute a quorum of the three-member group." *Ibid.*

The Board's minutes explain that it relied on "the statutory language" of §3(b), as well as an opinion issued by the Office of Legal Counsel (OLC), for the proposition that the Board may use this delegation procedure to "issue decisions during periods when three or more of the five seats on the Board are vacant." *Id.*, at 5a, 6a. The OLC had concluded in 2003 that "if the Board delegated all of its powers to a group of three members, that group could continue to issue decisions and orders as long as a quorum of two members remained." Dept. of Justice, OLC, Quorum Requirements, App. to Brief for Respondent 3a. In seeking the OLC's advice, the Board agreed to accept the OLC's answer regarding its ability to operate with only two members, *id.*, at 1a, n. 1, and the Board in its minutes therefore "acknowledged that it is bound" by the OLC opinion, Board Minutes 6a. The Board noted, however, that it was not bound to make this delegation; rather, it had "decided to exercise its discretion" to do so. *Ibid.*

On December 28, 2007, the Board's delegation to the three-member group of Members Liebman, Schaumber, and Kirsanow became effective. On December 31, 2007, Member Kirsanow's recess appointment expired. Thus, starting on

January 1, 2008, Members Liebman and Schaumber became the only members of the Board. They proceeded to issue decisions for the Board as a two-member quorum of a three-member group. The delegation automatically terminated on March 27, 2010, when the President made two recess appointments to the Board, because the terms of the delegation specified that it would be revoked when the Board's membership returned to at least three members, *id.*, at 7a.

During the 27-month period in which the Board had only two members, it decided almost 600 cases. See Letter from Elena Kagan, Solicitor General, to William K. Suter, Clerk of Court (Apr. 26, 2010). One of those cases involved petitioner New Process Steel. In September 2008, the two-member Board issued decisions sustaining two unfair labor practice complaints against petitioner. See *New Process Steel, LP*, 353 N. L. R. B. No. 25; *New Process Steel, LP*, 353 N. L. R. B. No. 13. Petitioner sought review of both orders in the Court of Appeals for the Seventh Circuit, and challenged the authority of the two-member Board to issue the orders.

The court ruled in favor of the Government. After a review of the text and legislative history of § 3(b) and the sequence of events surrounding the delegation of authority in December 2007, the court concluded that the then-sitting two members constituted a valid quorum of a three-member group to which the Board had legitimately delegated all its powers. 564 F. 3d 840, 845–847 (CA7 2009). On the same day that the Seventh Circuit issued its decision in this case, the Court of Appeals for the District of Columbia Circuit announced a decision coming to the opposite conclusion. *Laurel Baye Healthcare of Lake Lanier, Inc.* v. *NLRB*, 564 F. 3d 469 (2009). We granted certiorari to resolve the conflict.[1] 558 U. S. 989 (2009).

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[1] Several other Courts of Appeals reached the same conclusion as the Seventh Circuit, although not always following the same reasoning. See *Northeastern Land Servs., Ltd.* v. *NLRB*, 560 F. 3d 36, 41 (CA1 2009);

II

The Board's quorum requirements and delegation procedure are set forth in § 3(b) of the NLRA, 49 Stat. 451, as amended by 61 Stat. 139, which provides:

> "The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. . . . A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof." 29 U. S. C. § 153(b).

It is undisputed that the first sentence of this provision authorized the Board to delegate its powers to the three-member group effective on December 28, 2007, and the last sentence authorized two members of that group to act as a quorum of the group during the next three days if, for example, the third member had to recuse himself from a particular matter. The question we face is whether those two members could continue to act for the Board as a quorum of the delegee group after December 31, 2007, when the Board's membership fell to two and the designated three-member group of "Members Liebman, Schaumber, and Kirsanow" ceased to exist due to the expiration of Member Kirsanow's term. Construing § 3(b) as a whole and in light of the Board's longstanding practice, we are persuaded that they could not.

The first sentence of § 3(b), which we will call the delegation clause, provides that the Board may delegate its powers only to a "group of three or more members." 61 Stat. 139. There are two different ways to interpret that language.

Snell Island SNF LLC v. *NLRB*, 568 F. 3d 410, 424 (CA2 2009); *Narricot Industries, L. P.* v. *NLRB*, 587 F. 3d 654, 660 (CA4 2009); *Teamsters Local Union No. 523* v. *NLRB*, 590 F. 3d 849, 852 (CA10 2009).

One interpretation, put forward by the Government, would read the clause to require only that a delegee group contain three members at the precise time the Board delegates its powers, and to have no continuing relevance after the moment of the initial delegation. Under that reading, two members alone may exercise the full power of the Board so long as they were part of a delegee group that, at the time of its creation, included three members. The other interpretation, by contrast, would read the clause as requiring that the delegee group *maintain* a membership of three in order for the delegation to remain valid. Three main reasons support the latter reading.

First, and most fundamentally, reading the delegation clause to require that the Board's delegated power be vested continuously in a group of three members is the only way to harmonize and give meaningful effect to all of the provisions in § 3(b). See *Duncan* v. *Walker*, 533 U. S. 167, 174 (2001) (declining to adopt a "construction of the statute, [that] would render [a term] insignificant"); *Market Co.* v. *Hoffman*, 101 U. S. 112, 115–116 (1879) ("[A] statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be . . . insignificant" (internal quotation marks omitted)). Those provisions are: (1) the delegation clause; (2) the vacancy clause, which provides that "[a] vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board"; (3) the Board quorum requirement, which mandates that "three members of the Board shall, at all times, constitute a quorum of the Board"; and (4) the group quorum provision, which provides that "two members shall constitute a quorum" of any delegee group. See § 153(b).

Interpreting the statute to require the Board's powers to be vested at all times in a group of at least three members is consonant with the Board quorum requirement, which requires three participating members "at all times" for the Board to act. The interpretation likewise gives material ef-

fect to the three-member requirement in the delegation clause. The vacancy clause still operates to provide that vacancies do not impair the ability of the Board to take action, so long as the quorum is satisfied. And the interpretation does not render inoperative the group quorum provision, which still operates to authorize a three-member delegee group to issue a decision with only two members participating, so long as the delegee group was properly constituted. Reading §3(b) in this manner, the statute's various pieces hang together—a critical clue that this reading is a sound one.

The contrary reading, on the other hand, allows two members to act as the Board *ad infinitum*, which dramatically undercuts the significance of the Board quorum requirement by allowing its permanent circumvention. That reading also makes the three-member requirement in the delegation clause of vanishing significance, because it allows a *de facto* delegation to a two-member group, as happened in this case. Under the Government's approach, it would satisfy the statute for the Board to include a third member in the group for only one minute before her term expires; the approach gives no meaningful effect to the command implicit in both the delegation clause and the Board quorum requirement that the Board's full power be vested in no fewer than three members. Hence, while the Government's reading of the delegation clause is textually permissible in a narrow sense, it is structurally implausible, as it would render two of §3(b)'s provisions functionally void.

Second, and relatedly, if Congress had intended to authorize two members alone to act for the Board on an ongoing basis, it could have said so in straightforward language. Congress instead imposed the requirement that the Board delegate authority to no fewer than three members, and that it have three participating members to constitute a quorum. Those provisions are at best an unlikely way of conveying congressional approval of a two-member Board. Indeed,

had Congress wanted to provide for two members alone to act as the Board, it could have maintained the NLRA's original two-member Board quorum provision, see 29 U. S. C. § 153(b) (1946 ed.), or provided for a delegation of the Board's authority to groups of two. The Rube Goldberg-style delegation mechanism employed by the Board in 2007—delegating to a group of three, allowing a term to expire, and then continuing with a two-member quorum of a phantom delegee group—is surely a bizarre way for the Board to achieve the authority to decide cases with only two members. To conclude that Congress intended to authorize such a procedure to contravene the three-member Board quorum, we would need some evidence of that intent.

The Government has not adduced any convincing evidence on this front, and to the contrary, our interpretation is consistent with the longstanding practice of the Board. This is the third factor driving our decision. Although the Board has throughout its history allowed two members of a three-member group to issue decisions when one member of a group was disqualified from a case, see Brief for Respondent 20; Board Minutes 6a, the Board has not (until recently) allowed two members to act as a quorum of a defunct three-member group.[2] Instead, the Board concedes that its practice was to reconstitute a delegee group when one group member's term expired. Brief for Respondent 39, n. 27.[3]

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[2] When one member of a group is disqualified, only two members actually participate in the decision. That circumstance thus also presents the problem of the possible inferiority of two-member decisionmaking. That the Board found it necessary to reconstitute groups only when there was a vacancy, and not when there was a disqualification, suggests that its practice was driven by more than its belief in the "superiority of three-member groups," *post*, at 697 (KENNEDY, J., dissenting).

[3] It also has not been the Board's practice to issue decisions when the Board's membership has fallen to two. For about a 2-month period in 1993–1994, and a 1-month period in 2001–2002, the Board had only two members and did not issue decisions. Brief for Respondent 5, n. 4. In 2005, the Board did delegate its authority to a three-member group, of

That our interpretation of the delegation provision is consistent with the Board's longstanding practice is persuasive evidence that it is the correct one, notwithstanding the Board's more recent view. See *Bowen* v. *Georgetown Univ. Hospital*, 488 U. S. 204, 214 (1988).

In sum, a straightforward understanding of the text, which requires that no fewer than three members be vested with the Board's full authority, coupled with the Board's longstanding practice, points us toward an interpretation of the delegation clause that requires a delegee group to maintain a membership of three.

III

Against these points, the Government makes several arguments that we find unconvincing. It first argues that § 3(b) authorizes the Board's action by its plain terms, notwithstanding the somewhat fictional nature of the delegation to a three-member group with the expectation that within days it would become a two-member group. In particular, the Government contends the group quorum requirement and the vacancy clause together make clear that when the Board has delegated its power to a three-member group, "any two members of that group constitute a quorum that may continue to exercise the delegated powers, regardless whether the third group member . . . continues to sit on the Board" and regardless "whether a quorum remains in the full Board." Brief for Respondent 17; see also *id.*, at 20–23.

Although the group quorum provision clearly authorizes two members to act as a quorum of a "group designated pursuant to the first sentence"—*i. e.*, a group of at least three members—it does not, by its plain terms, authorize two members to constitute a valid delegee group. A quorum is the number of members of a larger body that must partici-

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which two members issued a few orders as a quorum during a 3-day period in which the Board's (and the group's) membership fell below three. *Ibid.* But the two-member Board at issue in this case, extending over two years, is unprecedented in the history of the post-Taft-Hartley Board.

pate for the valid transaction of business. See Black's Law Dictionary 1370 (9th ed. 2009) (defining "quorum" as the "minimum number of members . . . who must be present for a deliberative assembly to legally transact business"); 13 Oxford English Dictionary 51 (2d ed. 1989) ("A fixed number of members of any body . . . whose presence is necessary for the proper or valid transaction of business"); Webster's New International Dictionary 2046 (2d ed. 1954) ("Such a number of the officers or members of any body as is, when duly assembled, legally competent to transact business"). But the fact that there are sufficient members participating to constitute a quorum does not necessarily establish that the larger body is properly constituted or can validly exercise authority.[4] In other words, that only two members must participate to transact business in the name of the group does not establish that the group itself can exercise the Board's authority when the group's membership falls below three.

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[4] Nor does failure to meet a quorum requirement necessarily establish that an entity's power is suspended so that it can be exercised by no delegee. The requisite membership of an organization, and the number of members who must participate for it to take an action, are two separate (albeit related) characteristics. Thus, although we reach the same result, we do not adopt the District of Columbia Circuit's equation of a quorum requirement with a membership requirement that must be satisfied or else the power of any entity to which the Board has delegated authority is suspended. See *Laurel Baye Healthcare of Lake Lanier, Inc.* v. *NLRB*, 564 F. 3d 469, 475 (2009) ("[T]he Board quorum provision establishes that the power of the Board to act exists [only] when the Board consists of three members. The delegee group's delegated power to act . . . ceases when the Board's membership dips below the Board quorum of three members" (citation omitted)). The Board may not, of course, itself take any action absent sufficient membership to muster a quorum (three), and in that sense a quorum requirement establishes a minimum membership level. Our conclusion that the delegee group ceases to exist once there are no longer three Board members to constitute the group does not cast doubt on the prior delegations of authority to nongroup members, such as the regional directors or the general counsel. The latter implicates a separate question that our decision does not address.

The Government nonetheless contends that quorum rules "ordinarily" define the number of members that is both necessary and sufficient for an entity to take an action. Brief for Respondent 20. Therefore, because of the quorum provision, if "at least two members of a delegee group actually participate in a decision . . . that should be the end of the matter," regardless of vacancies in the group or on the Board. *Ibid.* But even if quorum provisions ordinarily provide the rule for dealing with vacancies—*i. e.*, even if they ordinarily make irrelevant any vacancies in the remainder of the larger body—the quorum provisions in § 3(b) do no such thing. Rather, there is a separate clause addressing vacancies. The vacancy clause, recall, provides that "[a] vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board." § 153(b) (2006 ed.). We thus understand the quorum provisions merely to define the number of members who must participate in a decision, and look to the vacancy clause to determine whether vacancies in excess of that number have any effect on an entity's authority to act.

The Government argues that the vacancy clause establishes that a vacancy in the *group* has no effect. But the clause speaks to the effect of a vacancy in the *Board* on the authority to exercise the powers of the *Board;* it does not provide a delegee group authority to act when there is a vacancy in the group. It is true that any vacancy in the group is necessarily also a vacancy in the Board (although the converse is not true), and that a group exercises the (delegated) "powers of the Board." But § 3(b) explicitly distinguishes between a group and the Board throughout, and in light of that distinction we do not think "Board" should be read to include "group" when doing so would negate for all practical purposes the command that a delegation must be made to a group of at least three members.

Some courts have nonetheless interpreted the quorum and vacancy provisions of § 3(b) by analogizing to an appellate

panel, which may decide a case even though only two of the three initially assigned judges remain on the panel. See *Photo-Sonics, Inc.* v. *NLRB*, 678 F. 2d 121, 122–123 (CA9 1982). The governing statute provides that a case may be decided "by separate panels, each consisting of three judges," 28 U. S. C. § 46(b), but that a "majority of the number of judges authorized to constitute a court or panel thereof . . . shall constitute a quorum," § 46(d). We have interpreted that statute to "requir[e] the inclusion of at least three judges in the first instance," but to allow a two-judge "quorum to proceed to judgment when one member of the panel dies or is disqualified." *Nguyen* v. *United States*, 539 U. S. 69, 82 (2003). But § 46, which addresses the assignment of particular cases to panels, is a world apart from this statute, which authorizes the standing delegation of all the Board's powers to a small group.[5] Given the difference between a panel constituted to decide particular cases and the creation of a standing panel plenipotentiary, which will decide many cases arising long after the third member departs, there is no basis for reading the statutes similarly. Moreover, our reading of the court of appeals quorum provision was informed by the longstanding practice of allowing two judges from the initial panel to proceed to judgment in the case of a vacancy, see *ibid.*, and as we have already explained, the Board's practice has been precisely the opposite.

Finally, we are not persuaded by the Government's argument that we should read the statute to authorize the Board to act with only two members in order to advance the congressional objective of Board efficiency. Brief for Respond-

[5] In any event, if the analogy to the appellate courts were correct, then one might have to examine each Board decision individually. Petitioner's case was not initially assigned to a three-member panel and thereafter decided by two members after one member had retired. Instead, by the time petitioner's case came before the Board, Member Kirsanow had long departed. In practical terms, petitioner's case was both assigned to and decided by a two-member delegee group.

ent 26. In the Government's view, Congress' establishment of the two-member quorum for a delegee group reflected its comfort with pre-Taft-Hartley practice, when the then-three-member Board regularly issued decisions with only two members. *Id.*, at 24. But it is unsurprising that two members regularly issued Board decisions prior to Taft-Hartley, because the statute then provided for a Board quorum of two. See 29 U. S. C. § 153(b) (1946 ed.). Congress *changed* that requirement to a three-member quorum for the Board. As we noted above, if Congress had wanted to allow the Board to continue to operate with only two members, it could have kept the Board quorum requirement at two.[6]

Furthermore, if Congress had intended to allow for a two-member Board, it is hard to imagine why it would have limited the Board's power to delegate its authority by requiring a delegee group of at least three members. Nor do we have any reason to surmise that Congress' overriding objective in amending § 3(b) was to keep the Board operating at all costs; the inclusion of the three-member quorum and delegation provisions indicate otherwise. Cf. Robert's Rules of Order § 3, p. 20 (10th ed. 2001) ("The requirement of a quorum is a protection against totally unrepresentative action in the name of the body by an unduly small number of persons").

IV

In sum, we find that the Board quorum requirement and the three-member delegation clause should not be read as easily surmounted technical obstacles of little to no import.

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[6] We have no doubt that Congress intended "to preserve the ability of two members of the Board to exercise the Board's full powers, in limited circumstances," *post*, at 699, as when a two-member quorum of a properly constituted delegee group issues a decision for the Board in a particular case. But we doubt "Congress intended to preserve" the pre-Taft-Hartley practice of two members acting for the Board when the third seat was vacant, *ibid.*, because it declined to preserve the pre-Taft-Hartley two-member Board quorum.

Our reading of the statute gives effect to those provisions without rendering any other provision of the statute superfluous: The delegation clause still operates to allow the Board to act in panels of three, and the group quorum provision still operates to allow any panel to issue a decision by only two members if one member is disqualified. Our construction is also consistent with the Board's longstanding practice with respect to delegee groups. We thus hold that the delegation clause requires that a delegee group maintain a membership of three in order to exercise the delegated authority of the Board.

We are not insensitive to the Board's understandable desire to keep its doors open despite vacancies.[7] Nor are we unaware of the costs that delay imposes on the litigants. If Congress wishes to allow the Board to decide cases with only two members, it can easily do so. But until it does, Congress' decision to require that the Board's full power be delegated to no fewer than three members, and to provide for a Board quorum of three, must be given practical effect rather than swept aside in the face of admittedly difficult circumstances. Section 3(b), as it currently exists, does not authorize the Board to create a tail that would not only wag the dog, but would continue to wag after the dog died.

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

It is so ordered.

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[7] Former Board members have identified turnover and vacancies as a significant impediment to the operations of the Board. See Truesdale, Battling Case Backlogs at the NLRB, 16 Lab. Law. 1, 5 (2000) ("[I]t is clear that turnover and vacancies have a major impact on Board productivity"); Higgins, Labor Czars—Commissars—Keeping Women in the Kitchen—the Purpose and Effects of the Administrative Changes Made by Taft-Hartley, 47 Cath. U. L. Rev. 941, 953 (1998) ("Taft-Hartley's Achilles heel is the appointment process. . . . In the past twenty years . . . Board member turnover and delays in appointments and in the confirmation process have kept the Board from reaching its true potential").

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

As of the day this case was argued before the Court, the National Labor Relations Board (Board), constituted as a five-member board, had operated with but two members for more than 26 months. That state of affairs, to say the least, was not ideal. This may be an underlying reason for the Court's conclusion. Despite the fact that the statute's plain terms permit a two-member quorum of a properly designated three-member group to issue orders, the Court holds that the two-member quorum lost all authority to act once the third member left the Board. Under the Court's holding, the Board was unauthorized to resolve the more than 500 cases it addressed during those 26 months in the course of carrying out its responsibility "to remove obstructions to the free flow of commerce" through "the promotion of industrial peace." *NLRB* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240, 257 (1939). This result is removed even further from the ideal and from congressional intent, as revealed in the statutory design. So it is hard to make the case that the Court's interpretation of the statute either furthers its most evident purposes or leads to the more sensible outcome.

Indeed, in my view, the objectives of the statute, which must be to ensure orderly operations when the Board is not at full strength as well as efficient operations when it is, are better respected by a statutory interpretation that dictates a result opposite to the one reached by the Court. And in all events, the outcome of the case is but a check on the accuracy of the textual analysis; and here the text of the statute, which must control, does not support the holding of the Court. These reasons, and those to be further discussed, inform this respectful dissent.

I

The Board, by statute, consists of five members. 29 U. S. C. § 153(a). Section 153(b) provides a mechanism in

which the Board can delegate all of its powers to a three-member group. As relevant here, the statute consists of three parts. First, a delegation clause:

> "The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise."

Then, a vacancy clause:

> "A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board . . . ."

And finally, immediately following the vacancy clause, are the Board and group quorum provisions:

> "[A]nd three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof."

As the Court acknowledges, *ante*, at 679, the three-member group of Members Liebman, Schaumber, and Kirsanow were a "group designated pursuant to the first sentence" of § 153(b). As such, a two-member quorum of that group had statutory authorization to issue orders; and that is precisely what Members Liebman and Schaumber did. Because the group was properly designated under § 153(b) and a two-member quorum of the group was authorized to act under the statute's plain terms, its actions were lawful. See *Connecticut Nat. Bank* v. *Germain*, 503 U. S. 249, 253–254 (1992) ("[I]n interpreting a statute a court should always turn first to one, cardinal canon before all others. . . . [C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says").

Nothing in the statute suggests that a delegation to a three-member group expires when one member's seat becomes vacant, as the Court holds today. In other contexts, it is settled law that a vacancy in a delegee group does not

void the initial delegation. See *Nguyen* v. *United States*, 539 U. S. 69, 82 (2003) (concerning vacancies in three-member panels of the courts of appeals). Any doubt on that point should be resolved by this specific statutory instruction: "A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board." § 153(b). Members Liebman and Schaumber were exercising the powers of the Board as its remaining members; yet the Court today holds that the vacancy impaired their right to exercise those powers in hundreds of cases. That conclusion is contrary to the statutory mandate.

By its holding, the Court rejects a straightforward reading that it acknowledges is "textually permissible." *Ante*, at 681. It does so because, in its view, it is "structurally implausible." *Ibid.* But the only textually permissible reading of § 153(b) authorizes a two-member quorum of a delegee group to issue orders, as was done here; and in any event there is no structural implausibility in reading the statute according to its plain terms.

II

The Court reads the statute to require a delegee group to maintain three members. Unable to find this requirement in the statute's text, the Court gives three reasons for its interpretation. Those reasons do not withstand scrutiny.

A

The first reason the Court gives for its interpretation is that reading the statute to require a delegee group to maintain three members "is the only way to harmonize and give meaningful effect to all of the provisions in" § 153(b). *Ante*, at 680. This is not so. But it should be further noted that the argument advanced by the Court is not that the Government's interpretation of the statute renders any provision superfluous or without a role to play in the statutory scheme. Instead, the Court surmises that certain provisions would not have "meaningful," "material," or "practical" effect, *ante*,

at 680, 688. But that is just to say that the Court has determined, in its own judgment, that some provisions should have a greater role than provided by the text of the statute.

The Government's reading of the statute does not render any clause meaningless. The full Board must have three or more members in order to conduct any business, including delegating its authority to a three-member group, as required under the Board quorum provision. This provision applies "at all times" to the Board acting as a whole. Two members of the Board could not conduct any business unless they were previously designated by the full Board as members of a delegee group with such authority. Any delegation of the Board's authority must be to at least three members, as required by the delegation clause. Any group to which the Board has properly delegated its authority must have two members present to act, as required by the group quorum provision. This reading gives the delegation clause and each of the quorum provisions independent meaning.

Where two members act as a quorum of a group, the statute (unlike the Court) is indifferent to the reason for the third member's absence, be it illness, recusal, or vacancy. The Court would hold that two members of a group can act as a quorum so long as the third's absence is not due to a vacancy; yet the vacancy clause makes it clear that the authority of Board "members" to act shall not be impaired by vacancies. The clause includes all members, including those acting as part of three-member groups.

The Court in effect would rewrite the group quorum provision to say, "two members shall constitute a quorum of any group [unless the third member's absence is due to a vacancy]." Even if the statute said nothing about vacancies, this would be a misreading of the quorum provision. A "quorum" is the "minimum number of members . . . who must be present for a deliberative assembly to legally transact business." Black's Law Dictionary 1370 (9th ed. 2009) (hereinafter Black's). As the Court has made clear in the

past, quorum requirements are generally indifferent to the reasons underlying any particular member's absence. See *Nguyen*, 539 U. S., at 82.

For instance, the Court has previously discussed a statute governing the delegation of power to three-member panels of the federal courts of appeals. *Ibid.* That statute provides: "A majority of the number of judges authorized to constitute a court or panel thereof . . . shall constitute a quorum." 28 U. S. C. § 46(d). While the statute makes no mention of vacancies, the Court had little trouble concluding that the statute "permits a quorum to proceed to judgment when one member of the panel dies or is disqualified." *Nguyen*, *supra*, at 82. The Court today offers to distinguish *Nguyen* as being "informed by the longstanding practice of allowing two judges from the initial panel to proceed to judgment in the case of a vacancy." *Ante*, at 686. But there was little if any reliance on any such practice in *Nguyen*. In noting that its conclusion was a matter of "settled law," the Court relied on the text of the statute and a single case that itself looked directly to the statutory text of § 46(d). *Nguyen*, *supra*, at 82 (citing *United States* v. *Allied Stevedoring Corp.*, 241 F. 2d 925, 927 (CA2 1957) (L. Hand, J.)).

If the group quorum provision leaves any room for doubt that it applies in cases of vacancy, its application is made clearer by the vacancy clause itself. That clause states in unequivocal terms that "[a] vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board." § 153(b). The Court makes much of the fact that the statute refers to a vacancy in the "Board" rather than in a "group." But the former category subsumes the latter. That is, the phrase "[a] vacancy in the Board" covers the entire universe of instances in which there may be a vacancy in a group, because all group members are Board members.

The Court counters that the vacancy clause "speaks to the effect of a vacancy in the *Board* on the authority to exercise

the powers of the *Board*," *ante*, at 685, as opposed to a vacancy in a group. But the Court's abridged restatement of the vacancy clause suffers from a critical imprecision. The Court's point would be well taken if the vacancy clause stated that "a vacancy in the Board shall not affect the power of the Board to operate." But the clause instead states that "[a] vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board." Delegee groups consist of members exercising the powers of the Board. This clause thus instructs that a vacancy in the Board shall not impair the right of members to exercise the Board's powers, an authority that members of delegee groups possess. But under the Court's reading, vacancies in the Board will often impair the right of the remaining members to exercise the powers of the Board, notwithstanding the explicit statutory command to the contrary.

In an effort to avoid the mandates of the group quorum provision, as buttressed by the vacancy clause, the Court relies on the delegation clause. The Court reads the clause as requiring a delegee group to maintain three members in order for its authority to remain intact. In my respectful submission, this reading of the statute, in which any vacancy in a delegee group somehow invalidates the delegation itself, has no textual basis. Contrary to the Court's and petitioner's assertions, the delegation clause is not rendered unimportant under the Government's interpretation. The delegation clause establishes what is required for delegation in the first instance, while the vacancy clause and the group quorum provision allow the delegee group to proceed in the event that a member's term expires or a member resigns.

Congress could have required a delegee group to maintain three members, but it did not do so; instead, it included a vacancy clause that is an explicit rejection of such a requirement. That is no doubt why the Court's reading has not been adopted by the five Courts of Appeals to have rejected its result. See *Teamsters Local Union No. 523* v. *NLRB*,

590 F. 3d 849 (CA10 2009); *Narricot Indus., L. P.* v. *NLRB*, 587 F. 3d 654 (CA4 2009); *Snell Island SNF LLC* v. *NLRB*, 568 F. 3d 410 (CA2 2009); 564 F. 3d 840 (CA7 2009); *Northeastern Land Servs., Ltd.* v. *NLRB*, 560 F. 3d 36 (CA1 2009). While one Court of Appeals reached the same result as the Court, it too did not adopt the Court's reasoning that a delegee group must maintain three members. *Laurel Baye Healthcare of Lake Lanier, Inc.* v. *NLRB*, 564 F. 3d 469, 472–473 (CADC 2009) ("[T]his delegee group may act with two members so long as the Board quorum requirement is, 'at all times,' satisfied").

The Court's reasons for nonetheless reading this requirement into the statutory text bring me to its second point.

B

The Court's textual arguments in the end reduce to a single objection: The Government's reading of § 153(b) allows two Board members to act as the full Board, thereby eviscerating the requirement that the Board only operate with a three-member quorum (or as three-member panels). This animates the Court's second reason for departing from the statutory text, as the Court suggests that had Congress "intended to authorize two members alone to act for the Board on an ongoing basis, it could have said so in straightforward language." *Ante*, at 681. But Congress undoubtedly permitted two members to act for the Board: Even under the Court's interpretation, two members are authorized to exercise the full powers of the Board so long as they are part of a delegee group that has fallen to two members due to any reason other than vacancy. *Ante*, at 688 ("[T]he group quorum provision still operates to allow any panel to issue a decision by only two members if one member is disqualified").

The Court's complaint, then, cannot be that Congress did not intend two members to exercise the powers of the Board; it must be that Congress did not intend to allow two mem-

bers to do so for protracted periods of time. The Court is likely correct that Congress did not expect a two-member quorum to operate as the Board for extended periods, but unintended consequences are typically the result of unforeseen circumstances. And it should be even more evident that Congress did not intend the Board to cease operating entirely for an extended period of time, as the Court's interpretation of § 153(b) now ordains. Members Liebman and Schaumber issued more than 500 opinions when they operated as a two-member quorum of a properly designated group:

> "Those decisions resolved a wide variety of disputes over union representation and allegations of unfair labor practices, including cases involving employers' discharges of employees for exercising their statutory rights; disputes over secret ballot elections in which employees voted to select a union representative; protests over employers' withdrawal of recognition from union representatives designated by employees; refusals by employers or unions to honor their obligation to bargain in good faith; and challenges to the requirement that employees pay union dues as a condition of employment." Brief for Respondent 6–7 (footnotes omitted).

The Court's objection, that Congress could have been more explicit if it wanted two members to operate as the Board, is misplaced. There is nothing inconsistent about Congress preferring Board decisions to be made by three members and advancing that preference through statutory requirements, while at the same time providing exceptions for suboptimal circumstances, such as those presented here. Quorum provisions do not express the legislature's judgment about the optimal number of members that should be present to transact business; they set a floor that, while less than ideal, provides a minimum number of participants necessary to protect

"against totally unrepresentative action." Robert's Rules of Order § 3, p. 16 (rev. ed. 1970).

One likely reason Congress did not permit the Board to delegate its authority to two-member groups in the first instance is that Congress wanted to avoid two-member groups in the mine run of cases. Congress' statutory scheme achieved that goal, as the Court's review of the Board's historical practices aptly demonstrates. *Ante*, at 681–683. Congress nonetheless provided for two-member quorums to operate in extraordinary circumstances, where the Board has exercised its discretion to delegate its authority to a particular three-member group, and one member of such a group is unavailable for whatever reason. The Board's delegation to a three-member group that ultimately dwindled to two was a thoughtful and considerate exercise of its reasonable discretion when it was confronted with two imperfect alternatives.

During the past two years, events have turned what Congress had undoubtedly thought would be an extraordinary circumstance into an ordinary one, through no fault of the Board. That is no reason to dispense with the statutory regime that is prescribed when these circumstances arise, even when they unexpectedly persist.

C

The Court's final reason for its interpretation is the Board's longstanding practice of reconstituting panels whenever they drop below three members due to a vacancy. But see *Photo-Sonics, Inc.* v. *NLRB*, 678 F. 2d 121, 122–123 (CA9 1982) (upholding decision from a two-member delegee group after third member retired). The commonsense conclusion from this practice, however, is that the Board respects the superiority of three-member groups to two-member quorums of those groups. That the Board reconstitutes its panels to include three members does not demonstrate that a

two-member group lacks the authority to act when recomposition is not an option.

The Court is mistaken, then, when it suggests that, if two-member quorums were permissible, the Board would have a practice of allowing two-member quorums to persist without reconstituting panels. Persuasive authority shows the contrary to be true. In 2003, the Office of Legal Counsel (OLC) advised that two members can operate as a quorum of a properly designated group, even if the other seats on the Board are vacant. The Board agreed to be bound by that opinion. See Dept. of Justice, OLC, Quorum Requirements, App. to Brief for Respondent 1a–3a. Six months later, Board Member Acosta resigned. See NLRB Bulletin, Ronald Meisburg Receives Recess Appointment From President Bush To Be NLRB Member (Dec. 29, 2003). Despite OLC's opinion and the Board's position that two-member quorums could exercise the full powers of the Board, the Board prudently reconstituted each three-member panel on which Member Acosta served before his departure because there were enough members of the Board to do so. Its own prudent actions should not be used as a reason to strip the Board of a statutory power.

And a further instructive history comes from the practices of the original Board, before the 1947 Taft-Hartley Act. The Wagner Act of 1935, 49 Stat. 451, provided for a three-member Board and contained a vacancy provision similar to the one found in § 153(b): "A vacancy in the Board shall not impair the right of the remaining members to exercise all the powers of the Board, and two members of the Board shall, at all times, constitute a quorum." § 3(b), 49 Stat. 451. Under this statutory grant of authority, from 1935 to 1947 a two-member quorum of the Board operated during three separate periods when the third seat was vacant, issuing nearly 500 two-member decisions during such times. Those two-member Boards issued 3 published decisions in 1936 (reported at 2 N. L. R. B. 198–240); 237 published decisions in

1940 (reported at 27 N. L. R. B. 1–1395 and 28 N. L. R. B. 1–115); and 225 published decisions in 1941 (reported at 35 N. L. R. B. 24–1360 and 36 N. L. R. B. 1–45). Brief for Respondent 3, n. 1.

Congress intended to preserve this practice when it enacted the Taft-Hartley Act in 1947. The purpose of the Taft-Hartley amendment was to increase the Board's efficiency by permitting multiple three-member groups to exercise the full powers of the Board. See S. Rep. No. 105, 80th Cong., 1st Sess., 8 (1947) ("The expansion of the Board . . . would permit it to operate in panels of three, thereby increasing by 100 percent its ability to dispose of cases expeditiously"). In furtherance of that objective, the new statutory language in § 153(b) complements the congressional intent to preserve the ability of two members of the Board to exercise the Board's full powers, in limited circumstances, by permitting the Board to delegate "any or all" of its powers "to any group of three or more members," two members of which would constitute a quorum.

D

Petitioner, but not the Court, advances an alternative interpretation of § 153(b) adopted by the United States Court of Appeals for the District of Columbia Circuit. See Brief for Petitioner 16–27; *Laurel Baye*, 564 F. 3d 469. In petitioner's view, § 153(b) requires the Board to have a quorum of three members "at all times," and when the Board's quorum fell to two members any powers that it had delegated automatically ceased.

This is a misreading of the statute that the Court rightly declines to adopt. *Ante*, at 684, n. 4. As explained above, that the Board must meet a three-member quorum requirement at all times when it wishes to operate as the full Board does not mean it must maintain three members in order for delegee groups to act. It just means that the quorum requirement for the full Board, operating independently of

any delegee group, is fixed at three, as opposed to the various dynamic quorum requirements found elsewhere in the United States Code. See, *e. g.*, 28 U. S. C. § 46(d) (setting the quorum requirements for courts of appeals at "[a] majority of the number of judges authorized to constitute a court or panel thereof"); see also Black's 1370 (defining "proportional quorum" as: "[a] quorum calculated with reference to some defined or assumed set, usu. either the number of seats (including vacancies) or the number of sitting members (excluding vacancies)").

Petitioner's reading ignores the operation of the word "except" in the statute: "[T]hree members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group." § 153(b).

While the Court does not adopt petitioner's flawed reading, it should be noted that its failure to decisively reject it calls into question various delegations of authority the Board has made beyond three-member groups. For instance, § 153(d) permits the Board to delegate various powers to its general counsel, but under petitioner's view the general counsel would have lost all authority the moment the Board fell to two members. See also § 153(b) (permitting Board to delegate certain powers to its regional directors). The Court's assurances that its opinion "does not cast doubt on the prior delegations of authority to nongroup members," *ante*, at 684, n. 4, are cold comfort when it fails to reject petitioner's view outright.

* * *

It is not optimal for a two-member quorum to exercise the full powers of the Board for an extended period of time. But the desire to avoid that situation cannot justify the Court's significant revisions to § 153(b): (1) It writes language into the delegation clause, requiring delegee groups to maintain a membership of three, despite the conspicuous absence of this requirement and the statutory rejection of it

in the group quorum provision; (2) it excises the word "not" from the vacancy clause, so that a Board vacancy does "impair the right of the remaining members to exercise all of the powers of the Board" in hundreds of cases; (3) it renders the group quorum provision unintelligible, so that its application depends entirely on the reason for the third member's absence, and applies in all instances except when the absence is due to a vacancy (despite the vacancy clause's contrary mandate, earlier in the very same sentence).

The Court's revisions leave the Board defunct for extended periods of time, a result that Congress surely did not intend. The Court's assurance that its interpretation is designed to give practical effect to the statute should bring it to the opposite result from the one it reaches. For these reasons, I would affirm the judgment of the Court of Appeals.

Syllabus

STOP THE BEACH RENOURISHMENT, INC. *v.* FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION ET AL.

CERTIORARI TO THE SUPREME COURT OF FLORIDA

No. 08–1151. Argued December 2, 2009—Decided June 17, 2010

Florida owns in trust for the public the land permanently submerged beneath navigable waters and the foreshore. The mean high-water line is the ordinary boundary between private beachfront, or littoral property, and state-owned land. Littoral owners have, *inter alia*, rights to have access to the water, to use the water for certain purposes, to have an unobstructed view of the water, and to receive accretions and relictions (collectively, accretions) to the littoral property. An accretion occurs gradually and imperceptibly, while a sudden change is an avulsion. The littoral owner automatically takes title to dry land added to his property by accretion. With avulsion, however, the seaward boundary of littoral property remains what it was: the mean high-water line before the event. Thus, when an avulsion has added new land, the littoral owner has no right to subsequent accretions, because the property abutting the water belongs to the owner of the seabed (ordinarily the State).

Florida's Beach and Shore Preservation Act establishes procedures for depositing sand on eroded beaches (restoration) and maintaining the deposited sand (nourishment). When such a project is undertaken, the state entity that holds title to the seabed sets a fixed "erosion control line" to replace the fluctuating mean high-water line as the boundary between littoral and state property. Once the new line is recorded, the common law ceases to apply. Thereafter, when accretion moves the mean high-water line seaward, the littoral property remains bounded by the permanent erosion-control line.

Respondents the city of Destin and Walton County sought permits to restore 6.9 miles of beach eroded by several hurricanes, adding about 75 feet of dry sand seaward of the mean high-water line (to be denominated the erosion-control line). Petitioner, a nonprofit corporation formed by owners of beachfront property bordering the project (hereinafter Members) brought an unsuccessful administrative challenge. Respondent the Florida Department of Environmental Protection approved the permits, and this suit followed. The State Court of Appeal concluded that the Department's order had eliminated the Members' littoral rights (1) to receive accretions to their property and (2) to have their property's contact with the water remain intact. Concluding that

this would be an unconstitutional taking and would require an additional administrative requirement to be met, it set aside the order, remanded the proceeding, and certified to the Florida Supreme Court the question whether the Act unconstitutionally deprived the Members of littoral rights without just compensation. The State Supreme Court answered "no" and quashed the remand, concluding that the Members did not own the property supposedly taken. Petitioner sought rehearing on the ground that the Florida Supreme Court's decision effected a taking of the Members' littoral rights contrary to the Fifth and Fourteenth Amendments; rehearing was denied.

Held: The judgment is affirmed.

998 So. 2d 1102, affirmed.

JUSTICE SCALIA delivered the opinion of the Court with respect to Parts I, IV, and V, concluding that the Florida Supreme Court did not take property without just compensation in violation of the Fifth and Fourteenth Amendments. Pp. 729–733.

(a) Respondents' arguments that petitioner does not own the property and that the case is not ripe were not raised in the briefs in opposition and thus are deemed waived. P. 729.

(b) There can be no taking unless petitioner can show that, before the Florida Supreme Court's decision, littoral property owners had rights to future accretions and to contact with the water superior to the State's right to fill in its submerged land. That showing cannot be made. Two core Florida property-law principles intersect here. First, the State as owner of the submerged land adjacent to littoral property has the right to fill that land, so long as it does not interfere with the rights of the public and of littoral landowners. Second, if an avulsion exposes land seaward of littoral property that had previously been submerged, that land belongs to the State even if it interrupts the littoral owner's contact with the water. Prior Florida law suggests that there is no exception to this rule when the State causes the avulsion. Thus, Florida law as it stood before the decision below allowed the State to fill in its own seabed, and the resulting sudden exposure of previously submerged land was treated like an avulsion for ownership purposes. The right to accretions was therefore subordinate to the State's right to fill. Pp. 729–731.

(c) The decision below is consistent with these principles. Cf. *Lucas* v. *South Carolina Coastal Council*, 505 U. S. 1003, 1028–1029. It did not abolish the Members' right to future accretions, but merely held that the right was not implicated by the beach-restoration project because of the doctrine of avulsion. Relying on dicta in the Florida Supreme Court's *Sand Key* decision, petitioner contends that the State took the

Members' littoral right to have the boundary always be the mean high-water line. But petitioner's interpretation of that dictum contradicts the clear law governing avulsion. One cannot say the Florida Supreme Court contravened established property law by rejecting it. Pp. 731–733.

JUSTICE SCALIA, joined by THE CHIEF JUSTICE, JUSTICE THOMAS, and JUSTICE ALITO, concluded in Parts II and III that if a court declares that what was once an established right of private property no longer exists, it has taken that property in violation of the Takings Clause. Pp. 713–728.

(a) Though the classic taking is a transfer of property by eminent domain, the Clause applies to other state actions that achieve the same thing, including those that recharacterize as public property what was previously private property, see *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U. S. 155, 163–165. The Clause is not addressed to the action of a specific branch or branches. It is concerned simply with the act, not with the governmental actor. This Court's precedents provide no support for the proposition that takings effected by the judicial branch are entitled to special treatment, and in fact suggest the contrary. See *PruneYard Shopping Center* v. *Robins*, 447 U. S. 74; *Webb's Fabulous Pharmacies*, *supra*. Pp. 713–725.

(b) For a judicial taking, respondents would add to the normal takings inquiry the requirement that the court's decision have no "fair and substantial basis." This test is not obviously appropriate, but it is no different in this context from the requirement that the property owner prove an established property right. Respondents' additional arguments—that federal courts lack the knowledge of state law required to decide whether a state judicial decision purporting to clarify property rights has instead taken them; that common-law judging should not be deprived of needed flexibility; and that applying the Takings Clause to judicial decisions would force lower federal courts to review final state-court judgments, in violation of the *Rooker-Feldman* doctrine, see *Rooker* v. *Fidelity Trust Co.*, 263 U. S. 413, 415–416; *District of Columbia Court of Appeals* v. *Feldman*, 460 U. S. 462, 476—are unpersuasive. And petitioner's proposed "unpredictability test"—that a judicial taking consists of a decision that "constitutes a sudden change in state law, unpredictable in terms of the relevant precedents," *Hughes* v. *Washington*, 389 U. S. 290, 296 (Stewart, J., concurring)—is misdirected. What counts is not whether there is precedent for the allegedly confiscatory decision, but whether the property right allegedly taken was well established. Pp. 725–728.

JUSTICE KENNEDY, joined by JUSTICE SOTOMAYOR, agreed that the Florida Supreme Court did not take property without just compensa-

Syllabus

tion, but concluded that this case does not require the Court to determine whether, or when, a judicial decision determining property owners' rights can violate the Takings Clause. If and when future cases show that the usual principles, including constitutional ones that constrain the judiciary like due process, are inadequate to protect property owners, then the question whether a judicial decision can effect a taking would be properly presented. Pp. 733–742.

JUSTICE BREYER, joined by JUSTICE GINSBURG, agreed that no unconstitutional taking occurred here, but concluded that it is unnecessary to decide more than that to resolve this case. Difficult questions of constitutional law—*e. g.*, whether federal courts may review a state court's decision to determine if it unconstitutionally takes private property without compensation, and what the proper test is for evaluating whether a state-court property decision enacts an unconstitutional taking—need not be addressed in order to dispose "of the immediate case." *Whitehouse* v. *Illinois Central R. Co.*, 349 U. S. 366, 373. Such questions are better left for another day. Pp. 742–745.

SCALIA, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, IV, and V, in which ROBERTS, C. J., and KENNEDY, THOMAS, GINSBURG, BREYER, ALITO, and SOTOMAYOR, JJ., joined, and an opinion with respect to Parts II and III, in which ROBERTS, C. J., and THOMAS and ALITO, JJ., joined. KENNEDY, J., filed an opinion concurring in part and concurring in the judgment, in which SOTOMAYOR, J., joined, *post,* p. 733. BREYER, J., filed an opinion concurring in part and concurring in the judgment, in which GINSBURG, J., joined, *post,* p. 742. STEVENS, J., took no part in the decision of the case.

D. Kent Safriet argued the cause for petitioner. With him on the briefs was *Richard S. Brightman.*

Scott D. Makar, Solicitor General of Florida, argued the cause for respondents. With him on the brief for Florida Department of Environmental Protection et al. were *Bill McCollum*, Attorney General, *Timothy D. Osterhaus*, Deputy Solicitor General, *Thomas M. Beason*, *Teresa L. Mussetto*, and *Kara L. Gross. Thomas W. Merrill*, *Hala Sandridge*, and *Linda Shelley* filed a brief for respondents Walton County, Florida, et al.

Deputy Solicitor General Kneedler argued the cause for the United States as *amicus curiae* supporting respondents.

With him on the brief were *Solicitor General Kagan*, *Acting Assistant Attorney General Cruden*, *Nicole A. Saharsky*, and *Katherine J. Barton.**

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*Briefs of *amici curiae* urging reversal were filed for the American Civil Rights Union by *Peter J. Ferrara;* for the Coalition for Property Rights, Inc., by *Menelaos K. Papalas* and *Sidney F. Ansbacher;* for the Eagle Forum Education and Legal Defense Fund by *Douglas G. Smith;* for the New England Legal Foundation by *Benjamin G. Robbins* and *Martin J. Newhouse;* for the Oregonians in Action Legal Center by *Donald Joe Willis;* for the Owners' Counsel of America by *Robert H. Thomas*, *Mark M. Murakami*, and *Tred R. Eyerly;* and for Save Our Beaches et al. by *Shannon Lee Goessling.*

Briefs of *amici curiae* urging affirmance were filed for the American Planning Association et al. by *John D. Echeverria;* for the Coastal States Organization by *Richard M. Frank;* for the National Association of Counties et al. by *Richard Ruda*, *Douglas T. Kendall*, and *Elizabeth B. Wydra;* and for the Surfrider Foundation by *Bruce J. Berman* and *Jeffrey W. Mikoni.*

Briefs of *amici curiae* were filed for the State of California et al. by *Edmund G. Brown, Jr.*, Attorney General of California, *Daniel L. Siegel*, Supervising Deputy Attorney General, *Manuel M. Medeiros*, Solicitor General, *J. Matthew Rodriquez*, Chief Assistant Attorney General, *Jan Stevens*, Senior Assistant Attorney General, and *Joseph Barbieri*, Supervising Deputy Attorney General, by *Richard S. Gebelein*, Chief Deputy Attorney General of Delaware, and by the Attorneys General for their respective States as follows: *Dustin McDaniel* of Arkansas, *Lisa Madigan* of Illinois, *Tom Miller* of Iowa, *James D. "Buddy" Caldwell* of Louisiana, *Janet T. Mills* of Maine, *Douglas F. Gansler* of Maryland, *Martha Coakley* of Massachusetts, *Michael A. Cox* of Michigan, *Jim Hood* of Mississippi, *Steve Bullock* of Montana, *Jon Bruning* of Nebraska, *Catherine Cortez Masto* of Nevada, *Michael A. Delaney* of New Hampshire, *Anne Milgram* of New Jersey, *Richard Cordray* of Ohio, *John R. Kroger* of Oregon, *Patrick C. Lynch* of Rhode Island, *Henry D. McMaster* of South Carolina, *Marty J. Jackley* of South Dakota, *Robert E. Cooper, Jr.*, of Tennessee, *William C. Mims* of Virginia, *Robert M. McKenna* of Washington, *Darrell V. McGraw, Jr.*, of West Virginia, and *Bruce A. Salzburg* of Wyoming; for Brevard County, Florida, by *Scott L. Knox;* for the Cato Institute et al. by *James S. Burling*, *Steven Geoffrey Gieseler*, *Ilya Shapiro*, *Karen R. Harned*, and *Elizabeth Milito;* for the Center for Constitutional Jurisprudence by *Anthony T. Caso*, *Edwin Meese III*, and *John C. Eastman;* for Citizens for Constitutional Property Rights Legal Foundation, Inc., by *John J. Delaney* and *Emily J. Vaias;* for the Florida Shore and Beach

JUSTICE SCALIA announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, IV, and V, and an opinion with respect to Parts II and III, in which THE CHIEF JUSTICE, JUSTICE THOMAS, and JUSTICE ALITO join.

We consider a claim that the decision of a State's court of last resort took property without just compensation in violation of the Takings Clause of the Fifth Amendment, as applied against the States through the Fourteenth, see *Dolan* v. *City of Tigard*, 512 U. S. 374, 383–384 (1994).

I

A

Generally speaking, state law defines property interests, *Phillips* v. *Washington Legal Foundation*, 524 U. S. 156, 164 (1998), including property rights in navigable waters and the lands underneath them, see *United States* v. *Cress*, 243 U. S. 316, 319–320 (1917); *St. Anthony Falls Water Power Co.* v. *St. Paul Water Comm'rs*, 168 U. S. 349, 358–359 (1897). In Florida, the State owns in trust for the public the land permanently submerged beneath navigable waters and the foreshore (the land between the low-tide line and the mean high-water line). Fla. Const., Art. X, § 11; *Broward* v. *Mabry*, 58 Fla. 398, 407–409, 50 So. 826, 829–830 (1909). Thus, the mean high-water line (the average reach of high tide over the preceding 19 years) is the ordinary boundary between private beachfront, or littoral[1] property, and state-owned

Preservation Association et al. by *Gary K. Oldehoff* and *Nancy E. Stroud;* for the National Association of Home Builders et al. by *Thomas Jon Ward* and *David N. Crump, Jr.;* for the New Jersey Land Title Association by *Michael J. Fasano;* and for Save Our Shoreline by *David L. Powers.*

[1] Many cases and statutes use "riparian" to mean abutting any body of water. The Florida Supreme Court, however, has adopted a more precise usage whereby "riparian" means abutting a river or stream and "littoral" means abutting an ocean, sea, or lake. *Walton Cty.* v. *Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102, 1105, n. 3 (2008). When speaking of the Florida law applicable to this case, we follow the Florida Supreme Court's terminology.

land. See *Miller* v. *Bay-To-Gulf, Inc.*, 141 Fla. 452, 458–460, 193 So. 425, 427–428 (1940) *(per curiam);* Fla. Stat. §§ 177.27(14)–(15), 177.28(1) (2007).

Littoral owners have, in addition to the rights of the public, certain "special rights" with regard to the water and the foreshore, *Broward,* 58 Fla., at 410, 50 So., at 830, rights which Florida considers to be property, generally akin to easements, see *ibid.; Thiesen* v. *Gulf, Fla. & Ala. R. Co.*, 75 Fla. 28, 57, 78, 78 So. 491, 500, 507 (1918) (on rehearing). These include the right of access to the water, the right to use the water for certain purposes, the right to an unobstructed view of the water, and the right to receive accretions and relictions to the littoral property. *Id.*, at 58–59, 78 So., at 501; *Board of Trustees of Internal Improvement Trust Fund* v. *Sand Key Assoc., Ltd.*, 512 So. 2d 934, 936 (Fla. 1987). This is generally in accord with well-established common law, although the precise property rights vary among jurisdictions. Compare *Broward, supra,* at 409–410, 50 So., at 830, with 1 J. Lewis, Law of Eminent Domain § 100 (3d ed. 1909); 1 H. Farnham, Law of Waters and Water Rights § 62, pp. 278–280 (1904) (hereinafter Farnham).

At the center of this case is the right to accretions and relictions. Accretions are additions of alluvion (sand, sediment, or other deposits) to waterfront land; relictions are lands once covered by water that become dry when the water recedes. F. Maloney, S. Plager, & F. Baldwin, Water Law and Administration: The Florida Experience § 126, pp. 385–386 (1968) (hereinafter Maloney); 1 Farnham § 69, at 320. (For simplicity's sake, we shall refer to accretions and relictions collectively as accretions, and the process whereby they occur as accretion.) In order for an addition to dry land to qualify as an accretion, it must have occurred gradually and imperceptibly—that is, so slowly that one could not see the change occurring, though over time the difference became apparent. *Sand Key, supra,* at 936; *County of St. Clair* v. *Lovingston*, 23 Wall. 46, 66–67 (1874). When, on the other hand, there is a "sudden or perceptible loss of or

addition to land by the action of the water or a sudden change in the bed of a lake or the course of a stream," the change is called an avulsion. *Sand Key, supra,* at 936; see also 1 Farnham § 69, at 320.

In Florida, as at common law, the littoral owner automatically takes title to dry land added to his property by accretion; but formerly submerged land that has become dry land by avulsion continues to belong to the owner of the seabed (usually the State). See, *e. g., Sand Key, supra,* at 937; Maloney § 126.6, at 392; 2 W. Blackstone, Commentaries on the Laws of England 261–262 (1766) (hereinafter Blackstone). Thus, regardless of whether an avulsive event exposes land previously submerged or submerges land previously exposed, the boundary between littoral property and sovereign land does not change; it remains (ordinarily) what was the mean high-water line before the event. See *Bryant* v. *Peppe,* 238 So. 2d 836, 838–839 (Fla. 1970); J. Gould, Law of Waters § 158, p. 290 (1883). It follows from this that, when a new strip of land has been added to the shore by avulsion, the littoral owner has no right to subsequent accretions. Those accretions no longer add to *his* property, since the property abutting the water belongs not to him but to the State. See Maloney § 126.6, at 393; 1 Farnham § 71a, at 328.

B

In 1961, Florida's Legislature passed the Beach and Shore Preservation Act, 1961 Fla. Laws ch. 61–246, as amended, Fla. Stat. §§ 161.011–161.45 (2007). The Act establishes procedures for "beach restoration and nourishment projects," § 161.088, designed to deposit sand on eroded beaches (restoration) and to maintain the deposited sand (nourishment). § 161.021(3), (4). A local government may apply to the Department of Environmental Protection (Department) for the funds and the necessary permits to restore a beach, see §§ 161.101(1), 161.041(1). When the project involves placing fill on the State's submerged lands, authorization is required from the Board of Trustees of the Internal Improvement

Trust Fund (Board), see § 253.77(1), which holds title to those lands, § 253.12(1).

Once a beach restoration "is determined to be undertaken," the Board sets what is called "an erosion control line." § 161.161(3)–(5). It must be set by reference to the existing mean high-water line, though in theory it can be located seaward or landward of that.[2] See § 161.161(5). Much of the project work occurs seaward of the erosion-control line, as sand is dumped on what was once submerged land. See App. 87–88. The fixed erosion-control line replaces the fluctuating mean high-water line as the boundary between privately owned littoral property and state property. § 161.191(1). Once the erosion-control line is recorded, the common law ceases to increase upland property by accretion (or decrease it by erosion). § 161.191(2). Thus, when accretion to the shore moves the mean high-water line seaward, the property of beachfront landowners is not extended to that line (as the prior law provided), but remains bounded by the permanent erosion-control line. Those landowners "continue to be entitled," however, "to all common-law riparian rights" other than the right to accretions. § 161.201. If the beach erodes back landward of the erosion-control line over a substantial portion of the shoreline covered by the project, the Board may, on its own initiative, or must, if asked by the owners or lessees of a majority of the property affected, direct the agency responsible for maintaining the beach to return the beach to the condition contemplated by the project. If that is not done within a year, the project is canceled and the erosion-control line is null and void. § 161.211(2), (3). Finally, by regulation, if

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[2] We assume, as the parties agree we should, that in this case the erosion-control line is the pre-existing mean high-water line. Tr. of Oral Arg. 11–12. Respondents concede that, if the erosion-control line were established landward of that, the State would have taken property. Brief for Respondent Department et al. 15; Brief for Respondent Walton County et al. 6.

the use of submerged land would "unreasonably infringe on riparian rights," the project cannot proceed unless the local governments show that they own or have a property interest in the upland property adjacent to the project site. Fla. Admin. Code Rule 18–21.004(3)(b) (2009).

C

In 2003, the city of Destin and Walton County applied for the necessary permits to restore 6.9 miles of beach within their jurisdictions that had been eroded by several hurricanes. The project envisioned depositing along that shore sand dredged from further out. See *Walton Cty.* v. *Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102, 1106 (Fla. 2008). It would add about 75 feet of dry sand seaward of the mean high-water line (to be denominated the erosion-control line). The Department issued a notice of intent to award the permits, App. 27–41, and the Board approved the erosion-control line, *id.*, at 49–50.

Petitioner here, Stop the Beach Renourishment, Inc., is a nonprofit corporation formed by people who own beachfront property bordering the project area (we shall refer to them as Members). It brought an administrative challenge to the proposed project, see *id.*, at 10–26, which was unsuccessful; the Department approved the permits. Petitioner then challenged that action in state court under the Florida Administrative Procedure Act, Fla. Stat. § 120.68 (2007). The District Court of Appeal for the First District concluded that, contrary to the Act's preservation of "'all common-law riparian rights,'" the order had eliminated two of the Members' littoral rights: (1) the right to receive accretions to their property; and (2) the right to have the contact of their property with the water remain intact. *Save Our Beaches, Inc.* v. *Florida Dept. of Environmental Protection*, 27 So. 3d 48, 58 (2006) (emphasis deleted). This, it believed, would be an unconstitutional taking, which would "unreasonably infringe on riparian rights," and therefore require the showing

under Fla. Admin. Code Rule 18–21.004(3)(b) that the local governments owned or had a property interest in the upland property. It set aside the Department's final order approving the permits and remanded for that showing to be made. 27 So. 3d, at 60. It also certified to the Florida Supreme Court the following question (as rephrased by the latter court):

> "On its face, does the Beach and Shore Preservation Act unconstitutionally deprive upland owners of littoral rights without just compensation?"[3] 998 So. 2d, at 1105 (footnotes omitted).

The Florida Supreme Court answered the certified question in the negative, and quashed the First District's remand. *Id.*, at 1121. It faulted the Court of Appeal for not considering the doctrine of avulsion, which it concluded permitted the State to reclaim the restored beach on behalf of the public. *Id.*, at 1116–1118. It described the right to accretions as a future contingent interest, not a vested property right, and held that there is no littoral right to contact with the water independent of the littoral right of access, which the Act does not infringe. *Id.*, at 1112, 1119–1120. Petitioner sought rehearing on the ground that the Florida Supreme Court's decision itself effected a taking of the Members' littoral rights contrary to the Fifth and Fourteenth Amendments to the Federal Constitution.[4] The request for rehearing was denied. We granted certiorari, 557 U. S. 903 (2009).

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[3] The Florida Supreme Court seemingly took the question to refer to constitutionality under the Florida Constitution, which contains a clause similar to the Takings Clause of the Federal Constitution. Compare Fla. Const., Art. X, § 6, cl. (a), with U. S. Const., Amdt. 5.

[4] We ordinarily do not consider an issue first presented to a state court in a petition for rehearing if the state court did not address it. See *Adams* v. *Robertson*, 520 U. S. 83, 89, n. 3 (1997) *(per curiam)*. But where the state-court decision itself is claimed to constitute a violation of federal law, the state court's refusal to address that claim put forward in a petition for rehearing will not bar our review. See *Brinkerhoff-Faris Trust & Sav. Co.* v. *Hill*, 281 U. S. 673, 677–678 (1930).

II

A

Before coming to the parties' arguments in the present case, we discuss some general principles of our takings jurisprudence. The Takings Clause—"nor shall private property be taken for public use, without just compensation," U. S. Const., Amdt. 5—applies as fully to the taking of a landowner's riparian rights as it does to the taking of an estate in land.[5] See *Yates* v. *Milwaukee*, 10 Wall. 497, 504 (1871). Moreover, though the classic taking is a transfer of property to the State or to another private party by eminent domain, the Takings Clause applies to other state actions that achieve the same thing. Thus, when the government uses its own property in such a way that it destroys private property, it has taken that property. See *United States* v. *Causby*, 328 U. S. 256, 261–262 (1946); *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166, 177–178 (1872). Similarly, our doctrine of regulatory takings "aims to identify regulatory actions that are functionally equivalent to the classic taking." *Lingle* v. *Chevron U. S. A. Inc.*, 544 U. S. 528, 539 (2005). Thus, it is a taking when a state regulation forces a property owner to submit to a permanent physical occupation, *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U. S. 419, 425–426 (1982), or deprives him of all economically beneficial use of his property, *Lucas* v. *South Carolina Coastal Council*, 505 U. S. 1003, 1019 (1992). Finally (and here we approach the situation before us), States effect a taking if they recharacterize as public property what was previously private property. See *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U. S. 155, 163–165 (1980).

The Takings Clause (unlike, for instance, the *Ex Post Facto* Clauses, see Art. I, § 9, cl. 3; § 10, cl. 1) is not addressed to the action of a specific branch or branches. It is con-

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[5] We thus need not resolve whether the right of accretion is an easement, as petitioner claims, or, as Florida claims, a contingent future interest.

cerned simply with the act, and not with the governmental actor ("nor shall private property *be taken*" (emphasis added)). There is no textual justification for saying that the existence or the scope of a State's power to expropriate private property without just compensation varies according to the branch of government effecting the expropriation. Nor does common sense recommend such a principle. It would be absurd to allow a State to do by judicial decree what the Takings Clause forbids it to do by legislative fiat. See *Stevens* v. *Cannon Beach*, 510 U. S. 1207, 1211–1212 (1994) (SCALIA, J., dissenting from denial of certiorari).

Our precedents provide no support for the proposition that takings effected by the judicial branch are entitled to special treatment, and in fact suggest the contrary. *PruneYard Shopping Center* v. *Robins*, 447 U. S. 74 (1980), involved a decision of the California Supreme Court overruling one of its prior decisions which had held that the California Constitution's guarantees of freedom of speech and of the press, and of the right to petition the government, did not require the owner of private property to accord those rights on his premises. The appellants, owners of a shopping center, contended that their private-property rights could not "be denied by invocation of a state constitutional provision *or by judicial reconstruction of a State's laws of private property*," *id.*, at 79 (emphasis added). We held that there had been no taking, citing cases involving legislative and executive takings, and applying standard Takings Clause analysis. See *id.*, at 82–84. We treated the California Supreme Court's application of the constitutional provisions as a regulation of the use of private property, and evaluated whether that regulation violated the property owners' "right to exclude others," *id.*, at 80 (internal quotation marks omitted). Our opinion addressed only the claimed taking by the constitutional provision. Its failure to speak separately to the claimed taking by "judicial reconstruction of a State's laws of private property" certainly does not suggest that a taking

by judicial action cannot occur, and arguably suggests that the same analysis applicable to taking by constitutional provision would apply.

Webb's Fabulous Pharmacies, *supra*, is even closer in point. There the purchaser of an insolvent corporation had interpleaded the corporation's creditors, placing the purchase price in an interest-bearing account in the registry of the Circuit Court of Seminole County, to be distributed in satisfaction of claims approved by a receiver. The Florida Supreme Court construed an applicable statute to mean that the interest on the account belonged to the county, because the account was "considered 'public money,'" *Beckwith* v. *Webb's Fabulous Pharmacies*, 374 So. 2d 951, 952–953 (1979) *(per curiam)*. We held this to be a taking. We noted that "[t]he usual and general rule is that any interest on an interpleaded and deposited fund follows the principal and is to be allocated to those who are ultimately to be the owners of that principal," 449 U. S., at 162. "Neither the Florida Legislature by statute, nor the Florida courts by judicial decree," we said, "may accomplish the result the county seeks simply by recharacterizing the principal as 'public money.'" *Id.*, at 164.

In sum, the Takings Clause bars *the State* from taking private property without paying for it, no matter which branch is the instrument of the taking. To be sure, the manner of state action may matter: Condemnation by eminent domain, for example, is always a taking, while a legislative, executive, or judicial restriction of property use may or may not be, depending on its nature and extent. But the particular state *actor* is irrelevant. If a legislature *or a court* declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation. "[A] State, by *ipse dixit*, may not transform private property into public property without compensation." *Ibid.*

B

JUSTICE BREYER's concurrence says that we need neither (1) to decide whether the judiciary can ever effect a taking, nor (2) to establish the standard for determining whether it has done so. See *post*, at 742–743 (opinion concurring in part and concurring in judgment). The second part of this is surely incompatible with JUSTICE BREYER's conclusion that the "Florida Supreme Court's decision in this case did not amount to a 'judicial taking.' " *Post*, at 745. One cannot know whether a takings claim is invalid without knowing what standard it has failed to meet.[6] Which means that JUSTICE BREYER must either (1) grapple with the artificial question of what would constitute a judicial taking if there were such a thing as a judicial taking (reminiscent of the perplexing question how much wood would a woodchuck chuck if a woodchuck could chuck wood?), or (2) answer in the negative what he considers to be the "unnecessary" constitutional question whether there is such a thing as a judicial taking.

It is not true that deciding the constitutional question in this case contradicts our settled practice. To the contrary, we have often recognized the existence of a constitutional right, or established the test for violation of such a right (or both), and then gone on to find that the claim at issue fails. See, *e. g.*, *New Jersey* v. *T. L. O.*, 469 U. S. 325, 333, 341–343 (1985) (holding that the Fourth Amendment applies to searches and seizures conducted by public-school officials, establishing the standard for finding a violation, but concluding that the claim at issue failed); *Strickland* v. *Washington*, 466 U. S. 668, 687, 698–700 (1984) (recognizing a constitutional right to effective assistance of counsel, establishing the test for its violation, but holding that the claim at issue failed);

[6] Thus, the landmark case of *Penn Central Transp. Co.* v. *New York City*, 438 U. S. 104, 124–128, 138 (1978), held that there was no taking only after setting forth a multifactor test for determining whether a regulation restricting the use of property effects a taking.

Hill v. *Lockhart*, 474 U. S. 52, 58–60 (1985) (holding that a *Strickland* claim can be brought to challenge a guilty plea, but rejecting the claim at issue); *Jackson* v. *Virginia*, 443 U. S. 307, 313–320, 326 (1979) (recognizing a due process claim based on insufficiency of evidence, establishing the governing test, but concluding that the claim at issue failed); *Village of Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 390, 395–397 (1926) (recognizing that block zoning ordinances could constitute a taking, but holding that the challenged ordinance did not do so); *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, 241, 255–257 (1897) (holding that the Due Process Clause of the Fourteenth Amendment prohibits uncompensated takings, but concluding that the court below made no errors of law in assessing just compensation). In constitutional-tort suits against public officials, we have found the defendants entitled to immunity only after holding that their action violated the Constitution. See, *e. g.*, *Wilson* v. *Layne*, 526 U. S. 603, 605–606 (1999). Indeed, up until last Term, we *required* federal courts to address the constitutional question before the immunity question. See *Saucier* v. *Katz*, 533 U. S. 194, 201 (2001), overruled by *Pearson* v. *Callahan*, 555 U. S. 223, 236 (2009).

"Assuming without deciding" would be less appropriate here than it was in many of those earlier cases, which established constitutional rights quite separate from any that had previously been acknowledged. Compared to *Strickland*'s proclamation of a right to effective assistance of counsel, for example, proclaiming that a taking can occur through judicial action addresses a point of relative detail.

In sum, JUSTICE BREYER cannot decide that petitioner's claim fails without first deciding what a valid claim would consist of. His agreement with Part IV of our opinion necessarily implies agreement with the test for a judicial taking (elaborated in Part II–A) which Part IV applies: whether the state court has "declare[d] that what was once an established right of private property no longer exists," *supra*, at 715.

JUSTICE BREYER must either agree with that standard or craft one of his own. And agreeing to or crafting a *hypothetical* standard for a *hypothetical* constitutional right is sufficiently unappealing (we have eschewed that course many times in the past) that JUSTICE BREYER might as well acknowledge the right as well. Or he could avoid the need to agree with or craft a hypothetical standard by *denying* the right. But embracing a standard while being coy about the right is, well, odd; and deciding this case while addressing *neither* the standard *nor* the right is quite impossible.

JUSTICE BREYER responds that he simply advocates resolving this case without establishing "*the precise* standard under which a party wins or loses." *Post*, at 744 (emphasis added). But he relies upon no standard at all, precise or imprecise. He simply pronounces that this is not a judicial taking if there is such a thing as a judicial taking. The cases he cites to support this Queen-of-Hearts approach provide no precedent. In each of them the existence of the right in question was settled,[7] and we faced a choice between *competing* standards that had been applied by the courts.[8] We simply held that the right in question had not been infringed under *any* of them. There is no established right here, and no competing standards.

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[7] See *Smith* v. *Spisak*, 558 U. S. 139, 149–156 (2010) (ineffective assistance of counsel); *Quilloin* v. *Walcott*, 434 U. S. 246, 255 (1978) (equal protection); *Mercer* v. *Theriot*, 377 U. S. 152, 155 (1964) *(per curiam)* (right to judgment notwithstanding the verdict where evidence is lacking).

[8] See *Spisak*, *supra*, at 155–156. *Quilloin*'s cryptic rejection of the claim "[u]nder any standard of review," 434 U. S., at 256, could only refer to the various levels of scrutiny—such as "strict" or "rational basis"—that we had applied to equal-protection claims, see *Loving* v. *Virginia*, 388 U. S. 1, 8–9 (1967). And in *Mercer*, which found the evidence "sufficient under any standard which might be appropriate—state or federal," 377 U. S., at 156, one of the parties had argued for an established standard under Louisiana law, and the other for an established federal standard. Compare Brief for Petitioner in *Mercer* v. *Theriot*, O. T. 1963, No. 336, pp. 18–22, with Brief for Respondent in *Mercer* v. *Theriot*, p. 5.

C

Like JUSTICE BREYER's concurrence, JUSTICE KENNEDY's concludes that the Florida Supreme Court's action here does not meet the standard for a judicial taking, while purporting not to determine what is the standard for a judicial taking, or indeed whether such a thing as a judicial taking even exists. That approach is invalid for the reasons we have discussed.

JUSTICE KENNEDY says that we need not take what he considers the bold and risky step of holding that the Takings Clause applies to judicial action, because the Due Process Clause "would likely prevent a State from doing by judicial decree what the Takings Clause forbids it to do by legislative fiat," *post*, at 737 (opinion concurring in part and concurring in judgment) (internal quotation marks omitted). He invokes the Due Process Clause "in both its substantive and procedural aspects," *post*, at 735, not specifying which of his arguments relates to which.

The first respect in which JUSTICE KENNEDY thinks the Due Process Clause can do the job seems to sound in procedural due process. Because, he says, "[c]ourts, unlike the executive or legislature, are not designed to make policy decisions" about expropriation, "[t]he Court would be on strong footing in ruling that a judicial decision that eliminates or substantially changes established property rights" violates the Due Process Clause. *Post*, at 736, 737. Let us be clear what is being proposed here. This Court has held that the separation-of-powers principles that the Constitution imposes upon the Federal Government do not apply against the States. See *Dreyer* v. *Illinois*, 187 U. S. 71, 83–84 (1902). But in order to avoid the bold and risky step of saying that the Takings Clause applies to *all* government takings, JUSTICE KENNEDY would have us use procedural due process to impose judicially crafted separation-of-powers limitations upon the States: Courts cannot be used to perform the governmental function of expropriation. The asserted reasons

for the due process limitation are that the legislative and executive branches "are accountable in their political capacity" for takings, *post*, at 734, and "[c]ourts . . . are not designed to make policy decisions" about takings, *post*, at 736. These reasons may have a lot to do with sound separation-of-powers principles that ought to govern a democratic society, but they have nothing whatever to do with the protection of individual rights that is the object of the Due Process Clause.

Of course even taking those reasons at face value, it is strange to proclaim a democracy deficit and lack of special competence for the judicial taking of an individual property right, when this Court has had no trouble deciding matters of much greater moment, contrary to congressional desire or the legislated desires of most of the States, with no special competence except the authority we possess to enforce the Constitution. In any case, our opinion does *not* trust judges with the relatively small power JUSTICE KENNEDY now objects to. It is we who propose setting aside judicial decisions that take private property; it is he who insists that judges cannot be so limited. Under his regime, the citizen whose property has been judicially redefined to belong to the State would presumably be given the Orwellian explanation: "The court did not take your property. Because it is neither politically accountable nor competent to make such a decision, it cannot take property."

JUSTICE KENNEDY's injection of separation-of-powers principles into the Due Process Clause would also have the ironic effect of preventing the assignment of the expropriation function to the branch of government whose procedures are, by far, the *most* protective of individual rights. So perhaps even this first respect in which JUSTICE KENNEDY would have the Due Process Clause do the work of the Takings Clause pertains to substantive, rather than procedural, due process. His other arguments undoubtedly pertain to that, as evidenced by his assertion that "[i]t is . . . natural to read the Due Process Clause as limiting the power of courts

to eliminate or change established property rights," *post,* at 736, his endorsement of the proposition that the Due Process Clause imposes "limits on government's ability to diminish property values by regulation," *ibid.*, and his contention that "the Due Process Clause would likely prevent a State from doing by judicial decree what the Takings Clause forbids it to do by legislative fiat," *post,* at 737 (internal quotation marks omitted).

The first problem with using substantive due process to do the work of the Takings Clause is that we have held it cannot be done. "Where a particular Amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of "substantive due process," must be the guide for analyzing these claims.'" *Albright* v. *Oliver*, 510 U. S. 266, 273 (1994) (four-Justice plurality opinion) (quoting *Graham* v. *Connor*, 490 U. S. 386, 395 (1989)); see also 510 U. S., at 281 (KENNEDY, J., concurring in judgment) ("I agree with the plurality that an allegation of arrest without probable cause must be analyzed under the Fourth Amendment without reference to more general considerations of due process"). The second problem is that we have held for many years (logically or not) that the "liberties" protected by substantive due process do not include economic liberties. See, *e. g.*, *Lincoln Fed. Labor Union* v. *Northwestern Iron & Metal Co.*, 335 U. S. 525, 536 (1949). JUSTICE KENNEDY's language ("If a judicial decision . . . eliminates an established property right, the judgment could be set aside as a deprivation of property without due process of law," *post,* at 735) propels us back to what is referred to (usually deprecatingly) as "the *Lochner* era." See *Lochner* v. *New York*, 198 U. S. 45, 56–58 (1905). That is a step of much greater novelty, and much more unpredictable effect, than merely applying the Takings Clause to judicial action. And the third and last problem with using substantive due process is that either (1) it will not do all that the Takings

Clause does, or (2) if it does all that the Takings Clause does, it will encounter the same supposed difficulties that JUSTICE KENNEDY finds troublesome.

We do not grasp the relevance of JUSTICE KENNEDY's speculation, *post*, at 739, that the Framers did not envision the Takings Clause would apply to judicial action. They doubtless did not, since the Constitution was adopted in an era when courts had no power to "change" the common law. See 1 Blackstone 69–70 (1765); *Rogers* v. *Tennessee*, 532 U. S. 451, 472–478 (2001) (SCALIA, J., dissenting). Where the text they adopted is clear, however ("nor shall private property be taken for public use"), what counts is not what they envisioned but what they wrote. Of course even after courts, in the 19th century, did assume the power to change the common law, it is not true that the new "common-law tradition . . . allows for incremental modifications to property law," *post*, at 736, so that "owners may reasonably expect or anticipate courts to make certain changes in property law," *post*, at 738. In the only sense in which this could be relevant to what we are discussing, that is an astounding statement. We are talking here about judicial elimination of established private-property rights. If that is indeed a "common-law tradition," JUSTICE KENNEDY ought to be able to provide a more solid example for it than the only one he cites, *ibid.*, a state-court change (from "noxious" to "harmful") of the test for determining whether a neighbor's vegetation is a tortious nuisance. *Fancher* v. *Fagella*, 274 Va. 549, 555–556, 650 S. E. 2d 519, 522 (2007). But perhaps he does not really mean that it is a common-law tradition to eliminate property rights, since he immediately follows his statement that "owners may reasonably expect or anticipate courts to make certain changes in property law" with the contradictory statement that "courts cannot abandon settled principles," *post*, at 738. If no "settled princip[e]" has been abandoned, it is hard to see how property law could have been "change[d]," rather than merely clarified.

JUSTICE KENNEDY has added "two additional practical considerations that the Court would need to address before recognizing judicial takings," *post*, at 740. One of them is simple and simply answered: the assertion that "it is unclear what remedy a reviewing court could enter after finding a judicial taking," *ibid.* JUSTICE KENNEDY worries that we may only be able to mandate compensation. That remedy is even rare for a legislative or executive taking, and we see no reason why it would be the exclusive remedy for a judicial taking. If we were to hold that the Florida Supreme Court had effected an uncompensated taking in the present case, we would simply reverse the Florida Supreme Court's judgment that the Beach and Shore Preservation Act can be applied to the property in question. JUSTICE KENNEDY's other point, *ibid.*—that we will have to decide when the claim of a judicial taking must be asserted—hardly presents an awe-inspiring prospect. These, and all the other "difficulties," *post*, at 734, "difficult questions," *post*, at 737, and "practical considerations" *post*, at 740, that JUSTICE KENNEDY worries *may perhaps* stand in the way of recognizing a judicial taking, are either nonexistent or insignificant.

Finally, we cannot avoid comment upon JUSTICE KENNEDY's donning of the mantle of judicial restraint—his assertion that it is we, and not he, who would empower the courts and encourage their expropriation of private property. He warns that if judges know that their action is covered by the Takings Clause, they will issue "sweeping new rule[s] to adjust the rights of property owners," comfortable in the knowledge that their innovations will be preserved upon payment by the State. *Post*, at 738. That is quite impossible. As we have said, if we were to hold that the Florida Supreme Court had effected an uncompensated taking in this case, we would not validate the taking by ordering Florida to pay compensation. We would simply reverse the Florida Supreme Court's judgment that the Beach and Shore Preservation Act can be applied to the Members' property. The

power to effect a *compensated* taking would then reside, where it has always resided, not in the Florida Supreme Court but in the Florida Legislature—which could either provide compensation or acquiesce in the invalidity of the offending features of the Act. Cf. *Davis* v. *Michigan Dept. of Treasury*, 489 U. S. 803, 817–818 (1989). The only realistic incentive that subjection to the Takings Clause might provide to any court would be the incentive to get reversed, which in our experience few judges value.

JUSTICE KENNEDY, however, while dismissive of the Takings Clause, places no other constraints on judicial action. He puts forward some extremely vague applications of substantive due process, and does not even say that they (whatever they are) will *for sure* apply. ("It is thus natural to read the Due Process Clause as limiting the power of courts to eliminate or change established property rights," *post*, at 736; "courts . . . may not have the power to eliminate established property rights by judicial decision," *ibid.;* "the Due Process Clause would likely prevent a State from doing by judicial decree what the Takings Clause forbids it to do by legislative fiat," *post*, at 737 (internal quotation marks omitted); we must defer applying the Takings Clause until "[i]f and when future cases show that the usual principles, including constitutional principles that constrain the judiciary like due process, are somehow inadequate to protect property owners," *post*, at 742.)

Moreover, and more importantly, JUSTICE KENNEDY places no constraints whatever upon *this* Court. Not only does his concurrence only *think about* applying substantive due process; but because substantive due process is such a wonderfully malleable concept, see, *e. g., Lawrence* v. *Texas*, 539 U. S. 558, 562 (2003) (referring to "liberty of the person both in its spatial and in its more transcendent dimensions"), even a firm commitment to apply it would be a firm commitment to nothing in particular. JUSTICE KENNEDY's desire to substitute substantive due process for the Takings Clause

suggests, and the rest of what he writes confirms, that what holds him back from giving the Takings Clause its natural meaning is not the *intrusiveness* of applying it to judicial action, but the *definiteness* of doing so; not a concern to preserve the powers of the States' political branches, but a concern to preserve this Court's discretion to say that property may be taken, or may not be taken, as in the Court's view the circumstances suggest. We must not say that we are bound by the Constitution never to sanction judicial elimination of clearly established property rights. Where the power of this Court is concerned, one must *never* say never. See, *e. g.*, *Vieth* v. *Jubelirer*, 541 U. S. 267, 302–305 (2004) (plurality opinion); *Sosa* v. *Alvarez-Machain*, 542 U. S. 692, 750–751 (2004) (SCALIA, J., concurring in part and concurring in judgment). The great attraction of substantive due process as a substitute for more specific constitutional guarantees is that it *never* means never—because it never means anything precise.

III

Respondents put forward a number of arguments which contradict, to a greater or lesser degree, the principle discussed above, that the existence of a taking does not depend upon the branch of government that effects it. First, in a case claiming a judicial taking they would add to our normal takings inquiry a requirement that the court's decision have no "fair and substantial basis." This is taken from our jurisprudence dealing with the question whether a state-court decision rests upon adequate and independent state grounds, placing it beyond our jurisdiction to review. See E. Gressman, K. Geller, S. Shapiro, T. Bishop, & E. Hartnett, Supreme Court Practice, ch. 3.26, p. 222 (9th ed. 2007). To ensure that there is no "evasion" of our authority to review federal questions, we insist that the nonfederal ground of decision have "fair support." *Broad River Power Co.* v. *South Carolina ex rel. Daniel*, 281 U. S. 537, 540 (1930); see also *Ward* v. *Board of Comm'rs of Love Cty.*, 253 U. S. 17,

22–23 (1920). A test designed to determine whether there has been an evasion is not obviously appropriate for determining whether there has been a taking of property. But if it is to be extended there it must mean (in the present context) that there is a "fair and substantial basis" for believing that petitioner's Members did not have a property right to future accretions which the Act would take away. This is no different, we think, from our requirement that petitioner's Members must prove the elimination of an established property right.[9]

Next, respondents argue that federal courts lack the knowledge of state law required to decide whether a judicial decision that purports merely to clarify property rights has instead taken them. But federal courts must often decide what state property rights exist in nontakings contexts, see, *e. g.*, *Board of Regents of State Colleges* v. *Roth*, 408 U. S. 564, 577–578 (1972) (Due Process Clause). And indeed they must decide it to resolve claims that legislative or executive action has effected a taking. For example, a regulation that deprives a property owner of all economically beneficial use of his property is not a taking if the restriction "inhere[s] in the title itself, in the restrictions that background principles

[9] JUSTICE BREYER complains that we do not set forth "procedural limitations or canons of deference" to restrict federal-court review of state-court property decisions. See *post*, at 744. (1) To the extent this is true it is unsurprising, but (2) fundamentally, it is false: (1) It is true that we make our own determination, without deference to state judges, whether the challenged decision deprives the claimant of an established property right. That is unsurprising because it is what this Court does when determining state-court compliance with *all* constitutional imperatives. We do not defer to the judgment of state judges in determining whether, for example, a state-court decision has deprived a defendant of due process or subjected him to double jeopardy. (2) The test we have adopted, however (deprivation of an *established* property right), contains within itself a considerable degree of deference to state courts. A property right is not established if there is doubt about its existence; and when there is doubt we do not make our own assessment but accept the determination of the state court.

of the State's law of property and nuisance already place upon land ownership." *Lucas*, 505 U. S., at 1029. A constitutional provision that forbids the uncompensated taking of property is quite simply insusceptible of enforcement by federal courts unless they have the power to decide what property rights exist under state law.

Respondents also warn us against depriving common-law judging of needed flexibility. That argument has little appeal when directed against the enforcement of a constitutional guarantee adopted in an era when, as we said *supra*, at 722, courts had no power to "change" the common law. But in any case, courts have no peculiar need of flexibility. It is no more essential that judges be free to overrule prior cases that establish property entitlements than that state legislators be free to revise pre-existing statutes that confer property entitlements, or agency-heads pre-existing regulations that do so. And insofar as courts merely clarify and elaborate property entitlements that were previously unclear, they cannot be said to have taken an established property right.

Finally, the city and county argue that applying the Takings Clause to judicial decisions would force lower federal courts to review final state-court judgments, in violation of the so-called *Rooker-Feldman* doctrine. See *Rooker* v. *Fidelity Trust Co.*, 263 U. S. 413, 415–416 (1923); *District of Columbia Court of Appeals* v. *Feldman*, 460 U. S. 462, 476 (1983). That does not necessarily follow. The finality principles that we regularly apply to takings claims, see *Williamson County Regional Planning Comm'n* v. *Hamilton Bank of Johnson City*, 473 U. S. 172, 186–194 (1985), would require the claimant to appeal a claimed taking by a lower court to the state supreme court, whence certiorari would come to this Court. If certiorari were denied, the claimant would no more be able to launch a lower-court federal suit against the taking effected by the state supreme-court opinion than he would be able to launch such a suit against

a legislative or executive taking approved by the state supreme-court opinion; the matter would be res judicata. And where the claimant was not a party to the original suit, he would be able to challenge in federal court the taking effected by the state supreme-court opinion to the same extent that he would be able to challenge in federal court a legislative or executive taking previously approved by a state supreme-court opinion.

For its part, petitioner proposes an unpredictability test. Quoting Justice Stewart's concurrence in *Hughes* v. *Washington*, 389 U. S. 290, 296 (1967), petitioner argues that a judicial taking consists of a decision that "'constitutes a sudden change in state law, unpredictable in terms of relevant precedents.'" See Brief for Petitioner 17, 34–50. The focus of petitioner's test is misdirected. What counts is not whether there is precedent for the allegedly confiscatory decision, but whether the property right allegedly taken was established. A "predictability of change" test would cover both too much and too little. Too much, because a judicial property decision need not be predictable, so long as it does not declare that what had been private property under established law no longer is. A decision that clarifies property entitlements (or the lack thereof) that were previously unclear might be difficult to predict, but it does not eliminate established property rights. And the predictability test covers too little, because a judicial elimination of established private-property rights that is foreshadowed by dicta or even by holdings years in advance is nonetheless a taking. If, for example, a state court held in one case, to which the complaining property owner was not a party, that it had the power to limit the acreage of privately owned real estate to 100 acres, and then, in a second case, applied that principle to declare the complainant's 101st acre to be public property, the State would have taken an acre from the complainant even though the decision was predictable.

IV

We come at last to petitioner's takings attack on the decision below. At the outset, respondents raise two preliminary points which need not detain us long. The city and the county argue that petitioner cannot state a cause of action for a taking because, though the Members own private property, petitioner itself does not; and that the claim is unripe because petitioner has not sought just compensation. Neither objection appeared in the briefs in opposition to the petition for writ of certiorari, and since neither is jurisdictional,[10] we deem both waived. See this Court's Rule 15.2; cf. *Oklahoma City* v. *Tuttle*, 471 U. S. 808, 815–816 (1985).

Petitioner argues that the Florida Supreme Court took two of the property rights of the Members by declaring that those rights did not exist: the right to accretions, and the right to have littoral property touch the water (which petitioner distinguishes from the mere right of access to the water).[11] Under petitioner's theory, because no prior Florida decision had said that the State's filling of submerged

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[10] Petitioner meets the two requirements necessary for an association to assert the Article III standing of its Members. See *Food and Commercial Workers* v. *Brown Group, Inc.*, 517 U. S. 544, 555–557 (1996). And the claim here is ripe insofar as Article III standing is concerned, since (accepting petitioner's version of Florida law as true) petitioner has been deprived of property.

[11] Petitioner raises two other claims that we do not directly address. First, petitioner tries to revive its challenge to the beach-restoration project, contending that it (rather than the Florida Supreme Court's opinion) constitutes a taking. Petitioner's arguments on this score are simply versions of two arguments it makes against the Florida Supreme Court's opinion: that the Department has replaced the Members' littoral-property rights with versions that are inferior because statutory; and that the Members previously had the right to have their property contact the water. We reject both, *infra*, at 732–733, and n. 12. Second, petitioner attempts to raise a challenge to the Act as a deprivation of property without due process. Petitioner did not raise this challenge before the Florida Supreme Court, and only obliquely raised it in the petition for certiorari. We therefore do not reach it. See *Adams*, 520 U. S., at 86–87.

tidal lands could have the effect of depriving a littoral owner of contact with the water and denying him future accretions, the Florida Supreme Court's judgment in the present case abolished those two easements to which littoral-property owners had been entitled. This puts the burden on the wrong party. There is no taking unless petitioner can show that, before the Florida Supreme Court's decision, littoral-property owners had rights to future accretions and contact with the water superior to the State's right to fill in its submerged land. Though some may think the question close, in our view the showing cannot be made.

Two core principles of Florida property law intersect in this case. First, the State as owner of the submerged land adjacent to littoral property has the right to fill that land, so long as it does not interfere with the rights of the public and the rights of littoral landowners. See *Hayes* v. *Bowman*, 91 So. 2d 795, 799–800 (Fla. 1957) (right to fill conveyed by State to private party); *State ex rel. Buford* v. *Tampa*, 88 Fla. 196, 210–211, 102 So. 336, 341 (1924) (same). Second, as we described *supra*, at 709, if an avulsion exposes land seaward of littoral property that had previously been submerged, that land belongs to the State even if it interrupts the littoral owner's contact with the water. See *Bryant*, 238 So. 2d, at 837, 838–839. The issue here is whether there is an exception to this rule when the State is the cause of the avulsion. Prior law suggests there is not. In *Martin* v. *Busch*, 93 Fla. 535, 112 So. 274 (1927), the Florida Supreme Court held that when the State drained water from a lakebed belonging to the State, causing land that was formerly below the mean high-water line to become dry land, that land continued to belong to the State. *Id.*, at 574, 112 So., at 287; see also *Bryant*, *supra*, at 838–839 (analogizing the situation in *Martin* to an avulsion). "'The riparian rights doctrine of accretion and reliction,'" the Florida Supreme Court later explained, "'does not apply to such lands.'" *Bryant*, *supra*, at 839 (quoting *Martin*, *supra*, at 578, 112 So., at 288 (Brown,

J., concurring)). This is not surprising, as there can be no accretions to land that no longer abuts the water.

Thus, Florida law as it stood before the decision below allowed the State to fill in its own seabed, and the resulting sudden exposure of previously submerged land was treated like an avulsion for purposes of ownership. The right to accretions was therefore subordinate to the State's right to fill. *Thiesen* v. *Gulf, Fla. & Ala. R. Co.* suggests the same result. That case involved a claim by a riparian landowner that a railroad's state-authorized filling of submerged land and construction of tracks upon it interfered with the riparian landowners' rights to access and to wharf out to a shipping channel. The Florida Supreme Court determined that the claimed right to wharf out did not exist in Florida, and that therefore only the right of access was compensable. 75 Fla., at 58–65, 78 So., at 501–503. Significantly, although the court recognized that the riparian-property owners had rights to accretion, see *id.*, at 64–65, 78 So., at 502–503, the only rights it even suggested would be infringed by the railroad were the right of access (which the plaintiff had claimed) and the rights of view and use of the water (which it seems the plaintiff had not claimed), see *id.*, at 58–59, 78, 78 So., at 501, 507.

The Florida Supreme Court decision before us is consistent with these background principles of state property law. Cf. *Lucas*, 505 U. S., at 1028–1029; *Scranton* v. *Wheeler*, 179 U. S. 141, 163 (1900). It did not abolish the Members' right to future accretions, but merely held that the right was not implicated by the beach-restoration project, because the doctrine of avulsion applied. See 998 So. 2d, at 1117, 1120–1121. The Florida Supreme Court's opinion describes beach restoration as the reclamation by the State of the public's land, just as *Martin* had described the lake drainage in that case. Although the opinion does not cite *Martin* and is not always clear on this point, it suffices that its characterization of the littoral right to accretion is consistent with *Martin*

and the other relevant principles of Florida law we have discussed.

What we have said shows that the rule of *Sand Key*, which petitioner repeatedly invokes, is inapposite. There the Florida Supreme Court held that an artificial accretion does not change the right of a littoral-property owner to claim the accreted land as his own (as long as the owner did not cause the accretion himself). 512 So. 2d, at 937–938. The reason *Martin* did not apply, *Sand Key* explained, is that the drainage that had occurred in *Martin* did not lower the water level by "'imperceptible degrees,'" and so did not qualify as an accretion. 512 So. 2d, at 940–941.

The result under Florida law may seem counterintuitive. After all, the Members' property has been deprived of its character (and value) as oceanfront property by the State's artificial creation of an avulsion. Perhaps state-created avulsions ought to be treated differently from other avulsions insofar as the property right to accretion is concerned. But nothing in prior Florida law makes such a distinction, and *Martin* suggests, if it does not indeed hold, the contrary. Even if there might be different interpretations of *Martin* and other Florida property-law cases that would prevent this arguably odd result, we are not free to adopt them. The Takings Clause only protects property rights as they are established under state law, not as they might have been established or ought to have been established. We cannot say that the Florida Supreme Court's decision eliminated a right of accretion established under Florida law.

Petitioner also contends that the State took the Members' littoral right to have their property continually maintain contact with the water. To be clear, petitioner does not allege that the State relocated the property line, as would have happened if the erosion-control line were *landward* of the old mean high-water line (instead of identical to it). Petitioner argues instead that the Members have a separate right for the boundary of their property to be always the mean high-

water line. Petitioner points to dicta in *Sand Key* that refers to "the right to have the property's contact with the water remain intact," 512 So. 2d, at 936. Even there, the right was included in the definition of the right to access, *ibid.*, which is consistent with the Florida Supreme Court's later description that "there is no independent right of contact with the water" but it "exists to preserve the upland owner's core littoral right of access to the water," 998 So. 2d, at 1119. Petitioner's expansive interpretation of the dictum in *Sand Key* would cause it to contradict the clear Florida law governing avulsion. One cannot say that the Florida Supreme Court contravened established property law by rejecting it.[12]

V

Because the Florida Supreme Court's decision did not contravene the established property rights of petitioner's Members, Florida has not violated the Fifth and Fourteenth Amendments. The judgment of the Florida Supreme Court is therefore affirmed.

It is so ordered.

JUSTICE STEVENS took no part in the decision of this case.

JUSTICE KENNEDY, with whom JUSTICE SOTOMAYOR joins, concurring in part and concurring in the judgment.

The Court's analysis of the principles that control ownership of the land in question, and of the rights of petitioner's members as adjacent owners, is correct in my view, leading to my joining Parts I, IV, and V of the Court's opinion. As JUSTICE BREYER observes, however, this case does not re-

[12] Petitioner also argues that the Members' other littoral rights have been infringed because the Act replaces their common-law rights with inferior statutory versions. Petitioner has not established that the statutory versions are inferior; and whether the source of a property right is the common law or a statute makes no difference, so long as the property owner continues to have what he previously had.

quire the Court to determine whether, or when, a judicial decision determining the rights of property owners can violate the Takings Clause of the Fifth Amendment of the United States Constitution. This separate opinion notes certain difficulties that should be considered before accepting the theory that a judicial decision that eliminates an "established property right," *ante*, at 726, constitutes a violation of the Takings Clause.

The Takings Clause is an essential part of the constitutional structure, for it protects private property from expropriation without just compensation; and the right to own and hold property is necessary to the exercise and preservation of freedom. The right to retain property without the fact or even the threat of that sort of expropriation is, of course, applicable to the States under the Due Process Clause of the Fourteenth Amendment. *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, 239 (1897).

The right of the property owner is subject, however, to the rule that the government does have power to take property for a public use, provided that it pays just compensation. See *First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles*, 482 U. S. 304, 314–315 (1987). This is a vast governmental power. And typically, legislative bodies grant substantial discretion to executive officers to decide what property can be taken for authorized projects and uses. As a result, if an authorized executive agency or official decides that Blackacre is the right place for a fire station or Greenacre is the best spot for a freeway interchange, then the weight and authority of the State are used to take the property, even against the wishes of the owner, who must be satisfied with just compensation.

In the exercise of their duty to protect the fisc, both the legislative and executive branches monitor, or should monitor, the exercise of this substantial power. Those branches are accountable in their political capacity for the proper discharge of this obligation.

To enable officials to better exercise this great power in a responsible way, some States allow their officials to take a second look after property has been condemned and a jury returns a verdict setting the amount of just compensation. See, *e. g.*, Cal. Civ. Proc. Code Ann. § 1268.510 (West 2007). If the condemning authority, usually acting through the executive, deems the compensation too high to pay for the project, it can decide not to take the property at all. The landowner is reimbursed for certain costs and expenses of litigation and the property remains in his or her hands. See, *e. g.*, § 1268.610(a).

This is just one aspect of the exercise of the power to select what property to condemn and the responsibility to ensure that the taking makes financial sense from the State's point of view. And, as a matter of custom and practice, these are matters for the political branches—the legislature and the executive—not the courts. See *First English*, *supra*, at 321 ("[T]he decision to exercise the power of eminent domain is a legislative function").

If a judicial decision, as opposed to an act of the executive or the legislature, eliminates an established property right, the judgment could be set aside as a deprivation of property without due process of law. The Due Process Clause, in both its substantive and procedural aspects, is a central limitation upon the exercise of judicial power. And this Court has long recognized that property regulations can be invalidated under the Due Process Clause. See, *e. g.*, *Lingle* v. *Chevron U. S. A. Inc.*, 544 U. S. 528, 542 (2005); *Goldblatt* v. *Hempstead*, 369 U. S. 590, 591, 592–593 (1962); *Demorest* v. *City Bank Farmers Trust Co.*, 321 U. S. 36, 42–43 (1944); *Broad River Power Co.* v. *South Carolina ex rel. Daniel*, 281 U. S. 537, 539, 540–541 (1930); *Washington ex rel. Seattle Title Trust Co.* v. *Roberge*, 278 U. S. 116, 121 (1928); *Nectow* v. *Cambridge*, 277 U. S. 183, 188 (1928); *Village of Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 395 (1926); see also *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 413 (1922) (there

must be limits on government's ability to diminish property values by regulation "or the contract and due process clauses are gone"). It is thus natural to read the Due Process Clause as limiting the power of courts to eliminate or change established property rights.

The Takings Clause also protects property rights, and it "operates as a conditional limitation, permitting the government to do what it wants so long as it pays the charge." *Eastern Enterprises* v. *Apfel,* 524 U. S. 498, 545 (1998) (KENNEDY, J., concurring in judgment and dissenting in part). Unlike the Due Process Clause, therefore, the Takings Clause implicitly recognizes a governmental power while placing limits upon that power. Thus, if the Court were to hold that a judicial taking exists, it would presuppose that a judicial decision eliminating established property rights is "otherwise constitutional" so long as the State compensates the aggrieved property owners. *Ibid.* There is no clear authority for this proposition.

When courts act without direction from the executive or legislature, they may not have the power to eliminate established property rights by judicial decision. "Given that the constitutionality" of a judicial decision altering property rights "appears to turn on the legitimacy" of whether the court's judgment eliminates or changes established property rights "rather than on the availability of compensation, . . . the more appropriate constitutional analysis arises under general due process principles rather than under the Takings Clause." *Ibid.* Courts, unlike the executive or legislature, are not designed to make policy decisions about "the need for, and likely effectiveness of, regulatory actions." *Lingle, supra,* at 545. State courts generally operate under a common-law tradition that allows for incremental modifications to property law, but "this tradition cannot justify a *carte blanch* judicial authority to change property definitions wholly free of constitutional limitation." Walston, The Con-

stitution and Property: Due Process, Regulatory Takings, and Judicial Takings, 2001 Utah L. Rev. 379, 435.

The Court would be on strong footing in ruling that a judicial decision that eliminates or substantially changes established property rights, which are a legitimate expectation of the owner, is "arbitrary or irrational" under the Due Process Clause. *Lingle*, 544 U. S., at 542; see *id.*, at 548–549 (KENNEDY, J., concurring); see also *Perry* v. *Sindermann*, 408 U. S. 593, 601 (1972) ("'[P]roperty'" interests protected by the Due Process Clauses are those "that are secured by 'existing rules or understandings'" (quoting *Board of Regents of State Colleges* v. *Roth*, 408 U. S. 564, 577 (1972))). Thus, without a judicial takings doctrine, the Due Process Clause would likely prevent a State from doing "by judicial decree what the Takings Clause forbids it to do by legislative fiat." *Ante*, at 714. The objection that a due process claim might involve close questions concerning whether a judicial decree extends beyond what owners might have expected is not a sound argument; for the same close questions would arise with respect to whether a judicial decision is a taking. See *Apfel*, *supra*, at 541 (opinion of KENNEDY, J.) ("Cases attempting to decide when a regulation becomes a taking are among the most litigated and perplexing in current law"); *Penn Central Transp. Co.* v. *New York City*, 438 U. S. 104, 123 (1978) ("The question of what constitutes a 'taking' for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty").

To announce that courts too can effect a taking when they decide cases involving property rights would raise certain difficult questions. Since this case does not require those questions to be addressed, in my respectful view, the Court should not reach beyond the necessities of the case to announce a sweeping rule that court decisions can be takings, as that phrase is used in the Takings Clause. The evident reason for recognizing a judicial takings doctrine would be

to constrain the power of the judicial branch. Of course, the judiciary must respect private ownership. But were this Court to say that judicial decisions become takings when they overreach, this might give more power to courts, not less.

Consider the instance of litigation between two property owners to determine which one bears the liability and costs when a tree that stands on one property extends its roots in a way that damages adjacent property. See, *e. g.*, *Fancher* v. *Fagella*, 274 Va. 549, 650 S. E. 2d 519 (2007). If a court deems that, in light of increasing urbanization, the former rule for allocation of these costs should be changed, thus shifting the rights of the owners, it may well increase the value of one property and decrease the value of the other. This might be the type of incremental modification under state common law that does not violate due process, as owners may reasonably expect or anticipate courts to make certain changes in property law. The usual due process constraint is that courts cannot abandon settled principles. See, *e. g.*, *Rogers* v. *Tennessee*, 532 U. S. 451, 457 (2001) (citing *Bouie* v. *City of Columbia*, 378 U. S. 347, 354 (1964)); *Apfel*, *supra*, at 548–549 (opinion of KENNEDY, J.); see also *Perry*, *supra*, at 601; *Roth*, *supra*, at 577.

But if the state court were deemed to be exercising the power to take property, that constraint would be removed. Because the State would be bound to pay owners for takings caused by a judicial decision, it is conceivable that some judges might decide that enacting a sweeping new rule to adjust the rights of property owners in the context of changing social needs is a good idea. Knowing that the resulting ruling would be a taking, the courts could go ahead with their project, free from constraints that would otherwise confine their power. The resulting judgment as between the property owners likely could not be set aside by some later enactment. See *Plaut* v. *Spendthrift Farm, Inc.*, 514 U. S. 211, 217 (1995) (leaving open whether legislation re-

opening final judgments violates Due Process Clause). And if the litigation were a class action to decide, for instance, whether there are public rights of access that diminish the rights of private ownership, a State might find itself obligated to pay a substantial judgment for the judicial ruling. Even if the legislature were to subsequently rescind the judicial decision by statute, the State would still have to pay just compensation for the temporary taking that occurred from the time of the judicial decision to the time of the statutory fix. See *First English*, 482 U. S., at 321.

The idea, then, that a judicial takings doctrine would constrain judges might just well have the opposite effect. It would give judges new power and new assurance that changes in property rights that are beneficial, or thought to be so, are fair and proper because just compensation will be paid. The judiciary historically has not had the right or responsibility to say what property should or should not be taken.

Indeed, it is unclear whether the Takings Clause was understood, as a historical matter, to apply to judicial decisions. The Framers most likely viewed this Clause as applying only to physical appropriation pursuant to the power of eminent domain. See *Lucas* v. *South Carolina Coastal Council*, 505 U. S. 1003, 1028, n. 15 (1992). And it appears these physical appropriations were traditionally made by legislatures. See 3 J. Story, Commentaries on the Constitution of the United States § 1784, p. 661 (1833). Courts, on the other hand, lacked the power of eminent domain. See 1 W. Blackstone, Commentaries 135 (W. Lewis ed. 1897). The Court's Takings Clause jurisprudence has expanded beyond the Framers' understanding, as it now applies to certain regulations that are not physical appropriations. See *Lucas*, *supra*, at 1014 (citing *Mahon*, 260 U. S. 393). But the Court should consider with care the decision to extend the Takings Clause in a manner that might be inconsistent with historical practice.

There are two additional practical considerations that the Court would need to address before recognizing judicial takings. First, it may be unclear in certain situations how a party should properly raise a judicial takings claim. "[I]t is important to separate out two judicial actions—the decision to change current property rules in a way that would constitute a taking, and the decision to require compensation." Thompson, Judicial Takings, 76 Va. L. Rev. 1449, 1515 (1990). In some contexts, these issues could arise separately. For instance, assume that a state-court opinion explicitly holds that it is changing state property law, or that it asserts that it is not changing the law but there is no "fair or substantial basis" for this statement. *Broad River*, 281 U. S., at 540. (Most of these cases may arise in the latter posture, like inverse condemnation claims where the State says it is not taking property and pays no compensation.) Call this Case A. The only issue in Case A was determining the substance of state property law. It is doubtful that parties would raise a judicial takings claim on appeal, or in a petition for a writ of certiorari, in Case A, as the issue would not have been litigated below. Rather, the party may file a separate lawsuit—Case B—arguing that a taking occurred in light of the change in property law made by Case A. After all, until the state court in Case A changes the law, the party will not know if his or her property rights will have been eliminated. So res judicata probably would not bar the party from litigating the takings issue in Case B.

Second, it is unclear what remedy a reviewing court could enter after finding a judicial taking. It appears under our precedents that a party who suffers a taking is only entitled to damages, not equitable relief: The Court has said that "[e]quitable relief is not available to enjoin an alleged taking of private property for a public use . . . when a suit for compensation can be brought against the sovereign subsequent to the taking," *Ruckelshaus* v. *Monsanto Co.*, 467 U. S. 986, 1016 (1984), and the Court subsequently held that the Tak-

ings Clause requires the availability of a suit for compensation against the States, *First English*, *supra*, at 321–322. It makes perfect sense that the remedy for a Takings Clause violation is only damages, as the Clause "does not proscribe the taking of property; it proscribes taking without just compensation." *Williamson County Regional Planning Comm'n* v. *Hamilton Bank of Johnson City*, 473 U. S. 172, 194 (1985).

It is thus questionable whether reviewing courts could invalidate judicial decisions deemed to be judicial takings; they may only be able to order just compensation. In the posture discussed above where Case A changes the law and Case B addresses whether that change is a taking, it is not clear how the Court, in Case B, could invalidate the holding of Case A. If a single case were to properly address both a state court's change in the law and whether the change was a taking, the Court might be able to give the state court a choice on how to proceed if there were a judicial taking. The Court might be able to remand and let the state court determine whether it wants to insist on changing its property law and paying just compensation or to rescind its holding that changed the law. Cf. *First English*, 482 U. S., at 321 ("Once a court determines that a taking has occurred, the government retains the whole range of options already available—amendment of the regulation, withdrawal of the invalidated regulation, or exercise of eminent domain"). But that decision would rest with the state court, not this Court; so the state court could still force the State to pay just compensation. And even if the state court decided to rescind its decision that changed the law, a temporary taking would have occurred in the interim. See *ibid.*

These difficult issues are some of the reasons why the Court should not reach beyond the necessities of the case to recognize a judicial takings doctrine. It is not wise, from an institutional standpoint, to reach out and decide questions that have not been discussed at much length by courts and

commentators. This Court's dicta in *Williamson County*, *supra*, at 194–197, regarding when regulatory takings claims become ripe, explains why federal courts have not been able to provide much analysis on the issue of judicial takings. See *San Remo Hotel, L. P.* v. *City and County of San Francisco*, 545 U. S. 323, 351 (2005) (Rehnquist, C. J., concurring in judgment) ("*Williamson County*'s state-litigation rule has created some real anomalies, justifying our revisiting the issue"). Until *Williamson County* is reconsidered, litigants will have to press most of their judicial takings claims before state courts, which are "presumptively competent . . . to adjudicate claims arising under the laws of the United States." *Tafflin* v. *Levitt*, 493 U. S. 455, 458 (1990). If and when future cases show that the usual principles, including constitutional principles that constrain the judiciary like due process, are somehow inadequate to protect property owners, then the question whether a judicial decision can effect a taking would be properly presented. In the meantime, it seems appropriate to recognize that the substantial power to decide whose property to take and when to take it should be conceived of as a power vested in the political branches and subject to political control.

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

I agree that no unconstitutional taking of property occurred in this case, and I therefore join Parts I, IV, and V of today's opinion. I cannot join Parts II and III, however, for in those Parts the plurality unnecessarily addresses questions of constitutional law that are better left for another day.

In Part II of its opinion, see *ante*, at 713–715, the plurality concludes that courts, including federal courts, may review the private property law decisions of state courts to determine whether the decisions unconstitutionally take "private property" for "public use, without just compensation." U. S.

Const., Amdt. 5. And in doing so it finds "irrelevant" that the "particular state *actor*" that takes private property (or unconstitutionally redefines state property law) is the judicial branch, rather than the executive or legislative branch. *Ante*, at 715; cf. *Hughes* v. *Washington*, 389 U. S. 290, 296–298 (1967) (Stewart, J., concurring).

In Part III, the plurality determines that it is "not obviously appropriate" to apply this Court's " 'fair and substantial basis' " test, familiar from our adequate and independent state ground jurisprudence, when evaluating whether a state-court property decision enacts an unconstitutional taking. *Ante*, at 726. The plurality further concludes that a state-court decision violates the Takings Clause not when the decision is "unpredictab[le]" on the basis of prior law, but rather when the decision takes private property rights that are "established." *Ante*, at 728. And finally, it concludes that all those affected by a state-court property law decision can raise a takings claim in federal court, *but for* the losing party in the initial state-court proceeding, who can only raise her claim (possibly for the first time) in a petition for a writ of certiorari here. *Ante*, at 727–728.

I do not claim that all of these conclusions are unsound. I do not know. But I do know that, if we were to express our views on these questions, we would invite a host of federal takings claims without the mature consideration of potential procedural or substantive legal principles that might limit federal interference in matters that are primarily the subject of state law. Property owners litigate many thousands of cases involving state property law in state courts each year. Each state-court property decision may further affect numerous nonparty property owners as well. Losing parties in many state-court cases may well believe that erroneous judicial decisions have deprived them of property rights they previously held and may consequently bring federal takings claims. And a glance at Part IV makes clear that such cases can involve state property law issues of con-

siderable complexity. Hence, the approach the plurality would take today threatens to open the federal-court doors to constitutional review of many, perhaps large numbers of, state-law cases in an area of law familiar to state, but not federal, judges. And the failure of that approach to set forth procedural limitations or canons of deference would create the distinct possibility that federal judges would play a major role in the shaping of a matter of significant state interest—state property law.

The plurality criticizes me for my cautious approach, and states that I "cannot decide that petitioner's claim fails without first deciding what a valid claim would consist of." *Ante*, at 717. But, of course, courts frequently find it possible to resolve cases—even those raising constitutional questions—without specifying the precise standard under which a party wins or loses. See, *e. g.*, *Smith* v. *Spisak*, 558 U. S. 139, 156 (2010) ("With or without such deference, our conclusion is the same"); *Quilloin* v. *Walcott*, 434 U. S. 246, 256 (1978) (rejecting an equal protection claim "[u]nder any standard of review"); *Mercer* v. *Theriot*, 377 U. S. 152, 156 (1964) *(per curiam)* (finding evidence sufficient to support a verdict "under any standard"). That is simply what I would do here.

In the past, Members of this Court have warned us that, when faced with difficult constitutional questions, we should "confine ourselves to deciding only what is necessary to the disposition of the immediate case." *Whitehouse* v. *Illinois Central R. Co.*, 349 U. S. 366, 373 (1955); see also *Lyng* v. *Northwest Indian Cemetery Protective Assn.*, 485 U. S. 439, 445 (1988) ("A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them"); *Ashwander* v. *TVA*, 297 U. S. 288, 346–347 (1936) (Brandeis, J., concurring) ("The Court will not anticipate a question of constitutional law in advance of the necessity of deciding it. It is not the habit of the Court to decide ques-

tions of a constitutional nature unless absolutely necessary to a decision of the case" (citations and internal quotation marks omitted)). I heed this advice here. There is no need now to decide more than what the Court decides in Parts IV and V, namely, that the Florida Supreme Court's decision in this case did not amount to a "judicial taking."

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CITY OF ONTARIO, CALIFORNIA, ET AL. *v.* QUON ET AL.

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

No. 08–1332. Argued April 19, 2010—Decided June 17, 2010

Petitioner Ontario (hereinafter City) acquired alphanumeric pagers able to send and receive text messages. Its contract with its service provider, Arch Wireless, provided for a monthly limit on the number of characters each pager could send or receive, and specified that usage exceeding that number would result in an additional fee. The City issued the pagers to respondent Quon and other officers in its police department (OPD), also a petitioner here. When Quon and others exceeded their monthly character limits for several months running, petitioner Scharf, OPD's chief, sought to determine whether the existing limit was too low, *i. e.*, whether the officers had to pay fees for sending work-related messages or, conversely, whether the overages were for personal messages. After Arch Wireless provided transcripts of Quon's and another employee's August and September 2002 text messages, it was discovered that many of Quon's messages were not work related, and some were sexually explicit. Scharf referred the matter to OPD's internal affairs division. The investigating officer used Quon's work schedule to redact from his transcript any messages he sent while off duty, but the transcript showed that few of his on-duty messages related to police business. Quon was disciplined for violating OPD rules.

He and the other respondents—each of whom had exchanged text messages with Quon during August and September—filed this suit, alleging, *inter alia*, that petitioners violated their Fourth Amendment rights and the federal Stored Communications Act (SCA) by obtaining and reviewing the transcript of Quon's pager messages, and that Arch Wireless violated the SCA by giving the City the transcript. The District Court denied respondents summary judgment on the constitutional claims, relying on the plurality opinion in *O'Connor* v. *Ortega*, 480 U. S. 709, to determine that Quon had a reasonable expectation of privacy in the content of his messages. Whether the audit was nonetheless reasonable, the court concluded, turned on whether Scharf used it for the improper purpose of determining if Quon was using his pager to waste time, or for the legitimate purpose of determining the efficacy of existing character limits to ensure that officers were not paying hidden

work-related costs. After the jury concluded that Scharf's intent was legitimate, the court granted petitioners summary judgment on the ground they did not violate the Fourth Amendment. The Ninth Circuit reversed. Although it agreed that Quon had a reasonable expectation of privacy in his text messages, the appeals court concluded that the search was not reasonable even though it was conducted on a legitimate, work-related rationale. The opinion pointed to a host of means less intrusive than the audit that Scharf could have used. The court further concluded that Arch Wireless had violated the SCA by giving the City the transcript.

Held: Because the search of Quon's text messages was reasonable, petitioners did not violate respondents' Fourth Amendment rights, and the Ninth Circuit erred by concluding otherwise. Pp. 755–765.

(a) The Amendment guarantees a person's privacy, dignity, and security against arbitrary and invasive governmental acts, without regard to whether the government actor is investigating crime or performing another function. *Skinner* v. *Railway Labor Executives' Assn.*, 489 U. S. 602, 613–614. It applies as well when the government acts in its capacity as an employer. *Treasury Employees* v. *Von Raab*, 489 U. S. 656, 665. The Members of the *O'Connor* Court disagreed on the proper analytical framework for Fourth Amendment claims against government employers. A four-Justice plurality concluded that the correct analysis has two steps. First, because "some government offices may be so open . . . that no expectation of privacy is reasonable," a court must consider "[t]he operational realities of the workplace" to determine if an employee's constitutional rights are implicated. 480 U. S., at 718, 717. Second, where an employee has a legitimate privacy expectation, an employer's intrusion on that expectation "for noninvestigatory, work-related purposes, as well as for investigations of work-related misconduct, should be judged by the standard of reasonableness under all the circumstances." *Id.*, at 725–726. JUSTICE SCALIA, concurring in the judgment, would have dispensed with the "operational realities" inquiry and concluded "that the offices of government employees . . . are [generally] covered by Fourth Amendment protections," *id.*, at 731, but he would also have held "that government searches to retrieve work-related materials or to investigate violations of workplace rules—searches of the sort that are regarded as reasonable and normal in the private-employer context—do not violate the . . . Amendment," *id.*, at 732. Pp. 755–757.

(b) Even assuming that Quon had a reasonable expectation of privacy in his text messages, the search was reasonable under both *O'Connor* approaches, the plurality's and JUSTICE SCALIA's. Pp. 758–765.

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(1) The Court does not resolve the parties' disagreement over Quon's privacy expectation. Prudence counsels caution before the facts in this case are used to establish far-reaching premises that define the existence, and extent, of privacy expectations of employees using employer-provided communication devices. Rapid changes in the dynamics of communication and information transmission are evident not just in the technology itself but in what society accepts as proper behavior. At present, it is uncertain how workplace norms, and the law's treatment of them, will evolve. Because it is therefore preferable to dispose of this case on narrower grounds, the Court assumes, *arguendo*, that: (1) Quon had a reasonable privacy expectation; (2) petitioners' review of the transcript constituted a Fourth Amendment search; and (3) the principles applicable to a government employer's search of an employee's physical office apply as well in the electronic sphere. Pp. 758–760.

(2) Petitioners' warrantless review of Quon's pager transcript was reasonable under the *O'Connor* plurality's approach because it was motivated by a legitimate work-related purpose, and because it was not excessive in scope. See 480 U. S., at 726. There were "reasonable grounds for [finding it] necessary for a noninvestigatory work-related purpose," *ibid.*, in that Chief Scharf had ordered the audit to determine whether the City's contractual character limit was sufficient to meet the City's needs. It was also " 'reasonably related to the objectives of the search,' " *ibid.*, because both the City and OPD had a legitimate interest in ensuring that employees were not being forced to pay out of their own pockets for work-related expenses, or, on the other hand, that the City was not paying for extensive personal communications. Reviewing the transcripts was an efficient and expedient way to determine whether either of these factors caused Quon's overages. And the review was also not " 'excessively intrusive.' " *Ibid.* Although Quon had exceeded his monthly allotment a number of times, OPD requested transcripts for only August and September 2002 in order to obtain a large enough sample to decide the character limits' efficaciousness, and all the messages that Quon sent while off duty were redacted. And from OPD's perspective, the fact that Quon likely had only a limited privacy expectation lessened the risk that the review would intrude on highly private details of Quon's life. Similarly, because the City had a legitimate reason for the search and it was not excessively intrusive in light of that justification, the search would be "regarded as reasonable and normal in the private-employer context" and thereby satisfy the approach of JUSTICE SCALIA's concurrence, *id.*, at 732. Conversely, the Ninth Circuit's "least intrusive" means approach was inconsistent with

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controlling precedents. See, *e. g.*, *Vernonia School Dist. 47J* v. *Acton*, 515 U. S. 646, 663. Pp. 760–765.

(c) Whether the other respondents can have a reasonable expectation of privacy in their text messages to Quon need not be resolved. They argue that because the search was unreasonable as to Quon, it was also unreasonable as to them, but they make no corollary argument that the search, if reasonable as to Quon, could nonetheless be unreasonable as to them. Given this litigating position and the Court's conclusion that the search was reasonable as to Quon, these other respondents cannot prevail. P. 765.

529 F. 3d 892, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C. J., and STEVENS, THOMAS, GINSBURG, BREYER, ALITO, and SOTOMAYOR, JJ., joined, and in which SCALIA, J., joined except for Part III–A. STEVENS, J., filed a concurring opinion, *post*, p. 765. SCALIA, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 767.

Kent L. Richland argued the cause for petitioners. With him on the briefs were *Kent J. Bullard* and *Dimitrios C. Rinos.*

Deputy Solicitor General Katyal argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Kagan*, *Assistant Attorney General Breuer*, *William M. Jay*, *Josh Goldfoot*, and *Vijay Shanker.*

Dieter C. Dammeier argued the cause for respondents. With him on the brief was *Michael A. McGill.**

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*Briefs of *amici curiae* urging reversal were filed for the League of California Cities et al. by *Nancy B. Thorington* and *Joseph M. Quinn;* for Los Angeles Times Communications LLC et al. by *Kelli L. Sager* and *Jeffrey L. Fisher;* for the National League of Cities et al. by *Richard Ruda*, *Robert A. Long, Jr.*, and *Joshua H. Whitman;* and for the National School Boards Association et al. by *Francisco M. Negrón, Jr.*, *Naomi E. Gittins*, *Lisa E. Soronen*, and *Sonja H. Trainor.*

Briefs of *amici curiae* urging affirmance were filed for the American Federation of Labor and Congress of Industrial Organizations by *Lynn K. Rhinehart*, *James B. Coppess*, and *Laurence Stephen Gold;* for the Electronic Frontier Foundation et al. by *Andrew J. Pincus*, *Charles Rothfeld*, *Dan M. Kahan*, *Scott L. Shuchart*, and *Steven R. Shapiro;* for the

JUSTICE KENNEDY delivered the opinion of the Court.

This case involves the assertion by a government employer of the right, in circumstances to be described, to read text messages sent and received on a pager the employer owned and issued to an employee. The employee contends that the privacy of the messages is protected by the ban on "unreasonable searches and seizures" found in the Fourth Amendment to the United States Constitution, made applicable to the States by the Due Process Clause of the Fourteenth Amendment. *Mapp* v. *Ohio*, 367 U. S. 643 (1961). Though the case touches issues of far-reaching significance, the Court concludes it can be resolved by settled principles determining when a search is reasonable.

I

A

The city of Ontario (City) is a political subdivision of the State of California. The case arose out of incidents in 2001 and 2002 when respondent Jeff Quon was employed by the Ontario Police Department (OPD). He was a police sergeant and member of OPD's Special Weapons and Tactics (SWAT) Team. The City, OPD, and OPD's Chief, Lloyd Scharf, are petitioners here. As will be discussed, two respondents share the last name Quon. In this opinion "Quon" refers to Jeff Quon, for the relevant events mostly revolve around him.

In October 2001, the City acquired 20 alphanumeric pagers capable of sending and receiving text messages. Arch Wireless Operating Company provided wireless service for the pagers. Under the City's service contract with Arch Wireless, each pager was allotted a limited number of characters

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Electronic Privacy Information Center et al. by *Marc Rotenberg;* for the New York Intellectual Property Law Association by *Jonathan E. Moskin* and *Mark J. Abate;* and for The Rutherford Institute by *John W. Whitehead.*

sent or received each month. Usage in excess of that amount would result in an additional fee. The City issued pagers to Quon and other SWAT Team members in order to help the SWAT Team mobilize and respond to emergency situations.

Before acquiring the pagers, the City announced a "Computer Usage, Internet and E-Mail Policy" (Computer Policy) that applied to all employees. Among other provisions, it specified that the City "reserves the right to monitor and log all network activity including e-mail and Internet use, with or without notice. Users should have no expectation of privacy or confidentiality when using these resources." App. to Pet. for Cert. 151, 152. In March 2000, Quon signed a statement acknowledging that he had read and understood the Computer Policy.

The Computer Policy did not apply, on its face, to text messaging. Text messages share similarities with e-mails, but the two differ in an important way. In this case, for instance, an e-mail sent on a City computer was transmitted through the City's own data servers, but a text message sent on one of the City's pagers was transmitted using wireless radio frequencies from an individual pager to a receiving station owned by Arch Wireless. It was routed through Arch Wireless' computer network, where it remained until the recipient's pager or cellular telephone was ready to receive the message, at which point Arch Wireless transmitted the message from the transmitting station nearest to the recipient. After delivery, Arch Wireless retained a copy on its computer servers. The message did not pass through computers owned by the City.

Although the Computer Policy did not cover text messages by its explicit terms, the City made clear to employees, including Quon, that the City would treat text messages the same way as it treated e-mails. At an April 18, 2002, staff meeting at which Quon was present, Lieutenant Steven Duke, the OPD officer responsible for the City's contract

with Arch Wireless, told officers that messages sent on the pagers "are considered e-mail messages. This means that [text] messages would fall under the City's policy as public information and [would be] eligible for auditing." App. 30. Duke's comments were put in writing in a memorandum sent on April 29, 2002, by Chief Scharf to Quon and other City personnel.

Within the first or second billing cycle after the pagers were distributed, Quon exceeded his monthly text message character allotment. Duke told Quon about the overage, and reminded him that messages sent on the pagers were "considered e-mail and could be audited." *Id.*, at 40. Duke said, however, that "it was not his intent to audit [an] employee's text messages to see if the overage [was] due to work related transmissions." *Ibid.* Duke suggested that Quon could reimburse the City for the overage fee rather than have Duke audit the messages. Quon wrote a check to the City for the overage. Duke offered the same arrangement to other employees who incurred overage fees.

Over the next few months, Quon exceeded his character limit three or four times. Each time he reimbursed the City. Quon and another officer again incurred overage fees for their pager usage in August 2002. At a meeting in October, Duke told Scharf that he had become "'tired of being a bill collector.'" *Id.*, at 91. Scharf decided to determine whether the existing character limit was too low—that is, whether officers such as Quon were having to pay fees for sending work-related messages—or if the overages were for personal messages. Scharf told Duke to request transcripts of text messages sent in August and September by Quon and the other employee who had exceeded the character allowance.

At Duke's request, an administrative assistant employed by OPD contacted Arch Wireless. After verifying that the City was the subscriber on the accounts, Arch Wireless provided the desired transcripts. Duke reviewed the tran-

scripts and discovered that many of the messages sent and received on Quon's pager were not work related, and some were sexually explicit. Duke reported his findings to Scharf, who, along with Quon's immediate supervisor, reviewed the transcripts himself. After his review, Scharf referred the matter to OPD's internal affairs division for an investigation into whether Quon was violating OPD rules by pursuing personal matters while on duty.

The officer in charge of the internal affairs review was Sergeant Patrick McMahon. Before conducting a review, McMahon used Quon's work schedule to redact the transcripts in order to eliminate any messages Quon sent while off duty. He then reviewed the content of the messages Quon sent during work hours. McMahon's report noted that Quon sent or received 456 messages during work hours in the month of August 2002, of which no more than 57 were work related; he sent as many as 80 messages during a single day at work; and on an average workday, Quon sent or received 28 messages, of which only 3 were related to police business. The report concluded that Quon had violated OPD rules. Quon was allegedly disciplined.

B

Raising claims under Rev. Stat. § 1979, 42 U. S. C. § 1983; 18 U. S. C. § 2701 *et seq.*, popularly known as the Stored Communications Act (SCA); and California law, Quon filed suit against petitioners in the United States District Court for the Central District of California. Arch Wireless and an individual not relevant here were also named as defendants. Quon was joined in his suit by another plaintiff who is not a party before this Court and by the other respondents, each of whom exchanged text messages with Quon during August and September 2002: Jerilyn Quon, Jeff Quon's then-wife, from whom he was separated; April Florio, an OPD employee with whom Jeff Quon was romantically involved; and Steve Trujillo, another member of the OPD SWAT Team.

Among the allegations in the complaint was that petitioners violated respondents' Fourth Amendment rights and the SCA by obtaining and reviewing the transcript of Jeff Quon's pager messages and that Arch Wireless had violated the SCA by turning over the transcript to the City.

The parties filed cross-motions for summary judgment. The District Court granted Arch Wireless' motion for summary judgment on the SCA claim but denied petitioners' motion for summary judgment on the Fourth Amendment claims. *Quon* v. *Arch Wireless Operating Co.*, 445 F. Supp. 2d 1116 (CD Cal. 2006). Relying on the plurality opinion in *O'Connor* v. *Ortega*, 480 U. S. 709, 711 (1987), the District Court determined that Quon had a reasonable expectation of privacy in the content of his text messages. Whether the audit of the text messages was nonetheless reasonable, the District Court concluded, turned on Chief Scharf's intent: "[I]f the purpose for the audit was to determine if Quon was using his pager to 'play games' and 'waste time,' then the audit was not constitutionally reasonable"; but if the audit's purpose "was to determine the efficacy of the existing character limits to ensure that officers were not paying hidden work-related costs, . . . no constitutional violation occurred." 445 F. Supp. 2d, at 1146.

The District Court held a jury trial to determine the purpose of the audit. The jury concluded that Scharf ordered the audit to determine the efficacy of the character limits. The District Court accordingly held that petitioners did not violate the Fourth Amendment. It entered judgment in their favor.

The United States Court of Appeals for the Ninth Circuit reversed in part. *Quon* v. *Arch Wireless Operating Co.*, 529 F. 3d 892 (2008). The panel agreed with the District Court that Jeff Quon had a reasonable expectation of privacy in his text messages but disagreed with the District Court about whether the search was reasonable. Even though the search was conducted for "a legitimate work-related ration-

ale," the Court of Appeals concluded, it "was not reasonable in scope." *Id.*, at 908. The panel disagreed with the District Court's observation that "there were no less-intrusive means" that Chief Scharf could have used "to verify the efficacy of the 25,000 character limit . . . without intruding on [respondents'] Fourth Amendment rights." *Id.*, at 908–909. The opinion pointed to a "host of simple ways" that the chief could have used instead of the audit, such as warning Quon at the beginning of the month that his future messages would be audited, or asking Quon himself to redact the transcript of his messages. *Id.*, at 909. The Court of Appeals further concluded that Arch Wireless had violated the SCA by turning over the transcript to the City.

The Ninth Circuit denied a petition for rehearing en banc. *Quon* v. *Arch Wireless Operating Co.*, 554 F. 3d 769 (2009). Judge Ikuta, joined by six other Circuit Judges, dissented. *Id.*, at 774–779. Judge Wardlaw concurred in the denial of rehearing, defending the panel's opinion against the dissent. *Id.*, at 769–774.

This Court granted the petition for certiorari filed by the City, OPD, and Chief Scharf challenging the Court of Appeals' holding that they violated the Fourth Amendment. 558 U. S. 1090 (2009). The petition for certiorari filed by Arch Wireless challenging the Ninth Circuit's ruling that Arch Wireless violated the SCA was denied. *USA Mobility Wireless, Inc.* v. *Quon*, 558 U. S. 1091 (2009).

II

The Fourth Amendment states: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." It is well settled that the Fourth Amendment's protection extends beyond the sphere of criminal investigations. *Camara* v. *Municipal Court of City and County of San Francisco*, 387 U. S. 523, 530 (1967). "The Amendment guarantees the privacy, dignity, and security of

persons against certain arbitrary and invasive acts by officers of the Government," without regard to whether the government actor is investigating crime or performing another function. *Skinner* v. *Railway Labor Executives' Assn.*, 489 U. S. 602, 613–614 (1989). The Fourth Amendment applies as well when the Government acts in its capacity as an employer. *Treasury Employees* v. *Von Raab*, 489 U. S. 656, 665 (1989).

The Court discussed this principle in *O'Connor*. There a physician employed by a state hospital alleged that hospital officials investigating workplace misconduct had violated his Fourth Amendment rights by searching his office and seizing personal items from his desk and filing cabinet. All Members of the Court agreed with the general principle that "[i]ndividuals do not lose Fourth Amendment rights merely because they work for the government instead of a private employer." 480 U. S., at 717 (plurality opinion); see also *id.*, at 731 (SCALIA, J., concurring in judgment); *id.*, at 737 (Blackmun, J., dissenting). A majority of the Court further agreed that "'special needs, beyond the normal need for law enforcement,'" make the warrant and probable-cause requirement impracticable for government employers. *Id.*, at 725 (plurality opinion) (quoting *New Jersey* v. *T. L. O.*, 469 U. S. 325, 351 (1985) (Blackmun, J., concurring in judgment)); 480 U. S., at 732 (opinion of SCALIA, J.) (quoting same).

The *O'Connor* Court did disagree on the proper analytical framework for Fourth Amendment claims against government employers. A four-Justice plurality concluded that the correct analysis has two steps. First, because "some government offices may be so open to fellow employees or the public that no expectation of privacy is reasonable," *id.*, at 718, a court must consider "[t]he operational realities of the workplace" in order to determine whether an employee's Fourth Amendment rights are implicated, *id.*, at 717. On this view, "the question whether an employee has a reason-

able expectation of privacy must be addressed on a case-by-case basis." *Id.*, at 718. Next, where an employee has a legitimate privacy expectation, an employer's intrusion on that expectation "for noninvestigatory, work-related purposes, as well as for investigations of work-related misconduct, should be judged by the standard of reasonableness under all the circumstances." *Id.*, at 725–726.

JUSTICE SCALIA, concurring in the judgment, outlined a different approach. His opinion would have dispensed with an inquiry into "operational realities" and would conclude "that the offices of government employees . . . are covered by Fourth Amendment protections as a general matter." *Id.*, at 731. But he would also have held "that government searches to retrieve work-related materials or to investigate violations of workplace rules—searches of the sort that are regarded as reasonable and normal in the private-employer context—do not violate the Fourth Amendment." *Id.*, at 732.

Later, in the *Von Raab* decision, the Court explained that "operational realities" could diminish an employee's privacy expectations, and that this diminution could be taken into consideration when assessing the reasonableness of a workplace search. 489 U. S., at 671. In the two decades since *O'Connor,* however, the threshold test for determining the scope of an employee's Fourth Amendment rights has not been clarified further. Here, though they disagree on whether Quon had a reasonable expectation of privacy, both petitioners and respondents start from the premise that the *O'Connor* plurality controls. See Brief for Petitioners 22–28; Brief for Respondents 25–32. It is not necessary to resolve whether that premise is correct. The case can be decided by determining that the search was reasonable even assuming Quon had a reasonable expectation of privacy. The two *O'Connor* approaches—the plurality's and JUSTICE SCALIA's—therefore lead to the same result here.

III

A

Before turning to the reasonableness of the search, it is instructive to note the parties' disagreement over whether Quon had a reasonable expectation of privacy. The record does establish that OPD, at the outset, made it clear that pager messages were not considered private. The City's Computer Policy stated that "[u]sers should have no expectation of privacy or confidentiality when using" City computers. App. to Pet. for Cert. 152. Chief Scharf's memo and Duke's statements made clear that this official policy extended to text messaging. The disagreement, at least as respondents see the case, is over whether Duke's later statements overrode the official policy. Respondents contend that because Duke told Quon that an audit would be unnecessary if Quon paid for the overage, Quon reasonably could expect that the contents of his messages would remain private.

At this point, were we to assume that inquiry into "operational realities" were called for, compare *O'Connor*, 480 U. S., at 717 (plurality opinion), with *id.*, at 730–731 (opinion of SCALIA, J.); see also *id.*, at 737–738 (Blackmun, J., dissenting), it would be necessary to ask whether Duke's statements could be taken as announcing a change in OPD policy, and if so, whether he had, in fact or appearance, the authority to make such a change and to guarantee the privacy of text messaging. It would also be necessary to consider whether a review of messages sent on police pagers, particularly those sent while officers are on duty, might be justified for other reasons, including performance evaluations, litigation concerning the lawfulness of police actions, and perhaps compliance with state open records laws. See Brief for Petitioners 35–40 (citing Cal. Public Records Act, Cal. Govt. Code Ann. § 6250 *et seq.* (West 2008)). These matters would all bear on the legitimacy of an employee's privacy expectation.

The Court must proceed with care when considering the whole concept of privacy expectations in communications made on electronic equipment owned by a government employer. The judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear. See, *e. g.*, *Olmstead* v. *United States*, 277 U. S. 438 (1928), overruled by *Katz* v. *United States*, 389 U. S. 347, 353 (1967). In *Katz*, the Court relied on its own knowledge and experience to conclude that there is a reasonable expectation of privacy in a telephone booth. See *id.*, at 360–361 (Harlan, J., concurring). It is not so clear that courts at present are on so sure a ground. Prudence counsels caution before the facts in the instant case are used to establish far-reaching premises that define the existence, and extent, of privacy expectations enjoyed by employees when using employer-provided communication devices.

Rapid changes in the dynamics of communication and information transmission are evident not just in the technology itself but in what society accepts as proper behavior. As one *amici* brief notes, many employers expect or at least tolerate personal use of such equipment by employees because it often increases worker efficiency. See Brief for Electronic Frontier Foundation et al. 16–20. Another *amicus* points out that the law is beginning to respond to these developments, as some States have recently passed statutes requiring employers to notify employees when monitoring their electronic communications. See Brief for New York Intellectual Property Law Association 22 (citing Del. Code Ann., Tit. 19, § 705 (2005); Conn. Gen. Stat. Ann. § 31–48d (West 2003)). At present, it is uncertain how workplace norms, and the law's treatment of them, will evolve.

Even if the Court were certain that the *O'Connor* plurality's approach were the right one, the Court would have difficulty predicting how employees' privacy expectations will be shaped by those changes or the degree to which society

will be prepared to recognize those expectations as reasonable. See 480 U. S., at 715. Cell phone and text message communications are so pervasive that some persons may consider them to be essential means or necessary instruments for self-expression, even self-identification. That might strengthen the case for an expectation of privacy. On the other hand, the ubiquity of those devices has made them generally affordable, so one could counter that employees who need cell phones or similar devices for personal matters can purchase and pay for their own. And employer policies concerning communications will of course shape the reasonable expectations of their employees, especially to the extent that such policies are clearly communicated.

A broad holding concerning employees' privacy expectations vis-à-vis employer-provided technological equipment might have implications for future cases that cannot be predicted. It is preferable to dispose of this case on narrower grounds. For present purposes we assume several propositions, *arguendo:* First, Quon had a reasonable expectation of privacy in the text messages sent on the pager provided to him by the City; second, petitioners' review of the transcript constituted a search within the meaning of the Fourth Amendment; and third, the principles applicable to a government employer's search of an employee's physical office apply with at least the same force when the employer intrudes on the employee's privacy in the electronic sphere.

B

Even if Quon had a reasonable expectation of privacy in his text messages, petitioners did not necessarily violate the Fourth Amendment by obtaining and reviewing the transcripts. Although as a general matter, warrantless searches "are *per se* unreasonable under the Fourth Amendment," there are "a few specifically established and well-delineated exceptions" to that general rule. *Katz, supra,* at 357. The Court has held that the "'special needs'" of the workplace

justify one such exception. *O'Connor*, 480 U. S., at 725 (plurality opinion); *id.*, at 732 (SCALIA, J., concurring in judgment); *Von Raab*, 489 U. S., at 666–667.

Under the approach of the *O'Connor* plurality, when conducted for a "noninvestigatory, work-related purpos[e]" or for the "investigatio[n] of work-related misconduct," a government employer's warrantless search is reasonable if it is "'justified at its inception'" and if "'the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of'" the circumstances giving rise to the search. 480 U. S., at 725–726. The search here satisfied the standard of the *O'Connor* plurality and was reasonable under that approach.

The search was justified at its inception because there were "reasonable grounds for suspecting that the search [was] necessary for a noninvestigatory work-related purpose." *Id.*, at 726. As a jury found, Chief Scharf ordered the search in order to determine whether the character limit on the City's contract with Arch Wireless was sufficient to meet the City's needs. This was, as the Ninth Circuit noted, a "legitimate work-related rationale." 529 F. 3d, at 908. The City and OPD had a legitimate interest in ensuring that employees were not being forced to pay out of their own pockets for work-related expenses, or on the other hand that the City was not paying for extensive personal communications.

As for the scope of the search, reviewing the transcripts was reasonable because it was an efficient and expedient way to determine whether Quon's overages were the result of work-related messaging or personal use. The review was also not "'excessively intrusive.'" *O'Connor*, *supra*, at 726 (plurality opinion). Although Quon had gone over his monthly allotment a number of times, OPD requested transcripts for only the months of August and September 2002. While it may have been reasonable as well for OPD to review transcripts of all the months in which Quon exceeded his

allowance, it was certainly reasonable for OPD to review messages for just two months in order to obtain a large enough sample to decide whether the character limits were efficacious. And it is worth noting that during his internal affairs investigation, McMahon redacted all messages Quon sent while off duty, a measure which reduced the intrusiveness of any further review of the transcripts.

Furthermore, and again on the assumption that Quon had a reasonable expectation of privacy in the contents of his messages, the extent of an expectation is relevant to assessing whether the search was too intrusive. See *Von Raab*, *supra*, at 671; cf. *Vernonia School Dist. 47J* v. *Acton*, 515 U. S. 646, 654–657 (1995). Even if he could assume some level of privacy would inhere in his messages, it would not have been reasonable for Quon to conclude that his messages were in all circumstances immune from scrutiny. Quon was told that his messages were subject to auditing. As a law enforcement officer, he would or should have known that his actions were likely to come under legal scrutiny, and that this might entail an analysis of his on-the-job communications. Under the circumstances, a reasonable employee would be aware that sound management principles might require the audit of messages to determine whether the pager was being appropriately used. Given that the City issued the pagers to Quon and other SWAT Team members in order to help them more quickly respond to crises—and given that Quon had received no assurances of privacy—Quon could have anticipated that it might be necessary for the City to audit pager messages to assess the SWAT Team's performance in particular emergency situations.

From OPD's perspective, the fact that Quon likely had only a limited privacy expectation, with boundaries that we need not here explore, lessened the risk that the review would intrude on highly private details of Quon's life. OPD's audit of messages on Quon's employer-provided pager was not nearly as intrusive as a search of his personal e-mail account

or pager, or a wiretap on his home phone line, would have been. That the search did reveal intimate details of Quon's life does not make it unreasonable, for under the circumstances a reasonable employer would not expect that such a review would intrude on such matters. The search was permissible in its scope.

The Court of Appeals erred in finding the search unreasonable. It pointed to a "host of simple ways to verify the efficacy of the 25,000 character limit . . . without intruding on [respondents'] Fourth Amendment rights." 529 F. 3d, at 909. The panel suggested that Scharf "could have warned Quon that for the month of September he was forbidden from using his pager for personal communications, and that the contents of all of his messages would be reviewed to ensure the pager was used only for work-related purposes during that timeframe. Alternatively, if [OPD] wanted to review past usage, it could have asked Quon to count the characters himself, or asked him to redact personal messages and grant permission to [OPD] to review the redacted transcript." *Ibid.*

This approach was inconsistent with controlling precedents. This Court has "repeatedly refused to declare that only the 'least intrusive' search practicable can be reasonable under the Fourth Amendment." *Vernonia*, *supra*, at 663; see also, *e. g.*, *Board of Ed. of Independent School Dist. No. 92 of Pottawatomie Cty.* v. *Earls*, 536 U. S. 822, 837 (2002); *Illinois* v. *Lafayette*, 462 U. S. 640, 647 (1983). That rationale "could raise insuperable barriers to the exercise of virtually all search-and-seizure powers," *United States* v. *Martinez-Fuerte*, 428 U. S. 543, 557, n. 12 (1976), because "judges engaged in *post hoc* evaluations of government conduct can almost always imagine some alternative means by which the objectives of the government might have been accomplished," *Skinner*, 489 U. S., at 629, n. 9 (internal quotation marks and brackets omitted). The analytic errors of the Court of Appeals in this case illustrate the necessity of

this principle. Even assuming there were ways that OPD could have performed the search that would have been less intrusive, it does not follow that the search as conducted was unreasonable.

Respondents argue that the search was *per se* unreasonable in light of the Court of Appeals' conclusion that Arch Wireless violated the SCA by giving the City the transcripts of Quon's text messages. The merits of the SCA claim are not before us. But even if the Court of Appeals was correct to conclude that the SCA forbade Arch Wireless from turning over the transcripts, it does not follow that petitioners' actions were unreasonable. Respondents point to no authority for the proposition that the existence of statutory protection renders a search *per se* unreasonable under the Fourth Amendment. And the precedents counsel otherwise. See *Virginia* v. *Moore*, 553 U. S. 164, 168 (2008) (search incident to an arrest that was illegal under state law was reasonable); *California* v. *Greenwood*, 486 U. S. 35, 43 (1988) (rejecting argument that if state law forbade police search of individual's garbage the search would violate the Fourth Amendment). Furthermore, respondents do not maintain that any OPD employee either violated the law himself or herself or knew or should have known that Arch Wireless, by turning over the transcript, would have violated the law. The otherwise reasonable search by OPD is not rendered unreasonable by the assumption that Arch Wireless violated the SCA by turning over the transcripts.

Because the search was motivated by a legitimate work-related purpose, and because it was not excessive in scope, the search was reasonable under the approach of the *O'Connor* plurality. 480 U. S., at 726. For these same reasons—that the employer had a legitimate reason for the search, and that the search was not excessively intrusive in light of that justification—the Court also concludes that the search would be "regarded as reasonable and normal in the private-employer context" and would satisfy the approach of Jus-

TICE SCALIA's concurrence. *Id.*, at 732. The search was reasonable, and the Court of Appeals erred by holding to the contrary. Petitioners did not violate Quon's Fourth Amendment rights.

C

Finally, the Court must consider whether the search violated the Fourth Amendment rights of Jerilyn Quon, Florio, and Trujillo, the respondents who sent text messages to Jeff Quon. Petitioners and respondents disagree whether a sender of a text message can have a reasonable expectation of privacy in a message he knowingly sends to someone's employer-provided pager. It is not necessary to resolve this question in order to dispose of the case, however. Respondents argue that because "the search was unreasonable as to Sergeant Quon, it was also unreasonable as to his correspondents." Brief for Respondents 60 (some capitalization omitted; boldface deleted). They make no corollary argument that the search, if reasonable as to Quon, could nonetheless be unreasonable as to Quon's correspondents. See *id.*, at 65–66. In light of this litigating position and the Court's conclusion that the search was reasonable as to Jeff Quon, it necessarily follows that these other respondents cannot prevail.

* * *

Because the search was reasonable, petitioners did not violate respondents' Fourth Amendment rights, and the court below erred by concluding otherwise. The judgment of the Court of Appeals for the Ninth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE STEVENS, concurring.

Although I join the Court's opinion in full, I write separately to highlight that the Court has sensibly declined to resolve whether the plurality opinion in *O'Connor* v. *Ortega*,

480 U. S. 709 (1987), provides the correct approach to determining an employee's reasonable expectation of privacy. See *ante,* at 757. Justice Blackmun, writing for the four dissenting Justices in *O'Connor*, agreed with JUSTICE SCALIA that an employee enjoys a reasonable expectation of privacy in his office. 480 U. S., at 737. But he advocated a third approach to the reasonable expectation of privacy inquiry, separate from those proposed by the *O'Connor* plurality and by JUSTICE SCALIA, see *ante,* at 756–757. Recognizing that it is particularly important to safeguard "a public employee's expectation of privacy in the workplace" in light of the "reality of work in modern time," 480 U. S., at 739, which lacks "tidy distinctions" between workplace and private activities, *ibid.*, Justice Blackmun argued that "the precise extent of an employee's expectation of privacy often turns on the nature of the search," *id.*, at 738. And he emphasized that courts should determine this expectation in light of the specific facts of each particular search, rather than by announcing a categorical standard. See *id.*, at 741.

For the reasons stated at page 762 of the Court's opinion, it is clear that respondent Jeff Quon, as a law enforcement officer who served on a SWAT Team, should have understood that all of his work-related actions—including all of his communications on his official pager—were likely to be subject to public and legal scrutiny. He therefore had only a limited expectation of privacy in relation to this particular audit of his pager messages. Whether one applies the reasoning from Justice O'Connor's opinion, JUSTICE SCALIA's concurrence, or Justice Blackmun's dissent* in *O'Connor*, the result

*I do not contend that Justice Blackmun's opinion is controlling under *Marks* v. *United States*, 430 U. S. 188, 193 (1977), but neither is his approach to evaluating a reasonable expectation of privacy foreclosed by *O'Connor*. Indeed, his approach to that inquiry led to the conclusion, shared by JUSTICE SCALIA but not adopted by the *O'Connor* plurality, that an employee had a reasonable expectation of privacy in his office. See *O'Connor* v. *Ortega*, 480 U. S. 709, 718 (1987) (plurality opinion). But Justice Blackmun would have applied the Fourth Amendment's warrant and probable-cause requirements to workplace investigatory searches, *id.*, at

is the same: The judgment of the Court of Appeals in this case must be reversed.

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

I join the Court's opinion except for Part III–A. I continue to believe that the "operational realities" rubric for determining the Fourth Amendment's application to public employees invented by the plurality in *O'Connor* v. *Ortega*, 480 U. S. 709, 717 (1987), is standardless and unsupported. *Id.*, at 729–732 (SCALIA, J., concurring in judgment). In this case, the proper threshold inquiry should be not whether the Fourth Amendment applies to messages on *public* employees' employer-issued pagers, but whether it applies *in general* to such messages on employer-issued pagers. See *id.*, at 731.

Here, however, there is no need to answer that threshold question. Even accepting at face value Quon's and his coplaintiffs' claims that the Fourth Amendment applies to their messages, the city's search was reasonable, and thus did not violate the Amendment. See *id.*, at 726 (plurality opinion); *id.*, at 732 (SCALIA, J., concurring in judgment). Since it is unnecessary to decide whether the Fourth Amendment applies, it is unnecessary to resolve which approach in *O'Connor* controls: the plurality's or mine.† That should end the matter.

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732 (dissenting opinion), whereas a majority of the Court rejected that view, see *id.*, at 722, 725 (plurality opinion); *id.*, at 732 (SCALIA, J., concurring in judgment). It was that analysis—regarding the proper standard for evaluating a search when an employee has a reasonable expectation of privacy—that produced the opposite result in the case. This case does not implicate that debate because it does not involve an investigatory search. The jury concluded that the purpose of the audit was to determine whether the character limits were sufficient for work-related messages. See *ante*, at 754.

†Despite his disclaimer, *ante*, at 766 and this page, n. (concurring opinion), JUSTICE STEVENS' concurrence implies, *ante*, at 765–766 and this page, that it is also an open question whether the approach advocated by Justice Blackmun in his *dissent* in *O'Connor* is the proper stand-

The Court concedes as much, *ante,* at 757, 760–765, yet it inexplicably interrupts its analysis with a recitation of the parties' arguments concerning, and an excursus on the complexity and consequences of answering, that admittedly irrelevant threshold question, *ante,* at 758–760. That discussion is unnecessary. (To whom do we owe an *additional* explanation for declining to decide an issue, once we have explained that it makes no difference?) It also seems to me exaggerated. Applying the Fourth Amendment to new technologies may sometimes be difficult, but when it is necessary to decide a case we have no choice. The Court's implication, *ante,* at 759, that where electronic privacy is concerned we should decide less than we otherwise would (that is, less than the principle of law necessary to resolve the case and guide private action)—or that we should hedge our bets by concocting case-specific standards or issuing opaque opinions—is in my view indefensible. The-times-they-are-a-changin' is a feeble excuse for disregard of duty.

Worse still, the digression is self-defeating. Despite the Court's insistence that it is agnostic about the proper test, lower courts will likely read the Court's self-described "instructive" expatiation on how the *O'Connor* plurality's approach would apply here (if it applied), *ante,* at 758–760, as a heavy-handed hint about how *they* should proceed. Litigants will do likewise, using the threshold question whether the Fourth Amendment is even implicated as a basis for bombarding lower courts with arguments about employer policies, how they were communicated, and whether they were authorized, as well as the latest trends in employees' use of

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ard. There is room for reasonable debate as to which of the two approaches advocated by Justices whose votes supported the judgment in *O'Connor*—the plurality's and mine—is controlling under *Marks* v. *United States,* 430 U. S. 188, 193 (1977). But unless *O'Connor* is overruled, it is assuredly false that a test that would have produced the *opposite* result in that case is still in the running.

electronic media. In short, in saying why it is not saying more, the Court says much more than it should.

The Court's inadvertent boosting of the *O'Connor* plurality's standard is all the more ironic because, in fleshing out its fears that applying that test to new technologies will be too hard, the Court underscores the unworkability of that standard. Any rule that requires evaluating whether a given gadget is a "necessary instrumen[t] for self-expression, even self-identification," on top of assessing the degree to which "the law's treatment of [workplace norms has] evolve[d]," *ante*, at 759–760, is (to put it mildly) unlikely to yield objective answers.

I concur in the Court's judgment.

Syllabus

SCHWAB *v.* REILLY

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

No. 08–538. Argued November 3, 2009—Decided June 17, 2010

Respondent Reilly filed for Chapter 7 bankruptcy when her catering business failed. She supported her petition with, *inter alia*, Schedule B, on which debtors must list their assets, and Schedule C, on which they must list the property they wish to reclaim as exempt. Her Schedule B assets included cooking and other kitchen equipment, to which she assigned an estimated market value of $10,718. On Schedule C, she claimed two exempt interests in this "business equipment": a "tool[s] of the trade" exemption for the statutory-maximum "$1,850 in value," 11 U. S. C. § 522(d)(6); and $8,868 under the statutory provisions allowing miscellaneous, or "wildcard," exemptions up to $10,225 in value. The claimed exemptions' total value ($10,718) equaled Reilly's estimate of the equipment's market value. Property claimed as exempt will be excluded from the bankruptcy estate "[u]nless a party in interest" objects, § 522(*l*), within a certain 30-day period, see Fed. Rule Bkrtcy. Proc. 4003(b). Absent an objection, the property will be excluded from the estate even if the exemption's value exceeds what the Code permits. See, *e. g.*, § 522(*l*); *Taylor* v. *Freeland & Kronz*, 503 U. S. 638, 642–643.

Although an appraisal revealed that the equipment's total market value could be as much as $17,200, petitioner Schwab, the bankruptcy estate's trustee, did not object to the claimed exemptions because the dollar value Reilly assigned to each fell within the limits of §§ 522(d)(5) and (6). Schwab moved the Bankruptcy Court for permission to auction the equipment so Reilly could receive the $10,718 she claimed exempt and the estate could distribute the remaining value to her creditors. Reilly countered that by equating on Schedule C the total value of her claimed exemptions in the equipment with the equipment's estimated market value, she had put Schwab and her creditors on notice that she intended to exempt the equipment's full value, even if it turned out to be more than the amounts she declared and that the Code allowed. She asserted that the estate had forfeited its claim to any portion of that value because Schwab had not objected within the Rule 4003(b) period, and that she would dismiss her petition rather than sell her equipment.

The Bankruptcy Court denied Schwab's motion and Reilly's conditional motion to dismiss. The District Court denied Schwab relief, re-

jecting his argument that neither the Code nor Rule 4003(b) requires a trustee to object to a claimed exemption where the amount the debtor declares as the exemption's value is within the limits the Code prescribes. Affirming, the Third Circuit agreed that Reilly's Schedule C entries indicated her intent to exempt the equipment's full value. Relying on *Taylor*, it held that Schwab's failure to object entitled Reilly to exempt the full value of her equipment, even though that value exceeded the amounts that Reilly declared and the Code permitted.

Held: Because Reilly gave "the value of [her] claimed exemption[s]" on Schedule C dollar amounts within the range the Code allows for what it defines as the "property claimed as exempt," Schwab was not required to object to the exemptions in order to preserve the estate's right to retain any value in the equipment beyond the value of the exempt interest. Pp. 779–795.

(a) Reilly's complicated view of the trustee's statutory obligation, and her reading of Schedule C, does not accord with the Code. Pp. 779–788.

(1) The parties agree that this case is governed by § 522(*l*), which states that a Chapter 7 debtor must "file a list of property that the debtor claims as exempt under subsection (b) of this section," and that "[u]nless a party in interest objects, the property claimed as exempt on such list is exempt." Reilly asserts that the "property claimed as exempt" refers to all of the information on Schedule C, including the estimated market value of each asset. Schwab and *amicus* United States counter that because the Code defines such property as an interest, not to exceed a certain dollar amount, in a particular asset, *not* as the asset itself, the value of the property claimed exempt should be judged on the dollar value the debtor assigns the interest, *not* on the value the debtor assigns the asset. Pp. 779–782.

(2) Schwab and the United States are correct. The portion of § 522(*l*) that resolves this case is not, as Reilly asserts, the provision stating that the "property claimed as exempt on [Schedule C] is exempt" unless an interested party objects. Rather, it is the portion that defines the objection's target, namely, the "list of property that the debtor claims as exempt under subsection (b)." Section 522(b) does *not* define the "property claimed as exempt" by reference to the estimated market value. It refers only to property defined in § 522(d), which in turn lists 12 categories of property that a debtor may claim as exempt. Most of these categories and all the ones applicable here define "property" as the debtor's "interest"—up to a specified dollar amount—in the assets described in the category, *not* as the assets themselves. Schwab had no duty to object to the property Reilly claimed as exempt because its stated value was within the limits the Code allows. Reilly's contrary

view does not withstand scrutiny because it defines the target of a trustee's objection based on Schedule C's language and dictionary definitions of "property" at odds with the Code's definition. The Third Circuit failed to account for the Code's definition and for provisions that permit debtors to exempt certain property in kind or in full regardless of value. See, *e. g.*, § 522(d)(9). Schwab was entitled to evaluate the claimed exemptions' propriety based on three Schedule C entries: the description of the business equipment in which Reilly claimed the exempt interests; the Code provisions governing the claimed exemptions; and the amounts Reilly listed in the column titled "value of claimed exemption." This conclusion does not render Reilly's market value estimate superfluous. It simply confines that estimate to its proper role: aiding the trustee in administering the estate by helping him identify assets that may have value beyond the amount the debtor claims as exempt, or whose full value may not be available for exemption. This interpretation is consistent with the historical treatment of bankruptcy exemptions. Pp. 782–788.

(b) *Taylor* does not dictate a contrary conclusion. While both *Taylor* and this case concern the consequences of a trustee's failure to object to a claimed exemption within Rule 4003's time period, *Taylor* establishes and applies the straightforward proposition that an interested party must object to a claimed exemption if the amount the debtor lists as the "value claimed exempt" is not within statutory limits. In *Taylor*, the value listed in Schedule C ("$ unknown") was not plainly within those limits, but here, the values ($8,868 and $1,850) are within Code limits and thus do not raise the warning flag present in *Taylor*. Departing from *Taylor* would not only ignore the presumption that parties act lawfully and with knowledge of the law; it would also require the Court to expand the statutory definition of "property claimed as exempt" and the universe of information an interested party must consider in evaluating an exemption's validity. Even if the Code allowed such expansions, they would be ill advised. Basing the definition of "property claimed exempt," and thus an interested party's obligation to object under § 522(*l*), on inferences that party must draw from preprinted bankruptcy schedules that evolve over time, rather than on the facial validity of the value the debtor assigns the "property claimed as exempt" as defined by the Code, would undermine the predictability the statute is designed to provide. Pp. 788–791.

(c) Reilly's argument threatens to convert the Code's goal of giving debtors a fresh start into a free pass. By permitting a debtor "to withdraw from the estate certain interests in property, . . . up to certain values," *Rousey* v. *Jacoway*, 544 U. S. 320, 325, Congress balanced the difficult choices that exemption limits impose on debtors with the eco-

Syllabus

nomic harm that exemptions visit on creditors. This Court should not alter that balance by requiring trustees to object to claimed exemptions based on form entries beyond those governing an exemption's validity under the Code. In rejecting Reilly's approach, the Court does not create incentives for trustees and creditors to sleep on their rights. The decision reached here encourages a debtor wishing to exempt an asset's full market value or the asset itself to declare the value of the claimed exemption in a way that makes its scope clear. Such declarations will encourage the trustee to object promptly and preserve for the estate any value in the asset beyond relevant statutory limits. If the trustee fails to object, or his objection is overruled, the debtor will be entitled to exclude the asset's full value. If the objection is sustained, the debtor will be required either to forfeit the portion of the exemption exceeding the statutory allowance or to revise other exemptions or arrangements with creditors to permit the exemption. See Rule 1009(a). Either result will facilitate the expeditious and final disposition of assets, and thus enable the debtor and creditors to achieve a fresh start free of Reilly's finality and clouded-title concerns. Pp. 791–795.

534 F. 3d 173, reversed and remanded.

THOMAS, J., delivered the opinion of the Court, in which STEVENS, SCALIA, KENNEDY, ALITO, and SOTOMAYOR, JJ., joined. GINSBURG, J., filed a dissenting opinion, in which ROBERTS, C. J., and BREYER, J., joined, *post*, p. 795.

Craig Goldblatt argued the cause for petitioner. With him on the briefs were *William G. Schwab*, *pro se*, *Seth P. Waxman*, *Danielle Spinelli*, and *Daniel S. Volchok*.

Jeffrey B. Wall argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Kagan*, *Assistant Attorney General West*, *Deputy Solicitor General Stewart*, *Ramona D. Elliott*, *P. Matthew Sutko*, and *Eric K. Bradford*.

G. Eric Brunstad, Jr., argued the cause for respondent. With him on the brief were *Collin O'Connor Udell*, *Joshua Richards*, and *Gino L. Andreuzzi*.*

**Martin P. Sheehan* filed a brief for the National Association of Bankruptcy Trustees as *amicus curiae* urging reversal.

William C. Heuer filed a brief for the National Association of Consumer Bankruptcy Attorneys et al. as *amici curiae* urging affirmance.

JUSTICE THOMAS delivered the opinion of the Court.

When a debtor files a Chapter 7 bankruptcy petition, all of the debtor's assets become property of the bankruptcy estate, see 11 U. S. C. § 541, subject to the debtor's right to reclaim certain property as "exempt," § 522(*l*). The Bankruptcy Code specifies the types of property debtors may exempt, § 522(b), as well as the maximum value of the exemptions a debtor may claim in certain assets, § 522(d). Property a debtor claims as exempt will be excluded from the bankruptcy estate "[u]nless a party in interest" objects. § 522(*l*).

This case presents an opportunity for us to resolve a disagreement among the Courts of Appeals about what constitutes a claim of exemption to which an interested party must object under § 522(*l*). The issue is whether an interested party must object to a claimed exemption where, as here, the Code defines the property the debtor is authorized to exempt as an interest, the value of which may not exceed a certain dollar amount, in a particular type of asset, and the debtor's schedule of exempt property accurately describes the asset and declares the "value of [the] claimed exemption" in that asset to be an amount within the limits that the Code prescribes. Fed. Rule Bkrtcy. Proc. Official Form 6, Schedule C (1991) (hereinafter Schedule C). We hold that, in cases such as this, an interested party need not object to an exemption claimed in this manner in order to preserve the estate's ability to recover value in the asset beyond the dollar value the debtor expressly declared exempt.

I

Respondent Nadejda Reilly filed for Chapter 7 bankruptcy when her catering business failed. She supported her petition with various schedules and statements, two of which are relevant here: Schedule B, on which the Bankruptcy Rules require debtors to list their assets (most of which become property of the estate), and Schedule C, on which the Rules

require debtors to list the property they wish to reclaim as exempt. The assets Reilly listed on Schedule B included an itemized list of cooking and other kitchen equipment that she described as "business equipment," and to which she assigned an estimated market value of $10,718. App. 40a, 49a–55a.

On Schedule C, Reilly claimed two exempt interests in this equipment pursuant to different sections of the Code. Reilly claimed a "tool[s] of the trade" exemption of $1,850 in the equipment under § 522(d)(6), which permits a debtor to exempt his "aggregate interest, not to exceed [$1,850] in value, in any implements, professional books, or tools, of [his] trade." See also 69 Fed. Reg. 8482 (2004) (Table). And she claimed a miscellaneous exemption of $8,868 in the equipment under § 522(d)(5), which, at the time she filed for bankruptcy, permitted a debtor to take a "wildcard" exemption equal to the "debtor's aggregate interest in any property, not to exceed" $10,225 "in value."[1] See App. 58a. The total value of these claimed exemptions ($10,718) equaled the value Reilly separately listed on Schedules B and C as the equipment's estimated market value, see *id.*, at 49a, 58a.

Subject to exceptions not relevant here, the Federal Rules of Bankruptcy Procedure require interested parties to object to a debtor's claimed exemptions within 30 days after the conclusion of the creditors' meeting held pursuant to Rule 2003(a). See Fed. Rule Bkrtcy. Proc. 4003(b). If an interested party fails to object within the time allowed, a claimed exemption will exclude the subject property from the estate

[1] The 1994 version of 11 U. S. C. § 522(d)(5) allowed debtors to exempt an "aggregate interest in any property, not to exceed in value $800 plus up to $7,500 of any unused amount of the [homestead or burial plot] exemption provided under [§ 522(d)(1)]." In 2004, pursuant to § 104(b)(2), the Judicial Conference of the United States published notice that § 522(d)(5) would impose the $975 and $9,250 ($10,225 total) limits that governed Reilly's April 2005 petition. See 69 Fed. Reg. 8482 (Table). In 2007 and 2010 the limits were again increased. See 72 *id.*, at 7082 (Table); 75 *id.*, at 8748 (Table).

even if the exemption's value exceeds what the Code permits. See, *e. g.*, § 522(*l*); *Taylor* v. *Freeland & Kronz*, 503 U. S. 638, 642–643 (1992).

Petitioner William G. Schwab, the trustee of Reilly's bankruptcy estate, did not object to Reilly's claimed exemptions in her business equipment because the dollar value Reilly assigned each exemption fell within the limits that §§ 522(d)(5) and (6) prescribe. App. 163a. But because an appraisal revealed that the total market value of Reilly's business equipment could be as much as $17,200,[2] Schwab moved the Bankruptcy Court for permission to auction the equipment so Reilly could receive the $10,718 she claimed as exempt, and the estate could distribute the equipment's remaining value (approximately $6,500) to Reilly's creditors. *Id.*, at 141a–143a.

Reilly opposed Schwab's motion. She argued that by equating on Schedule C the total value of the exemptions she claimed in the equipment with the equipment's estimated market value, she had put Schwab and her creditors on notice that she intended to exempt the equipment's full value, even if that amount turned out to be more than the dollar amount she declared, and more than the Code allowed. *Id.*, at 165a. Citing § 522(*l*), Reilly asserted that because her Schedule C notified Schwab of her intent to exempt the full value of her business equipment, he was obliged to object if he wished to preserve the estate's right to retain any value in the equipment in excess of the $10,718 she estimated. Because Schwab did not object within the time prescribed by Rule 4003(b), Reilly asserted that the estate forfeited its claim to such value. *Id.*, at 165a. Reilly further informed the Bankruptcy Court that exempting her business equipment from the estate was so important to her that she would

[2] Schwab concedes that the appraisal occurred before Rule 4003(b)'s 30-day window for objecting to the claimed exemptions had passed. See Brief for Petitioner 15.

dismiss her bankruptcy case if doing so was the only way to avoid the equipment's sale at auction.[3]

The Bankruptcy Court denied both Schwab's motion to auction the equipment and Reilly's conditional motion to dismiss her case. See *In re Reilly*, 403 B. R. 336 (Bkrtcy. Ct. MD Pa. 2006). Schwab sought relief from the District Court, arguing that neither the Code nor Rule 4003(b) requires a trustee to object to a claimed exemption where the amount the debtor declares as the "value of [the debtor's] claimed exemption" in certain property is an amount within the limits the Code prescribes. The District Court rejected Schwab's argument, and the Court of Appeals affirmed. See *In re Reilly*, 534 F. 3d 173 (CA3 2008).

The Court of Appeals agreed with the Bankruptcy Court that by equating on Schedule C the total value of her exemptions in her business equipment with the equipment's market value, Reilly "indicate[d] the intent" to exempt the equipment's full value. *Id.*, at 174. In reaching this conclusion, the Court of Appeals relied on our decision in *Taylor:*

> "[W]e believe this case to be controlled by *Taylor*. Just as we perceive it was important to the *Taylor* Court that the debtor meant to exempt the full amount of the property by listing 'unknown' as both the value of the property and the value of the exemption, it is important to us that Reilly valued the business equipment at

[3] Reilly's desire to avoid the equipment's auction is understandable because the equipment, which Reilly's parents purchased for her despite their own financial difficulties, has "'extraordinary sentimental value.'" Brief for Respondent 5 (quoting App. 152a–153a). But the sentimental value of the property cannot drive our decision in this case, because sentimental value is not a basis for construing the Bankruptcy Code. Because the Code imposes limits on exemptions, many debtors who seek to take advantage of the Code are, no doubt, put to the similarly difficult choice of parting with property of "extraordinary sentimental value." *Id.*, at 152a–153a; see *infra*, at 791–794.

> $10,718 and claimed an exemption in the same amount. Such an identical listing put Schwab on notice that Reilly intended to exempt the property fully.
>
> . . . . .
>
> "'[A]n unstated premise' of *Taylor* was 'that a debtor who exempts the entire reported value of an asset is claiming the "full amount," whatever it turns out to be.'" 534 F. 3d, at 178–179.

Relying on this "unstated premise," the Court of Appeals held that Schwab's failure to object to Reilly's claimed exemptions entitled Reilly to the equivalent of an in-kind interest in her business equipment, even though the value of that exemption exceeded the amount that Reilly declared on Schedule C and the amount that the Code allowed her to withdraw from the bankruptcy estate. *Ibid.*

As noted, the Court of Appeals' decision adds to disagreement among the Circuits about what constitutes a claim of exemption to which an interested party must object under § 522(*l*).[4] We granted certiorari to resolve this conflict. See 556 U. S. 1207 (2009). We conclude that the Court of Appeals' approach fails to account for the text of the relevant Code provisions and misinterprets our decision in *Taylor*. Accordingly, we reverse.

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[4] Compare *In re Williams*, 104 F. 3d 688, 690 (CA4 1997) (holding that interested parties have no duty to object to a claimed exemption where the dollar amount the debtor assigns the exemption is facially within the range the Code allows for the type of property in issue); *In re Wick*, 276 F. 3d 412 (CA8 2002) (employing reasoning similar to *Williams*, but stopping short of articulating a clear rule), with *In re Green*, 31 F. 3d 1098, 1100 (CA11 1994) ("[A] debtor who exempts the entire reported value of an asset is claiming the [asset's] 'full amount,' whatever it turns out to be"); *In re Anderson*, 377 B. R. 865 (Bkrtcy. App. Panel CA6 2007) (similar); *In re Barroso-Herrans*, 524 F. 3d 341, 344 (CA1 2008) (focusing on "how a reasonable trustee would have understood the filings under the circumstances"); and *In re Hyman*, 967 F. 2d 1316 (CA9 1992) (applying an analogous totality-of-the-circumstances approach).

II

The starting point for our analysis is the proper interpretation of Reilly's Schedule C. If we read the Schedule Reilly's way, she claimed exemptions in her business equipment that could exceed statutory limits, and thus claimed exemptions to which Schwab should have objected if he wished to enforce those limits for the benefit of the estate. If we read Schedule C Schwab's way, Reilly claimed valid exemptions to which Schwab had no duty to object. The Court of Appeals construed Schedule C Reilly's way and interpreted her claimed exemptions as improper, and therefore objectionable, even though their declared value was facially within the applicable Code limits. In so doing, the Court of Appeals held that trustees evaluating the validity of exemptions in cases like this cannot take a debtor's claim at face value, and specifically cannot rely on the fact that the amount the debtor declares as the "value of [the] claimed exemption" is within statutory limits. Instead, the trustee's duty to object turns on whether the interplay of various schedule entries supports an inference that the debtor "intended" to exempt a dollar value different than the one she wrote on the form. 534 F. 3d, at 178. This complicated view of the trustee's statutory obligation, and the strained reading of Schedule C on which it rests, is inconsistent with the Code.[5]

The parties agree that this case is governed by § 522(*l*), which states that a Chapter 7 debtor must "file a list of property that the debtor claims as exempt under subsection (b) of this section," and further states that "[u]nless a party in interest objects, the property claimed as exempt on such list is exempt." The parties further agree that the "list" to which § 522(*l*) refers is the "list of property . . . claim[ed] as exempt"

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[5] The forms, rules, treatise excerpts, and policy considerations on which the dissent relies, see *post*, at 798–810 (opinion of GINSBURG, J.), must be read in light of the Bankruptcy Code provisions that govern this case, and must yield to those provisions in the event of conflict.

currently known as "Schedule C." See Schedule C.[6] The parties, like the Courts of Appeals, disagree about what information on Schedule C defines the "property claimed as exempt" for purposes of evaluating an exemption's propriety under § 522(*l*). Reilly asserts that the "property claimed as exempt" is defined by reference to all the information on Schedule C, including the estimated market value of each asset in which the debtor claims an exempt interest. Schwab and the United States as *amicus curiae* argue that the Code specifically defines the "property claimed as exempt" as an interest, the value of which may not exceed a certain dollar amount, in a particular asset, *not* as the asset itself. Accordingly, they argue that the value of the property claimed exempt, *i. e.*, the value of the debtor's exempt interest in the asset, should be judged on the value the debtor assigns the interest, *not* on the value the debtor assigns the asset. The point of disagreement is best illustrated by the relevant portion of Reilly's Schedule C:

Schedule C–Property Claimed as Exempt

Description of Property	Specify Law Providing Each Exemption	Value of Claimed Exemption	Current Market Value of Property Without Deducting Exemptions
Schedule B Personal Property			
. . . . .	. . . . .	. . . . .	. . . . .
See attached list of business equipment.	11 U. S. C. § 522(d)(6)	1,850	10,718
	11 U. S. C. § 522(d)(5)	8,868	

[6] Bankruptcy Rule 4003 specifies the time within which the debtor must file Schedule C, as well as the time within which interested parties must object to the exemptions claimed thereon.

According to Reilly, Schwab was required to treat the estimate of market value she entered in column 4 as part of her claimed exemption in identifying the "property claimed as exempt" under § 522(*l*). See Brief for Respondent 22–28. Relying on this premise, Reilly argues that where, as here, a debtor equates the total value of her claimed exemptions in a certain asset (column 3) with her estimate of the asset's market value (column 4), she establishes the "property claimed as exempt" as the full value of the asset, whatever that turns out to be. See *ibid.* Accordingly, Reilly argues that her Schedule C clearly put Schwab on notice that she "intended" to claim an exemption for the full value of her business equipment, and that Schwab's failure to oppose the exemption in a timely manner placed the full value of the equipment outside the estate's reach.

Schwab does not dispute that columns 3 and 4 apprised him that Reilly equated the total value of her claimed exemptions in the equipment ($1,850 plus $8,868) with the equipment's market value ($10,718). He simply disagrees with Reilly that this "identical listing put [him] on notice that Reilly intended to exempt the property fully," regardless of whether its value exceeded the exemption limits the Code prescribes. 534 F. 3d, at 178. Schwab and *amicus* United States instead contend that the Code defines the "property" Reilly claimed as exempt under § 522(*l*) as an "interest" whose value cannot exceed a certain dollar amount. Brief for Petitioner 20–26; Reply Brief for Petitioner 3–6; Brief for United States as *Amicus Curiae* 12–18. Construing Reilly's Schedule C in light of this statutory definition, they contend that Reilly's claimed exemption was facially unobjectionable because the "property claimed as exempt" (*i. e.*, two interests in her business equipment worth $8,868 and $1,850, respectively) is property Reilly was clearly entitled to exclude from her estate under the Code provisions she referenced in column 2. See *supra*, at 780 (citing §§ 522(d)(5) and (6)). Accordingly, Schwab and the United States conclude

that Schwab had no obligation to object to the exemption in order to preserve for the estate any value in Reilly's business equipment beyond the total amount ($10,718) Reilly properly claimed as exempt.

We agree. The portion of § 522(*l*) that resolves this case is not, as Reilly asserts, the provision stating that the "property claimed as exempt on [Schedule C] is exempt" unless an interested party objects. Rather, it is the portion of § 522(*l*) that defines the target of the objection, namely, the portion that says Schwab has a duty to object to the "list of property that the debtor claims as exempt *under subsection (b)*." (Emphasis added.) That subsection, § 522(b), does *not* define the "property claimed as exempt" by reference to the estimated market value on which Reilly and the Court of Appeals rely. Brief for Respondent 22–23; 534 F. 3d, at 178. Section 522(b) refers only to property defined in § 522(d), which in turn lists 12 categories of property that a debtor may claim as exempt. As we have recognized, most of these categories (and all of the categories applicable to Reilly's exemptions) define the "property" a debtor may "clai[m] as exempt" as the debtor's "interest"—up to a specified dollar amount—in the assets described in the category, *not* as the assets themselves. §§ 522(d)(5)–(6); see also §§ 522(d)(1)–(4), (8); *Rousey* v. *Jacoway*, 544 U. S. 320, 325 (2005); *Owen* v. *Owen*, 500 U. S. 305, 310 (1991). Viewing Reilly's form entries in light of this definition, we agree with Schwab and the United States that Schwab had no duty to object to the property Reilly claimed as exempt (two interests in her business equipment worth $1,850 and $8,868) because the stated value of each interest, and thus of the "property claimed as exempt," was within the limits the Code allows.[7]

[7] Schwab's statutory duty to object to the exemptions in this case turns solely on whether the value of the property claimed as exempt exceeds statutory limits because the parties agree that Schwab had no cause to object to Reilly's attempt to claim exemptions in the equipment at issue,

Reilly's contrary view of Schwab's obligations under § 522(*l*) does not withstand scrutiny because it defines the target of a trustee's objection—the "property claimed as exempt"—based on language in Schedule C and dictionary definitions of "property," see Brief for Respondent 24–25, 40–41, that the definition in the Code itself overrides.[8] Although we may look to dictionaries and the Bankruptcy Rules to determine the meaning of words the Code does not define, see, *e. g.*, *Rousey*, *supra*, at 330, the Code's definition of the "property claimed as exempt" in this case is clear. As noted above, §§ 522(d)(5) and (6) define the "property claimed as exempt" as an "interest" in Reilly's business equipment, *not* as the equipment *per se*. Sections 522(d)(5) and (6) further and plainly state that claims to exempt such interests are statutorily permissible, and thus unobjectionable, if the value of the claimed interest is below a particular dollar amount.[9] That is the case here, and Schwab was entitled

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or to the applicability of the Code provisions Reilly cited in support of her exemptions.

[8] The dissent's approach suffers from a similar flaw, and misstates our holding in critiquing it. See *post*, at 795–796 (asserting that by refusing to subject "challenges to the debtor's valuation of exemptible assets" to the "30-day" objection period in Federal Rule of Bankruptcy Procedure 4003(b), we "drastically reduc[e] Rule 4003's governance"). Challenges to the valuation of what the dissent terms "exemptible assets" are not covered by Rule 4003(b) in the first place. *Post*, at 795. Challenges to "property claimed as exempt" as defined by the Code are covered by Rule 4003(b), but in this case that property is not objectionable, so the lack of an objection did not violate the Rule. Our holding is confined to this point. Accordingly, our holding does not "reduc[e] Rule 4003's governance," nor does it express any judgment on what constrains objections to the type of "market value" estimates, *post*, at 796, the dissent equates with the dollar value a debtor assigns the "property claimed as exempt" as defined by the Code, see, *e. g.*, *post*, at 795–796, 800.

[9] Treating such claims as unobjectionable is consistent with our precedents. See, *e. g.*, *Rousey*, 544 U. S., at 325. It also accords with bankruptcy court decisions holding that where, as here, a debtor claims an exemption pursuant to provisions that (like § 522(d)(6)) permit the debtor to exclude from the estate only an "interest" in certain property, the

to rely upon these provisions in evaluating whether Reilly's exemptions were objectionable under the Code. See *Lamie* v. *United States Trustee*, 540 U. S. 526, 534 (2004); *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N. A.*, 530 U. S. 1, 6 (2000). The Court of Appeals' contrary holding not only fails to account for the Code's definition of the "property claimed as exempt." It also fails to account for the provisions in § 522(d) that permit debtors to exempt certain property in kind or in full regardless of value. See, *e. g.*, §§ 522(d)(9) (professionally prescribed health aids), (10)(C) (disability benefits), (7) (unmatured life insurance contracts). We decline to construe Reilly's claimed exemptions in a manner that elides the distinction between these provisions and provisions such as §§ 522(d)(5) and (6), see, *e. g.*, *Duncan* v. *Walker*, 533 U. S. 167, 174 (2001), particularly based upon an entry on Schedule C—Reilly's estimate of her equipment's market value—to which the Code does not refer in defining the "property claimed as exempt."[10]

"property" that becomes exempt absent objection, § 522(*l*), is only the "partial interest" claimed as exempt and not "the asset as a whole," *e. g.*, *In re Soost*, 262 B. R. 68, 72 (Bkrtcy. App. Panel CA8 2001).

[10] The dissent's approach does not avoid these concerns. The dissent insists that "a debtor's market valuation [of the equipment in which she claims an exempt interest] is an essential factor in determining the nature of the 'interest' [the] debtor lists as exempt" (and thus in determining whether the claimed exemption is objectionable), because "without comparing [the debtor's] market valuation of the equipment to the value of her claimed exemption" the trustee "could not comprehend whether [the debtor] claimed a monetary or an in-kind 'interest' in [the] equipment." *Post*, at 803, n. 9. This argument overlooks the fact that there is another way the trustee could discern from the "face of the debtor's filings," *post*, at 801, n. 6, whether the debtor claimed as exempt a "monetary or an in-kind 'interest' in" her equipment, *post*, at 803, n. 9: The trustee could simply consult the Code provisions the debtor listed as governing the exemption in question. Here, those provisions, §§ 522(d)(5) and (6), expressly describe the exempt interest as an "interest" "not to exceed" a specified dollar amount. Accordingly, it was entirely appropriate for Schwab to view Reilly's schedule entries as exempting an interest in her business equipment in the (declared and unobjectionable) amounts of $1,850 and $8,868. Viewing the entries otherwise, *i. e.*, as exempting the

For all of these reasons, we conclude that Schwab was entitled to evaluate the propriety of the claimed exemptions based on three, and only three, entries on Reilly's Schedule C: the description of the business equipment in which Reilly claimed the exempt interests; the Code provisions governing the claimed exemptions; and the amounts Reilly listed in the column titled "value of claimed exemption." In reaching this conclusion, we do not render the market value estimate on Reilly's Schedule C superfluous. We simply confine the estimate to its proper role: aiding the trustee in administering the estate by helping him identify assets that may have value beyond the dollar amount the debtor claims as exempt, or whose full value may not be available for exemption because a portion of the interest is, for example, encumbered by an unavoidable lien. See, *e. g.*, 3 W. Norton & W. Norton, Bankruptcy Law and Practice § 56:7 (3d ed. 2009); Brief for United States as *Amicus Curiae* 16; Dept. of Justice, Executive Office for U. S. Trustees, Handbook for Chapter 7 Trustees, p. 8–1 (2005), http://www.justice.gov/ust/eo/private_trustee/library/chapter07/docs/7handbook1008/Ch7_Handbook.pdf (as visited June 14, 2010, and available in Clerk of Court's case file). As noted, most assets become property of the estate upon commencement of a bankruptcy case, see 11 U. S. C. § 541, and exemptions represent the debtor's attempt to reclaim those assets or, more often, certain interests in those assets, to the creditors' detriment. Accordingly, it is at least useful for a trustee to be able to compare the value of the claimed exemption (which typically represents the debtor's interest in a particular asset) with

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equipment in kind or in full no matter what its dollar value, would unnecessarily treat the exemption as violating the limits imposed by the Code provisions that govern it, as well as ignore the distinction between those provisions and the provisions that "authoriz[e] reclamation of the property in full without any cap on value," *post,* at 801, n. 5. And it would do all of this based on information (identical dollar amounts in columns 3 and 4 of Schedule C) that Schwab and one of his *amici* say often result from a default setting in commercial bankruptcy software. See Reply Brief for Petitioner 15; Brief for National Association of Bankruptcy Trustees 13, n. 15.

the asset's estimated market value (which belongs to the estate subject to any valid exemption) without having to consult separate schedules.[11]

Our interpretation of Schwab's statutory obligations is not only consistent with the governing Code provisions; it is also consistent with the historical treatment of bankruptcy exemptions. Congress has permitted debtors to exempt certain property from their bankruptcy estates for more than two centuries. See Act of Apr. 4, 1800, ch. 19, § 5, 2 Stat.

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[11] The dissent's argument that the estimate plays a greater role, and is "vital," *post*, at 801, to determining whether the value a debtor assigns the "property claimed as exempt" (here, an interest in certain business equipment) is objectionable, see *post*, at 801–802, lacks statutory support because the governing Code provisions phrase the exemption limit as a simple dollar amount. The dissent's view, see *post*, at 800–803, might be plausible if the Code stated that the debtor could exempt an interest in her equipment "not to exceed" a certain *percentage* of the equipment's market value, because then it might be necessary to "compar[e] [the debtor's] market valuation of the equipment to the value of her claimed exemption" to determine the exemption's propriety. *Post*, at 803, n. 9. But the Code does not phrase the exemption cap in such terms. Moreover, even accepting that the equivalent Schedule C entries the dissent relies upon represent a claim to exempt an asset's full value, the dissent does not explain why this equivalence precludes a trustee from relying on the dollar amount the debtor expressly assigns both entries. According to the dissent, a trustee faced with such entries should assume not only that the debtor reclaims from the estate what she believes to be the full value of an asset in which the Code allows her to exempt an interest "not to exceed" a certain dollar amount, *e. g.*, § 522(d)(6), but *also* that the debtor would continue to claim the asset's full value as exempt even if that value exceeds her estimate to a point that would cause her claim to violate the Code. The schedule entries themselves do not compel this assumption, and the Code provisions they invoke undercut it. The evidence that the debtor in this case would have chosen that course is external to her exemption schedule. See, *e. g.*, *supra*, at 776–777 (citing statements in Reilly's motion to dismiss); *post*, at 798, n. 3, 800 (same). And in the ordinary case, particularly if the equivalent entries the dissent relies upon result from a software default, see n. 10, *supra*, there is no reason to assume that a debtor would want to violate the Code or jeopardize other exemptions if her market value estimate turns out to be wrong.

23.[12] Throughout these periods, debtors have validly exempted property based on forms that required the debtor to list the value of a claimed exemption without also estimating the market value of the asset in which the debtor claimed the exempt interest. See Brief for Respondent 46, n. 7 (citing Sup. Ct. Bkrtcy. Form 20 (1877)).[13] Indeed, it was not until 1991 that Schedule B–4 was redesignated as Schedule C and amended to require the estimate of market value on which Reilly so heavily relies. See Schedule C. This amendment was not occasioned by legislative changes that altered the Code's definition of "the property claimed as exempt" in this case as an "interest," not to exceed a certain dollar amount, in Reilly's business equipment.[14] Accordingly, we agree with Schwab and the United States that this recent amendment to the exemption form does not compel Reilly's view of Schwab's statutory obligations, or render the claimed exemptions in this case objectionable under the

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[12] See also Act of Aug. 19, 1841, ch. 9, § 3, 5 Stat. 442; Act of Mar. 2, 1867, ch. 176, § 11, 14 Stat. 521, amended by Act of June 22, 1874, 18 Stat., pt. 3, p. 182; Bankruptcy Act of July 1, 1898, ch. 541, § 6, 30 Stat. 548, 11 U. S. C. § 24 (1926 ed.); Chandler Act, ch. 575, § 1, 52 Stat. 847, 11 U. S. C. § 24 (1934 ed., Supp. IV); § 522 (1976 ed., Supp. II); § 522 (2000 ed. and Supp. V).

[13] See also General Orders and Forms in Bankruptcy, Official Form 1, Schedule B (5) (1898); Fed. Rule Bkrtcy. Proc. Official Form 6, Schedule B–4 (1971).

[14] The precise reason for the amendment is unclear. See Communication from THE CHIEF JUSTICE of the United States Transmitting Amendments to the Federal Rules of Bankruptcy Procedure Prescribed by the Court, Pursuant to 28 U. S. C. 2075, H. R. Doc. No. 102–80, p. 558, reprinted in 11 Bankruptcy Rules Documentary History (1990–1991) (referencing only the fact of the amendment). It may have been to consolidate and reconcile the separate forms debtors were previously required to file in Chapter 7 and Chapter 13 cases, see, *e. g.*, *In re Beshirs*, 236 B. R. 42, 46–47 (Bkrtcy. Ct. Kan. 1999), or simply to make it easier for trustees to evaluate whether certain assets were viable candidates for liquidation. Whatever the case, it did not result from statutory changes to the Code provisions that govern this dispute.

Code. See Reply Brief for Petitioner 9–11; Brief for United States as *Amicus Curiae* 16–17.[15]

III

The Court of Appeals erred in holding that our decision in *Taylor* dictates a contrary conclusion. See 534 F. 3d, at 178. *Taylor* does not rest on what the debtor "meant" to exempt. 534 F. 3d, at 178. Rather, *Taylor* applies to the face of a debtor's claimed exemption the Code provisions that compel reversal here.

The debtor in *Taylor*, like the debtor here, filed a schedule of exemptions with the Bankruptcy Court on which the debtor described the property subject to the claimed exemption, identified the Code provision supporting the exemption, and listed the dollar value of the exemption. Critically, however, the debtor in *Taylor* did *not*, like the debtor here, state the value of the claimed exemption as a specific dollar amount at or below the limits the Code allows. Instead, the debtor in *Taylor* listed the value of the exemption itself as "$ *unknown*":

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[15] Because the Code provisions we rely upon to resolve this case do not obligate trustees to object under Rule 4003(b) to a debtor's estimate of the market value of an asset in which the debtor claims an exempt interest, our analysis does not depend on whether the schedule of "property claimed as exempt" (currently Schedule C) calls for such an estimate or not. We engage the point only because Reilly suggests that the 1991 schedule revisions requiring debtors to provide such an estimate on the schedule of "property claimed as exempt" means that the estimate must be viewed as part of the exemption and is therefore subject to the Rule. See Brief for Respondent 40–41. The dissent ranges far beyond even this unavailing argument in suggesting that the market value estimate served as "an essential factor in determining the nature of the 'interest' a debtor lists as exempt," *post*, at 803, n. 9, even before 1991 when that estimate did *not* appear on the schedule of "property claimed as exempt" (former Schedule B–4), but rather appeared on former "Schedule B–2," *post*, at 801, n. 6, which merely listed the debtor's "personal property" as of the date of the petition filing. Interim Fed. Rule Bkrtcy. Proc. Official Form 6, Schedules B–2, B–4 (1979).

Schedule B-4. –Property Claimed Exempt

Type of Property	Location, Description, and, So Far as Relevant to the Claim of Exemption, Present Use of Property	Specify the Statute Creating the Exemption	Value Claimed Exempt
Proceeds from lawsuit	Winn v. TWA Claim for lost wages	11 U. S. C. 522(b)(d)	$ *unknown*

The interested parties in *Taylor* agreed that this entry rendered the debtor's claimed exemption objectionable on its face because the exemption concerned an asset (lawsuit proceeds) that the Code did not permit the debtor to exempt beyond a specific dollar amount. See 503 U. S., at 642. Accordingly, although this case and *Taylor* both concern the consequences of a trustee's failure to object to a claimed exemption within the time specified by Rule 4003, the question arose in *Taylor* on starkly different facts. In *Taylor*, the question concerned a trustee's obligation to object to the debtor's entry of a "value claimed exempt" that was *not* plainly within the limits the Code allows. In this case, the opposite is true. The amounts Reilly listed in the Schedule C column titled "Value of Claimed Exemption" *are* facially within the limits the Code prescribes and raise no warning flags that warranted an objection.[16] See *supra*, at 780.

[16] See, *e. g.*, *Barroso-Herrans*, 524 F. 3d, at 345 (explaining that Schedule C entries listing the value of a claimed exemption as "unknown," "to be determined," or "100%" are "'red flags to trustees and creditors,' and therefore put them on notice that if they do not object, the whole value of the asset—whatever it might later turn out to be—will be exempt" (quoting 1 Collier on Bankruptcy ¶ 8.06[1][c][ii] (rev. 15th ed. 2007); citation and some internal quotation marks omitted)). The dissent concedes that a debtor's exemption schedule "must give notice sufficient to cue the trustee that an objection may be in order," and rightly observes that the sufficiency of a particular cue, or "'warning flag,'" may lie "in the eye of the beholder." *Post*, at 808. In this case, however, the Code itself breaks the tie between what might otherwise be two equally tenable views.

Taylor supports this conclusion. In holding otherwise, the Court of Appeals focused on what it described as *Taylor*'s "'unstated premise'" that "'a debtor who exempts the entire reported value of an asset is claiming the "full amount," whatever it turns out to be.'" 534 F. 3d, at 179. But *Taylor* does not rest on this premise. It establishes and applies the straightforward proposition that an interested party must object to a claimed exemption if the amount the debtor lists as the "value claimed exempt" is not within statutory limits, a test the value ($ *unknown*) in *Taylor* failed, and the values ($8,868 and $1,850) in this case pass.

We adhere to this test. Doing otherwise would not only depart from *Taylor* and ignore the presumption that parties act lawfully and with knowledge of the law, cf. *United States* v. *Budd*, 144 U. S. 154, 163 (1892); it would also require us to expand the statutory definition of "property claimed as exempt" and the universe of information an interested party must consider in evaluating the validity of a claimed exemption. Even if the Code allowed such expansions, they would be ill advised. As evidenced by the differences between Reilly's Schedule C and the schedule in *Taylor*, preprinted bankruptcy schedules change over time. Basing the definition of the "property claimed as exempt," and thus an interested party's obligation to object under § 522(*l*), on inferences that party must draw from evolving forms, rather than on the facial validity of the value the debtor assigns the "property claimed as exempt" as defined by the Code, would undermine the predictability the statute is designed to provide.[17] For all of these reasons, we take Reilly's exemptions

[17] Reilly insists that our conclusion should nonetheless be avoided because "procedures that burden the debtor's exemption entitlements, like those that impair a debtor's discharge generally, are to be construed narrowly." Brief for Respondent 33 (citing *Kawaauhau* v. *Geiger*, 523 U. S. 57, 62 (1998)). This argument misses the mark for two reasons. First, the only burdens our conclusion imposes are burdens the Code itself prescribes, specifically, the burdens the Code places on debtors to state their claimed exemptions accurately and to conform such claims to statutory limits. Second, and in any event, *Geiger* and the other cases Reilly cites

at face value and find them unobjectionable under the Code, so the objection deadline we enforced in *Taylor* is inapplicable here.

IV

In a final effort to defend the Court of Appeals' judgment, Reilly asserts that her approach to § 522(*l*) is necessary to vindicate the Code's goal of giving debtors a fresh start, and to further its policy of discouraging trustees and creditors from sleeping on their rights. See Brief for Respondent 21, 55–68. Although none of Reilly's policy arguments can overcome the Code provisions or the aspects of *Taylor* that govern this case, our decision fully accords with all of the policies she identifies. We agree that "exemptions in bankruptcy cases are part and parcel of the fundamental bankruptcy concept of a 'fresh start.'" Brief for Respondent 21 (quoting *Rousey*, 544 U. S., at 325); see *Marrama* v. *Citizens Bank of Mass.*, 549 U. S. 365, 367 (2007). We disagree that this policy required Schwab to object to a facially valid claim of exemption on pain of forfeiting his ability to preserve for the estate any value in Reilly's business equipment beyond the value of the interest she declared exempt. This approach threatens to convert a fresh start into a free pass.

As we emphasized in *Rousey*, "[t]o help the debtor obtain a fresh start, the Bankruptcy Code permits him to *withdraw from the estate* certain *interests in* property, such as his car or home, *up to certain values*." 544 U. S., at 325 (emphasis added). The Code limits exemptions in this fashion because every asset the Code permits a debtor to withdraw from the estate is an asset that is not available to his creditors. See § 522(b)(1). Congress balanced the difficult choices that exemption limits impose on debtors with the economic harm that exemptions visit on creditors, and it is not for us to

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emphasize in the discharge context the importance of limiting exceptions to discharge to "those plainly expressed," a principle that supports our approach here. *Ibid.* (internal quotation marks omitted).

alter this balance by requiring trustees to object to claimed exemptions based on form entries beyond those that govern an exemption's validity under the Code. See *Lamie*, 540 U. S., at 534, 538; *Hartford*, 530 U. S., at 6; *United States* v. *Locke*, 471 U. S. 84, 95 (1985).

Reilly nonetheless contends that our approach creates perverse incentives for trustees and creditors to sleep on their rights. See Brief for Respondent 64, n. 10, 67–69. Again, we disagree. Where a debtor intends to exempt nothing more than an interest worth a specified dollar amount in an asset that is not subject to an unlimited or in-kind exemption under the Code, our approach will ensure clear and efficient resolution of competing claims to the asset's value. If an interested party does not object to the claimed interest by the time the Rule 4003 period expires, title to the asset will remain with the estate pursuant to § 541, and the debtor will be guaranteed a payment in the dollar amount of the exemption. If an interested party timely objects, the court will rule on the objection and, if it is improper, allow the debtor to make appropriate adjustments.[18]

Where, as here, it is important to the debtor to exempt the full market value of the asset or the asset itself, our decision will encourage the debtor to declare the value of her claimed exemption in a manner that makes the scope of the exemption clear, for example, by listing the exempt value as

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[18] We disagree that Reilly's approach to exemptions would more efficiently dispose of competing claims to the asset. On Reilly's view, a trustee would be encouraged (if not obliged) to object to claims to exempt a specific dollar amount of interest in an asset whenever the value of the exempt interest equaled the debtor's estimate of the asset's market value. Where the debtor genuinely intended to claim nothing more than the face value of the exempt interest (which is rational if a debtor wishes to ensure that his aggregate exemptions remain within statutory limits), such an approach would engender needless objections and litigation, particularly if the equation that would precipitate the objection often results from a default software entry. See Reply Brief for Petitioner 15; Brief for National Association of Bankruptcy Trustees as *Amicus Curiae* 13, n. 15.

"full fair market value (FMV)" or "100% of FMV."[19] Such a declaration will encourage the trustee to object promptly to the exemption if he wishes to challenge it and preserve for the estate any value in the asset beyond relevant statutory limits.[20] If the trustee fails to object, or if the trustee objects and the objection is overruled, the debtor will be entitled to exclude the full value of the asset. If the trustee objects and the objection is sustained, the debtor will be required either to forfeit the portion of the exemption that exceeds the statutory allowance, or to revise other exemptions or arrangements with her creditors to permit the exemption. See Fed. Rule Bkrtcy. Proc. 1009(a). Either re-

[19] The dissent's observations about the poor fit between our admonition and a form entry calling for a dollar amount, see *post*, at 808–809, simply reflect the tension between the Code's definition of "property claimed as exempt" (*i. e.*, an interest, not to exceed a certain dollar amount, *in* Reilly's business equipment) and Reilly's attempt to convert into a dollar value an improper claim to exempt the equipment itself, "'whatever [its value] turns out to be,'" *In re Reilly*, 534 F. 3d 173, 178–179 (CA3 2008). As the dissent concedes, "[s]ection 522(d) catalogs exemptions of two types." *Post*, at 800–801, n. 5. "Most exemptions—and all of those Reilly invoked—place a monetary limit on the value of the property the debtor may reclaim," and such exemptions are distinct from those made pursuant to Code provisions that "authoriz[e] reclamation of the property in full without any cap on value." *Ibid.* Nothing about Reilly's schedule entries establishes that Schwab should have treated Reilly's claim for $10,718, an unobjectionable amount under the Code provisions she expressly invoked, as an objectionable claim for thousands of dollars more than those provisions allow, or as a claim for an uncapped exemption under Code provisions she did not invoke and the dissent admits are "not at issue here." *Ibid.*

[20] A trustee will not always file an objection. As the United States observes, Schwab did not do so in this case with respect to certain assets (perishable foodstuffs from Reilly's commercial kitchen) that could not be readily sold. See Brief for United States as *Amicus Curiae* 28, n. 7 (explaining that Schwab could have objected to Reilly's claim of a wildcard exemption for an interest in the food totaling $2,306 because this claim, combined with her wildcard claims for an interest of $8,868 in her business equipment and interests totaling $26 in her bank accounts, placed the total value of the interests she claimed exempt under the wildcard provision $975 above then-applicable limits).

sult will facilitate the expeditious and final disposition of assets, and thus enable the debtor (and the debtor's creditors) to achieve a fresh start free of the finality and clouded-title concerns Reilly describes. See Brief for Respondent 57–59 (arguing that "[u]nder [Schwab's] interpretation of Rule 4003(b), a debtor would never have the certainty of knowing whether or not he or she may keep her exempted property until the case had ended"); *id.*, at 66.[21]

For all of these reasons, the policy considerations Reilly cites support our approach. Where, as here, a debtor accurately describes an asset subject to an exempt interest and on Schedule C declares the "value of [the] claimed exemption" as a dollar amount within the range the Code allows, interested parties are entitled to rely upon that value as evidence of the claim's validity. Accordingly, we hold that Schwab was not required to object to Reilly's claimed exemptions in her business equipment in order to preserve the estate's right to retain any value in the equipment beyond the

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[21] Reilly's clouded-title argument arises only if one accepts her flawed conception of the exemptions in this case. According to Reilly, "once the thirty-day deadline passed without objection" to her claim, she was "entitled to know that she would emerge from bankruptcy with her cooking equipment intact." Brief for Respondent 57. There are two problems with this argument. First, it assumes that the property she claimed as exempt was the full value of the equipment. That assumption is incorrect for the reasons we explain. Second, her argument assumes that a claim to exempt the full value of the equipment would, if unopposed, entitle her to the equipment itself as opposed to a payment equal to the equipment's full value. That assumption is at least questionable. Section 541 is clear that title to the equipment passed to Reilly's estate at the commencement of her case, and §§ 522(d)(5) and (6) are equally clear that her reclamation right is limited to exempting an interest in the equipment, not the equipment itself. Accordingly, it is far from obvious that the Code would "entitle" Reilly to clear title in the equipment even if she claimed as exempt a "full" or "100%" interest in it (which she did not). Of course, it is likely that a trustee who fails to object to such a claim would have little incentive to do anything but pass title in the asset to the debtor. But that does not establish the statutory entitlement Reilly claims.

value of the exempt interest. In reaching this conclusion, we express no judgment on the merits of, and do not foreclose the courts from entertaining on remand, procedural or other measures that may allow Reilly to avoid auction of her business equipment.

* * *

We reverse the judgment of the Court of Appeals for the Third Circuit and remand this case for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE GINSBURG, with whom THE CHIEF JUSTICE and JUSTICE BREYER join, dissenting.

In Chapter 7 bankruptcies, debtors must surrender to the trustee-in-bankruptcy all their assets, 11 U. S. C. § 541, but may reclaim for themselves exempt property, § 522. Within 30 days after the meeting of creditors, the trustee or a creditor may file an objection to the debtor's designation of property as exempt. Fed. Rule Bkrtcy. Proc. 4003(b). Absent timely objection, "property claimed [by the debtor] as exempt . . . is exempt." § 522(*l*).

The trustee in this case, petitioner William G. Schwab, maintains that the obligation promptly to object to exemption claims extends only to the qualification of an asset as exemptible, not to the debtor's valuation of the asset. Respondent Nadejda Reilly, the debtor-in-bankruptcy, urges that the timely objection requirement applies not only to the debtor's designation of an asset as exempt; the requirement applies as well, she asserts, to her estimate of the asset's market value. That is so, she reasons, because the asset's current dollar value is critical to the determination whether she may keep the property intact and outside bankruptcy, or whether the trustee, at any time during the course of the proceedings, may sell it.

The Court holds that challenges to the debtor's valuation of exemptible assets need not be made within the 30-day

period allowed for "objection[s] to the list of property claimed as exempt." Rule 4003(b). Instead, according to the Court, no time limit constrains the trustee's (or a creditor's) prerogative to place at issue the debtor's evaluation of the property as fully exempt.

The Court's decision drastically reduces Rule 4003's governance, for challenges to valuation have been, until today, the most common type of objection leveled against exemption claims. See 9 Collier on Bankruptcy ¶ 4003.04, p. 4003–15 (rev. 15th ed. 2009) (hereinafter Collier) ("Normally, objections to exemptions will focus primarily on issues of valuation."). In addition to departing from the prevailing understanding and practice, the Court's decision exposes debtors to protracted uncertainty concerning their right to retain exempt property, thereby impeding the "fresh start" exemptions are designed to foster. In accord with the courts below, I would hold that a debtor's valuation of exempt property counts and becomes conclusive absent a timely objection.

I

Nadejda Reilly is a cook who operated a one-person catering business. Unable to cover her debts, she filed a Chapter 7 bankruptcy petition appending all required schedules and statements. Relevant here, her filings included a form captioned "Schedule B - Personal Property," which called for enumeration of "all personal property of the debtor of whatever kind." App. 40a. On that all-encompassing schedule, Reilly listed "business equipment," *i. e.*, her kitchen equipment, with a current market value of $10,718. *Id.*, at 49a.

Reilly also filed the more particular form captioned "Schedule C - Property Claimed as Exempt." *Id.*, at 56a. Schedule C contained four columns, the first headed "Description of Property"; the second, "Specify Law Providing Each Exemption"; the third, "Value of Claimed Exemption"; and the fourth, "Current Market Value of Property Without

Deducting Exemptions." *Id.*, at 57a. In the first column of Schedule C, Reilly wrote, as she did in Schedule B's description-of-property column: "See attached list of business equipment." *Id.*, at 58a. On the list appended to Schedules B and C, Reilly set out by hand a 31-item inventory of her restaurant-plus-catering-venture equipment. Next to each item, *e. g.*, "Dough Mixer," "Gas stove," "Hood," she specified, first, the purchase price and, next, "Today's Market Value," which added up to $10,718 for the entire inventory. *Id.*, at 51a–55a.[1]

As the laws securing exemption of her kitchen equipment, Reilly specified in the second Schedule C column, § 522(d)(6), the exemption covering trade tools, and § 522(d)(5), the "wildcard" exemption. *Id.*, at 58a.[2] In the value-of-claimed-exemption column, she listed $1,850, then the maximum trade-tools exemption, and $8,868, drawn from her wildcard exemption, amounts adding up to $10,718. *Ibid.* And in the fourth, current-market-value, column, she recorded $10,718, corresponding to the total market value she had set out in her inventory and reported in Schedule B. *Ibid.*

Before the 30-day clock on filing objections had begun to run, an appraiser told Schwab that Reilly's equipment was worth at least $17,000. Brief for Petitioner 15; App. 164a. Nevertheless, Schwab did not object to the $10,718 market value Reilly attributed to her business equipment in Schedule C and the attached inventory. Instead, he allowed the limitations period to lapse and then moved, unsuccessfully,

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[1] Reilly's Schedules B and C, and the inventory she attached to the forms, are reproduced in an Appendix to this opinion.

[2] Unlike exemptions that describe the specific property debtors may preserve, *e. g.*, 11 U. S. C. § 522(d)(6) (debtor may exempt her "aggregate interest, not to exceed [$1,850] in value, in any implements, professional books, or tool[s] of [her] trade"), the "wildcard" exemption permits a debtor to shield her "aggregate interest in any property" she chooses, up to a stated dollar limit, § 522(d)(5); *In re Smith*, 640 F. 2d 888, 891 (CA7 1981).

for permission to sell the equipment at auction. *Id.*, at 141a–143a.[3]

From Reilly's filings, the Bankruptcy Judge found it evident that Reilly had claimed the property itself, not its dollar value, as exempt. *Id.*, at 168a–169a ("I know there's an argument . . . that . . . the property identified as exempt is really the [valuation] column, [*i. e.*, $10,718,] but that's not what the forms say. The forms say property declared as exempt and to see attached list. So, they're exempting all the property. . . . If the Trustee believes that . . . all the property cannot be exempt, [he] should object to it.").

The District Court and Court of Appeals similarly concluded that, by listing the identical amount, $10,718, as the property's market value and the value of the claimed exemptions, Reilly had signaled her intention to safeguard all of her kitchen equipment from inclusion in the bankruptcy estate. *In re Reilly*, 403 B. R. 336, 338–339 (Bkrtcy. Ct. MD Pa. 2006); *In re Reilly*, 534 F. 3d 173, 178 (CA3 2008). Both courts looked to § 522(*l*) and Federal Rule of Bankruptcy Procedure 4003(b), which state, respectively:

> "The debtor shall file a list of property that the debtor claims as exempt . . . . Unless a party in interest objects, the property claimed as exempt on such list is exempt." § 522(*l*).
>
> "A party in interest may file an objection to the list of property claimed as exempt only within 30 days after the meeting of creditors held under § 341(a) is con-

[3] Schwab informed Reilly at the meeting of creditors that he planned to sell all of her business equipment. App. 137a. She promptly moved to dismiss her bankruptcy petition, stating that her "business equipment . . . is necessary to her livelihood and art, and was a gift to her from her parents." *Id.*, at 138a. She "d[id] not desire to continue with the bankruptcy," she added, because "she wishe[d] to continue in restaurant and catering as her occupation." *Ibid.* The Bankruptcy Court denied Reilly's dismissal motion simultaneously with Schwab's motion to sell Reilly's equipment. *Id.*, at 149a–170a.

> cluded . . . . The court may, for cause, extend the time for filing objections if, before the time to object expires, a party in interest files a request for an extension." Rule 4003(b).[4]

Schwab having filed no objection within the allowable 30 days, each of the tribunals below ruled that the entire inventory of Reilly's business equipment qualified as exempt in full. App. 168a; 403 B. R., at 339; 534 F. 3d, at 178. The leading treatise on bankruptcy, the Court of Appeals noted, *id.*, at 180, n. 4, is in accord:

> "Normally, if the debtor lists property as exempt, that listing is interpreted as a claim for exemption of the debtor's entire interest in the property, and the debtor's valuation of that interest is treated as the amount of the exemption claimed. Were it otherwise—that is, if the listing were construed to claim as exempt only that portion of the property having the value stated—the provisions finalizing exemptions if no objections are filed would be rendered meaningless. The trustee or creditors could [anytime] claim that the debtor's interest in the property was greater than the value claimed as exempt and [then] object to the debtor exempting his or her entire interest in the property after the deadline for objections had passed." 9 Collier ¶ 4003.02[1], pp. 4003–4 to 4003–5.

Agreeing with the courts below, I would hold that Reilly, by her precise identification of the exempt property, and her specification of $10,718 as both the current market value of her kitchen equipment and the value of the claimed exemptions, had made her position plain: She claimed as exempt the listed property itself—not the dollar amount, up to $10,718, that sale of the property by Schwab might yield.

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[4] In 2008, this prescription was recodified without material change and designated Rule 4003(b)(1).

Because neither Schwab nor any creditor lodged a timely objection, the listed property became exempt, reclaimed as property of the debtor, and therefore outside the bankruptcy estate the trustee is charged to administer.

II

A

Pursuant to § 522(*l*), Reilly filed a list of property she claimed as exempt from the estate-in-bankruptcy. Her filing left no doubt that her exemption claim encompassed her entire inventory of kitchen equipment. Schwab, in fact, was fully aware of the nature of the claim Reilly asserted. At the meeting of creditors, Reilly reiterated that she sought to keep the equipment in her possession; she would rather discontinue the bankruptcy proceeding, she made plain, than lose her equipment. See *supra*, at 798, n. 3. Bankruptcy Rule 4003(b) requires the trustee, if he contests the debtor's exemption claim in whole or part, to file an objection within 30 days after the meeting of creditors. Absent a timely objection, "the property claimed as exempt . . . is exempt." § 522(*l*); Rule 4003. That prescription should be dispositive of this case.

The Court holds, however, that Schwab was not obliged to file a timely objection to the exemption Reilly claimed, and indeed could auction off her cooking equipment anytime prior to the administrative closing of the bankruptcy estate. In so holding, the Court decrees that no objection need be made to a debtor's valuation of her property.

To support the conclusion that Rule 4003's timely objection requirement does not encompass the debtor's estimation of her property's market value, the Court homes in on the language of exemption prescriptions that are subject to a monetary cap.[5] Those prescriptions, the Court points out, "define

[5] Section 522(d) catalogs exemptions of two types. Most exemptions—and all of those Reilly invoked—place a monetary limit on the value of the property the debtor may reclaim. See, *e. g.*, § 522(d)(2) ("motor vehicle");

the 'property' a debtor may 'clai[m] as exempt' as the debtor's 'interest'—up to a specified dollar amount—in the assets described in the category, *not* as the assets themselves." *Ante*, at 782. So long as a debtor values her claimed exemption at a dollar amount below the statutory cap, the Court reasons, the claim is on-its-face permissible no matter the market value she ascribes to the asset. To evaluate the propriety of Reilly's declared "interest" in her kitchen equipment, the Court concludes, Schwab was obliged promptly to inspect "three, and only three, entries on Reilly's Schedule C: the description of the business equipment . . . ; the Code provisions governing the claimed exemptions; and the amounts Reilly listed in the column titled 'value of claimed exemption.'" *Ante*, at 785.[6]

B

The Court's account, however, shuts from sight the vital part played by the fourth entry on Schedule C—current mar-

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§ 522(d)(3) ("household furnishings, household goods, wearing apparel, appliances, books, animals, crops, or musical instruments"); § 522(d)(4) ("jewelry"). For certain exemptions not at issue here, the Bankruptcy Code authorizes reclamation of the property in full without any cap on value. See, *e. g.*, § 522(d)(7) ("unmatured life insurance contract"); § 522(d)(9) ("[p]rofessionally prescribed health aids"); § 522(d)(11)(A) ("award under a crime victim's reparation law").

[6] In support of its view that market value is not relevant to determining the "property claimed as exempt" for purposes of Rule 4003(b)'s timely objection mandate, the Court observes that Schedule C did not require the debtor to list this information until 1991. *Ante*, at 786–787. Prior to 1991, however, debtors recorded market value on a different schedule. See Interim Fed. Rule Bkrtcy. Proc. Official Form 6, Schedule B–2 (1979) (requiring debtor to list the "[m]arket value of [her] interest [in personal property] without deduction for . . . exemptions claimed"). Trustees assessing the "property claimed as exempt," therefore, have always been able, from the face of the debtor's filings, to compare the value of the claimed exemption to the property's declared market value. See Brief for National Association of Consumer Bankruptcy Attorneys et al. as *Amici Curiae* 34.

ket value—when a capped exemption is claimed. A debtor who estimates a market value *below* the cap, and lists an identical amount as the value of her claimed exemption, thereby signals that her aim is to keep the listed property in her possession, outside the estate-in-bankruptcy. In contrast, a debtor who estimates a market value *above* the cap, and above the value of her claimed exemption, thereby recognizes that she cannot shelter the property itself and that the trustee may seek to sell it for whatever it is worth.[7] Schedule C's final column, in other words, alerts the trustee whether the debtor is claiming a right to retain the listed property itself as her own, a right secured to her if the trustee files no timely objection.[8]

Because an asset's market value is key to determining the character of the interest the debtor is asserting in that asset, Rule 4003(b) is properly read to require objections to valuation within 30 days, just as the Rule requires timely objec-

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[7] By authorizing exemption of assets that a debtor would want to keep in kind, such as her jewelry and car, but limiting the exemptible value of this property, Congress struck a balance between debtors' and creditors' interests: Debtors can reclaim items helpful to their fresh start after bankruptcy, but only if those items are of modest value. Assets of larger worth, however, are subject to liquidation so that creditors may obtain a portion of the item's value. Cf. *In re Price*, 370 F. 3d 362, 378 (CA3 2004) ("[B]ankruptcy law is bilateral, replete with protections and policy considerations favoring both debtors and creditors.").

[8] The significance of market value is what differentiates capped exemptions from uncapped ones that permit debtors to exempt certain property in kind regardless of its worth. See *supra*, at 800–801, n. 5. For uncapped exemptions, the nature of the property the debtor has reclaimed is clear: If the exemption is valid, the debtor gets the asset in full every time. For capped exemptions, however, market value is a crucial component in determining whether the debtor gets the item itself or a sum of money representing a share of the item's liquidation value. Reading Bankruptcy Rule 4003(b) to require objections to valuation thus does not, as the Court contends, "*elid[e]* the distinction" between capped and uncapped exemptions, *ante*, at 784 (emphasis added), but instead *accounts for* that distinction.

tions to the debtor's description of the property, the asserted legal basis for the exemption, and the claimed value of the exemption. See 4 Collier ¶ 522.05[1], p. 522–28 (rev. 15th ed. 2005) ("[T]o evaluate the propriety of the debtor's claim of exemption," trustees need the information in all four columns of Schedule C; "[market] value" is "essential" to judging whether the claim is proper because "[e]xemption provisions often are limited according to . . . [the property's] value.").[9]

C

Requiring objections to market valuation notably facilitates the debtor's fresh start, and thus best fulfills the prime purpose of the exemption prescriptions. See, *e. g.*, *Burlingham* v. *Crouse*, 228 U. S. 459, 473 (1913) (Bankruptcy provisions "must be construed" in light of policy "to give the bankrupt a fresh start."). See also *Rousey* v. *Jacoway*, 544 U. S. 320, 325 (2005); *United States* v. *Security Industrial Bank*, 459 U. S. 70, 72, n. 1 (1982); *ante*, at 791. The 30-day deadline for objections, this Court has recognized, "prompt[s] parties to act and . . . produce[s] finality." *Taylor* v. *Free-*

[9] Suggesting that this interpretation of Rule 4003(b) "lacks statutory support," *ante*, at 786, n. 11, the Court repeatedly emphasizes that the Bankruptcy Code defines the "property claimed as exempt," to which a trustee must object, as "the debtor's 'interest'—up to a specified dollar amount—in the assets described in [capped exemption] categor[ies]," *ante*, at 782; see, *e. g.*, *ante*, at 783; *ibid.*, n. 9; *ante*, at 793, n. 19. But the commonly understood definition of a property "interest" is "[a] legal share in something; all or part of a legal or equitable claim to or right in property . . . . Collectively, the word includes any aggregation of [such] rights." Black's Law Dictionary 828 (8th ed. 2004). Schwab, therefore, could not comprehend whether Reilly claimed a monetary or an in-kind "interest" in her kitchen equipment without comparing her market valuation of the equipment to the value of her claimed exemption. See *supra*, at 802 and this page. In line with the statutory text, a debtor's market valuation is an essential factor in determining the nature of the "interest" a debtor lists as exempt. Bankruptcy "forms, rules, treatise excerpts, and policy considerations," *ante*, at 779, n. 5, corroborate, rather than conflict with, this reading of the Code.

land & Kronz, 503 U. S. 638, 644 (1992). As "there can be no possibility of further objection to the exemptions" after this period elapses, the principal bankruptcy treatise observes, "if the debtor is not yet in possession of the property claimed as exempt, it should be turned over to [her] at this time to effectuate fully the fresh start purpose of the exemptions." 9 Collier ¶ 4003.03[3], p. 4003–13.

With the benefit of closure, and the certainty it brings, the debtor may, at the end of the 30 days, plan for her future secure in the knowledge that the possessions she has exempted in their entirety are hers to keep. See 534 F. 3d, at 180. If she has reclaimed her car from the estate, for example, she may accept a job not within walking distance. See Brief for National Association of Consumer Bankruptcy Attorneys et al. as *Amici Curiae* 2–3 (hereinafter NACBA Brief). Or if she has exempted her kitchen equipment, she may launch a new catering venture. See App. 138a (Reilly "wishe[d] to continue in restaurant and catering as her occupation" postbankruptcy.).

By permitting trustees to challenge a debtor's valuation of exempted property anytime before the administrative closing of the bankruptcy estate, the Court casts a cloud of uncertainty over the debtor's use of assets reclaimed in full. If the trustee gains a different opinion of an item's value months, even years, after the debtor has filed her bankruptcy petition,[10] he may seek to repossess the asset, auction it off, and hand the debtor a check for the dollar amount of her claimed exemption.[11] With this threat looming until the ad-

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[10] Schwab states that "[c]ases in which there are assets to administer . . . can take 'one to four years' to complete." Brief for Petitioner 32 (quoting Dept. of Justice, U. S. Trustee Program, Preliminary Report on Chapter 7 Asset Cases 1994 to 2000, p. 7 (June 2001)).

[11] Money generated by liquidation of an asset will often be of less utility to a debtor, who will have to pay more to replace the item. See H. R. Rep. No. 95–595, p. 127 (1977) (noting that "household goods have little resale value" but "replacement costs of the goods are generally high").

ministrative closing of the bankruptcy estate, "[h]ow can debtors reasonably be expected to restructure their affairs"? NACBA Brief 25. See *In re Polis*, 217 F. 3d 899, 903 (CA7 2000) (Posner, C. J.) ("If the assets sought to be exempted by the debtor were not valued at a date early in the bankruptcy proceeding, neither the debtor nor the creditors would know who had the right to them.").

III

The Court and Schwab raise three concerns about reading Rule 4003 to require timely objection to the debtor's estimate of an exempt asset's market value: Would trustees face an untoward administrative burden? Would trustees lack fair notice of the need to object? And would debtors be tempted to undervalue their property in an effort to avoid the monetary cap on exemptions? In my judgment, all three questions should be answered no.

A

The Court suggests that requiring timely objections to a debtor's valuation of exempt property would saddle trustees with an unmanageable load. See *ante*, at 790 (declining to "expand . . . the universe of information an interested party must consider in evaluating the validity of a claimed exemption"). See also Brief for Petitioner 32–33; Brief for United States as *Amicus Curiae* 24.[12] But trustees, sooner or later, must attempt to ascertain the market value of ex-

[12] This concern is questionable in light of the prevailing practice, for, as earlier noted, valuation objections are the most common Rule 4003(b) challenge. See *supra*, at 796. By lopping off valuation disagreements from the timely objection requirement, see, *e. g.*, *ante*, at 783, n. 8, the Court so severely shrinks the Rule's realm that this question arises: Why are trustees granted a full 30 days to lodge objections? Under the Court's reading of the Rule, trustees need only compare a debtor's Schedule C to the text of the exemption prescriptions to assess an exemption claim's facial validity, with no further investigation necessary. That comparison should take no more than minutes, surely not a month.

empted assets. They must do so to determine whether sale of the items would likely produce surplus proceeds for the estate above the value of the claimed exemption, see § 704(a)(1); the only question, then, is *when* this market valuation must occur—(1) within 30 days or (2) at any time before the administrative closing of the bankruptcy estate? Removing valuation from Rule 4003's governance thus does little to reduce the labors trustees must undertake.

The 30-day objection period, I note, does not impose on trustees any *additional* duty, but rather guides the exercise of *existing* responsibilities; under Rule 4003(b), a trustee must rank evaluation of the debtor's exemptions as a priority item in his superintendence of the estate.[13] And if the trustee entertains any doubt about the accuracy of a debtor's estimation of market value, the procedure for interposing objections is hardly arduous. The trustee need only file with the court a simple declaration stating that an item's value exceeds the amount listed by the debtor.[14]

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[13] Trustees, it bears noting, historically had valuation duties far more onerous than they have today. Rule 4003's predecessor required trustees in the first instance, rather than debtors, to estimate the market value of property claimed as exempt. See Rule 403(b) (1975). Trustees had to provide this valuation to the court within 15 days of their appointment. See *ibid.*

[14] The leading bankruptcy treatise supplies an illustrative valuation objection:

"*[Name of Trustee]*, the duly qualified and acting trustee of the estate of the debtor, would show the court the following:

"1. The debtor is not entitled under [the automobile exemption] to an interest of more than $3,225 in an automobile. The automobile claimed by debtor as exempt . . . has a value substantially greater than $3,225.

. . . . . .

"WHEREFORE Trustee prays that the court determine that debtor is not entitled to . . . the exemptio[n] claimed by him, that the [property claimed as exempt] which [is] disallowed be turned over to the trustee herein as property of the estate, and that he have such other and further relief as is just." 13A Collier § CS17.14, p. CS17–22 (rev. 15th ed. 2009). See also Rules 9013–9014.

If the trustee needs more than 30 days to assess market value, moreover, the time period is eminently extendable. Rule 4003(b) prescribes that a trustee may, for cause, ask the court for an extension of the objection period. Alternatively, the trustee can postpone the conclusion of the meeting of creditors, from which the 30-day clock runs, simply by adjourning the meeting to a future date. Rule 2003(e). A trustee also may examine the debtor under oath at the creditors' meeting, Rule 2003(b)(1); if he gathers information impugning her exemption claims, he may ask the bankruptcy court to hold a hearing to determine valuation issues, Rule 4003(c). See *Taylor*, 503 U. S., at 644 ("If [the trustee] did not know the value of [a claimed exemption], he could have sought a hearing on the issue . . . or . . . asked the Bankruptcy Court for an extension of time to object."). See also NACBA Brief 19, 21–23 (listing ways trustees may enlarge the limitations period for objections). Trustees, in sum, have ample mechanisms at their disposal to gain the time and information they need to lodge objections to valuation.

B

On affording trustees fair notice of the need to object, the Court emphasizes that a debtor must list her claimed exemptions "in a manner that makes the scope of the exemption clear." *Ante*, at 792. If a debtor wishes to exempt property in its entirety, for example, the Court counsels her to write "full fair market value (FMV)" or "100% of FMV" in Schedule C's value-of-claimed-exemption column. *Ante*, at 793 (internal quotation marks omitted). See also Tr. of Oral Arg. 6–7, 26–29; *In re Hyman*, 967 F. 2d 1316, 1319–1320, n. 6 (CA9 1992) (Trustees must be able to assess the validity of an exemption from the face of a debtor's schedules.). Our decision in *Taylor* v. *Freeland & Kronz*, the Court notes, is instructive. In *Taylor*, the debtor recorded the term "$ *unknown*" as the value of a claimed exemption, which, the Court observes, raised a "warning fla[g]" because the value

"was *not* plainly within the limits the Code allows." *Ante*, at 788–789.

True, a debtor's schedules must give notice sufficient to cue the trustee that an objection may be in order. But a "warning flag" is in the eye of the beholder: If a debtor lists identical amounts as the market value of exempted property and the value of her claimed exemption, she has, *on the face of her schedules*, reclaimed the entire asset just as surely as if she had recorded "100% of FMV" in Schedule C's value-of-claimed-exemption column. See Brief for Respondent 36. See also 9 Collier ¶ 4003.03[3], p. 4003–14 ("*Only* when a debtor's schedules specifically value the debtor's interest in the property at an amount *higher* than the amount claimed as exempt can it be argued that a part of the debtor's interest in property has not been exempted." (emphasis added)).

In this case, by specifying $10,718 as both the current market value of her kitchen equipment and the value of her claimed exemptions, Reilly gave notice that she had reclaimed the listed property in full. See *supra*, at 796–800. To borrow the Court's terminology, Reilly waved a "warning flag" that should have prompted Schwab to object if he believed the equipment could not be reclaimed in its entirety because its value exceeded the statutory cap. 534 F. 3d, at 179. See 4 Collier ¶ 522.05[2][b], p. 522–33 ("Normally, if a debtor lists an asset as having a particular value in the schedules and then exempts that value, the schedules should be read as a claim of exemption for the entire asset, to which the trustee should object if the trustee believes the asset has been undervalued.").

Training its attention on trustees' needs, moreover, the Court overlooks the debtor's plight. As just noted, the Court counsels debtors wishing to exempt an asset in full to write "100% of FMV" or "full FMV" in the value-of-claimed-exemption column. But a debtor following the instructions that accompany Schedule C would consider such a response nonsensical, for those instructions direct her to "state the

dollar value of the claimed exemption in the space provided." Fed. Rule Bkrtcy. Proc. Official Form 6, Schedule C, Instruction 5 (1991) (emphasis added). Chapter 7 debtors are often unrepresented. How are they to know they must ignore Schedule C's instructions and employ the "warning flag" described today by the Court, if they wish to trigger the trustee's obligation to object to their market valuation in a timely fashion? See *In re Anderson*, 377 B. R. 865, 875 (Bkrtcy. App. Panel CA6 2007).[15]

C

Schwab finally urges that requiring timely objections to a debtor's market-value estimations "would give debtors a perverse incentive to game the system by undervaluing their assets." Brief for Petitioner 35; see Brief for United States as *Amicus Curiae* 27. The Court rejected an argument along these lines in *Taylor*, and should follow suit here. Multiple measures, *Taylor* explained, discourage undervaluation of property claimed as exempt. 503 U. S., at 644. Among those measures: The debtor files her exemption claim under penalty of perjury. See Rule 1008. She risks judicial sanction for signing documents not well grounded in fact. Rule 9011. And proof of fraud subjects her to criminal prosecution, 18 U. S. C. § 152; extends the limitations period for filing objections to Schedule C, Rule 4003(b); and authorizes denial of discharge, 11 U. S. C. § 727(a)(4)(B). See also NACBA Brief 29–33 (detailing additional checks against inadequate or inaccurate filings).

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[15] Trustees, in contrast, are repeat players in bankruptcy court; if this Court required timely objections to market valuation, trustees would, no doubt, modify their practices in response. See 1 Collier ¶ 8.06[1][c][ii], p. 8–75 (rev. 15th ed. 2009) ("Since *Taylor* [v. *Freeland & Kronz*, 503 U. S. 638 (1992)], trustees rarely fail to closely scrutinize vague exemption claims."). Moreover, because valuation objections are already the norm, see *supra*, at 796, and 805, n. 12, few trustees would have to adjust their behavior.

Furthermore, the objection procedure is itself a safeguard against debtor undervaluation. If a trustee suspects that the market value of property claimed as exempt may exceed a debtor's estimate, he should do just what Rule 4003(b) prescribes: "[F]ile an objection . . . within 30 days after the meeting of creditors."

* * *

For the reasons stated, I would affirm the Third Circuit's judgment.

APPENDIX

IN RE Reilly, Nadejda Case No. _____
Debtor(s)

SCHEDULE B - PERSONAL PROPERTY

Except as directed below, list all personal property of the debtor of whatever kind. If the debtor has no property in one or more of the categories, place an "X" in the appropriate position in the column labeled "None". If additional space is needed in any category, attached a separate sheet properly identified with the case name, case number, and the number of the category. If the debtor is married, state whether husband, wife, or both own the property by placing an "H" for Husband, "W" for Wife, "J" for Joint, or "C" for Community in the column labeled "HWJC." If the debtor is an individual or a joint petition is filed, state the amount of any exemptions only in Schedule C - Property Claimed as Exempt.

Do not include interests in executory contracts and unexpired leases on the schedule. List them in Schedule G - Executory Contracts and Unexpired Leased.

If the property is being held for the debtor by someone else, state that person's name and address under "Description and Location of Property".

TYPE OF PROPERTY	NONE	DESCRIPTION AND LOCATION OF PROPERTY	HWJC	CURRENT MARKET VALUE OF DEBTORS INTEREST IN PROPERTY WITHOUT DEDUCTING ANY SECURED CLAIM OR EXEMPTION
1. Cash on hand.	X			
2. Checking, savings or other financial accounts, certificates of deposit, or shares in banks, savings and loan, thrift, building and loan, and homestead associations, or credit unions, brokerage houses, or cooperatives.		Account no. [redacted], business account at PNC Bank, Hazleton, PA. Name on account, [redacted]		21.00
		Personal checking account of debtor with PNC Bank, Hazleton, PA acct. no. [redacted]		5.00
3. Security deposits with public utilities, telephone companies, landlords, and others.	X			
4. Household goods and furnishings, include audio, video, and computer equipment.	X			
5. Books, pictures and other art objects, antiques, stamp, coin, record, tape, compact disc, and other collections or collectibles.		Pictures, camera, other personal property for child.		1,000.00
6. Wearing apparel.		Clothing.		1,000.00
7. Furs and jewelry.		Jewelry		100.00
8. Firearms and sports, photographic, and other hobby equipment.	X			
9. Interest in insurance policies. Name insurance company of each policy and itemize surrender or refund value of each.	X			
10. Annuities. Itemize and name each issue.	X			
11. Interests in IRA, ERISA, Keogh, or other pension or profit sharing plans. Itemize.		Pension fund with International Union Industry.		57.92
12. Stock and interests in incorporated and unincorporated businesses. Itemize.	X			
13. Interests in partnerships or joint ventures. Itemize.	X			
14. Government and corporate bonds and other negotiable and non-negotiable instruments.	X			
15. Accounts receivable.	X			
16. Alimony, maintenance, support, and property settlements in which the debtor is or may be entitled. Give particulars.	X			
17. Other liquidated debts owing debtor including tax refunds. Give particulars.	X			

Appendix to opinion of GINSBURG, J.

IN RE Reilly, Nadejda Case No. _____
Debtor(s)

SCHEDULE B - PERSONAL PROPERTY
(Continuation Sheet)

TYPE OF PROPERTY	N O N E	DESCRIPTION AND LOCATION OF PROPERTY	H W J C	CURRENT MARKET VALUE OF DEBTOR'S INTEREST IN PROPERTY WITHOUT DEDUCTING ANY SECURED CLAIM OR EXEMPTION
18. Equitable or future interest, life estates, and rights or powers exercisable for the benefit of the debtor other than those listed in Schedule of Real Property.	X			
19. Contingent and noncontingent interests in estate of a decedent, death benefit plan, life insurance policy, or trust.	X			
20. Other contingent and unliquidated claims of every nature, including tax refunds, counterclaims of the debtor, and rights to setoff claims. Give estimated value of each.	X			
21. Patents, copyrights, and other intellectual property. Give particulars.	X			
22. Licenses, franchises, and other general intangibles. Give particulars.	X			
23. Automobiles, trucks, trailers, and other vehicles and accessories.		02 Honda CRV, V.I.N. [redacted] title holder, American Honda Finance Corp., 470 Granby Rd., Ste. 2, S. Hadley, MA 01075.		13,367.00
24. Boats, motors, and accessories.	X			
25. Aircraft and accessories.	X			
26. Office equipment, furnishings, and supplies.	X			
27. Machinery, fixtures, equipment, and supplies used in business.		See attached list of business equipment.		10,718.00
28. Inventory.		Food goods on hand at restaurant of the debtor		3,000.00
29. Animals.	X			
30. Crops - growing or harvested. Give particulars.	X			
31. Farming equipment and implements.	X			
32. Farm supplies, chemicals, and feed.	X			
33. Other personal property of any kind not already listed. Itemize.	X			
			TOTAL	29,268.92

0 continuation sheets attached

(Include amounts from any continuation sheets attached. Report total also on Summary of Schedules.)

SCHEDULE B - PERSONAL PROPERTY

Schedule B, attachment in answer to question 27 of the preceeding. Reilly.

TWO WORLDS BY FINE EUROPEAN
CATERING
AT
[redacted]
CONYNGHAM PA 18219
[redacted]

EQUIPMENT: Tax is not included.

	Paid	Today's Market Value
① Coffee Maker ① New Air Pot Brewer	$545.00	$250.00
② Soup Warmers ② New Anvil (Black & Stainless steel)	$270.00	$100.00
③ 3 Bay Sink ① Used	$350.00	$100.00
④ Hand washing sink ① Used.	Free	Free
⑤ Microwave oven ① Used Quasar	$120.00	$25.00
⑥ Sandwich Grill ① New Star Pane Belle Broiler New	$1,897.40	$950.00
⑦ Hot Plate ① New	$378.00	$150.00
⑧ Convection Oven ① New Single deck - US Range	$2,225.00 200.00	$1000.00 100.00

TWO WORLDS' EQUIPMENT

			Paid.	Today's Market Value.
(10)	Refrigerator 32" (1)	new	$1,775.00	$600.00
"	Turbo Air 2 sliding door			
(11)	56" Refrigerator (1) Turbo Air 2 sliding door	new	$1,975.00	$800.00
(12)	coffee table	new	$55.00	$30.00
(12a)	Grill table	new	$150.00	$50.00
(13)	Refrigerated Pastry Case (1) Federal used	Used	$950.00	$400.00 or best offer
(14)	Round Table (3)	used	$100.00	$50.00
(15)	Chairs (9) BISTRO CHAIR BK FRAME	new	$458.00	$150.00
(16)	Barstools (6) BURG BK FRAME	new	$476.92	$160.00
(17)	Holding Shelves (3)	new	$160.00	$80.00
(18)	High Chair (1) Wooden Mahogany	new	~~$36.00 ea.~~ $38.16	$18.00
(20)	Cash Register (1)	new	$148.00	$70.00
(21)	Slicer (1)	Used	$150.00	$75.00
(22)	Holding Rack Trays		$185.00	$100.00
(23)	Dishes, Flatware & others		$300.00	$100.00

FINE EUROPEAN CATERING

AT [redacted] Paid Today's Market Value

EQUIPMENT.

①	3 Bay Sink. ① New	$ 700,00	$ 300.00
②	Hand Washup Sink ① New	$ 36.00	$ 10.00.
③	Dough Roller-Sheeter ① New	$ 2,665.00	$ 800.0
④	Gas stove ① New Us Range ① New.	$ 1,000.00	$ 500.00
⑤	Hood ① New	$ 2,000.00	$ 1,000.00
⑥	Ref- Freezer. ① New	$ 2,200.00	$ 500.00.
⑦	Dough Mixer ① New	$ 2300	$ 1500.00.
⑧	Fire suppresive System	$ 1,500.00.	$ 750.00

Appendix to opinion of GINSBURG, J.

IN RE Reilly, Nadejda Case No. _____
Debtor(s)

SCHEDULE C - PROPERTY CLAIMED AS EXEMPT

Debtor elects the exemptions to which debtor is entitled under:

(Check one box)

☑ 11 U.S.C. § 522(b)(1): Exemptions provided in 11 U.S.C. § 522(d). NOTE: These exemptions are available only in certain states.

☐ 11 U.S.C. § 522(b)(2): Exemptions available under applicable nonbankruptcy federal laws, state or local law where the debtor's domicile has been located for 180 days immediately preceding the filing of the petition, or for a longer portion of the 180-day period than in any other place, and the debtor's interest as a tenant by the entirety or joint tenant to the extent the interest is exempt from process under applicable nonbankruptcy law.

DESCRIPTION OF PROPERTY	SPECIFY LAW PROVIDING EACH EXEMPTION	VALUE OF CLAIMED EXEMPTION	CURRENT MARKET VALUE OF PROPERTY WITHOUT DEDUCTING EXEMPTIONS
SCHEDULE B - PERSONAL PROPERTY			
Account no. [redacted], business account at PNC Bank, Hazleton, PA. Name on account, [redacted]	11 USC § 522(d)(5)	21.00	21.00
Personal checking account of debtor with PNC Bank, Hazleton, PA acct. no. [redacted]	11 USC § 522(d)(5)	5.00	5.00
Pictures, camera, other personal property for child.	11 USC § 522(d)(3)	1,000.00	1,000.00
Clothing.	11 USC § 522(d)(3)	1,000.00	1,000.00
Jewelry	11 USC § 522(d)(4)	100.00	100.00
Pension fund with International Union Industry.	11 USC § 522(d)(10)(E)	57.92	57.92
02 Honda CRV, V.I.N. [redacted] title holder, American Honda Finance Corp., 470 Granby Rd., Ste. 2, S. Hadley, MA 01075.	11 USC § 522(d)(2)	2,950.00	13,367.00
See attached list of business equipment.	11 USC § 522(d)(6) 11 USC § 522(d)(5)	1,850.00 8,868.00	10,718.00
Food goods on hand at restaurant of the debtor	11 USC § 522(d)(5) 11 USC § 522(d)(5)	1,331.00 975.00	3,000.00

Syllabus

DILLON *v.* UNITED STATES

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

No. 09–6338. Argued March 30, 2010—Decided June 17, 2010

In 1993, petitioner Dillon was convicted of, *inter alia*, crack and powder cocaine offenses, which produced a base offense level of 38 and a Guidelines range of 262 to 327 months' imprisonment. The court sentenced him at the bottom of the range for those counts. After the Sentencing Commission amended the Guidelines to reduce the base offense level associated with each quantity of crack cocaine, USSG Supp. App. C, Amdt. 706, and made that amendment retroactive, Amdt. 713, Dillon moved for a sentence reduction under 18 U. S. C. § 3582(c)(2). That provision authorizes a district court to reduce an otherwise final sentence pursuant to a Guidelines amendment if a reduction is consistent with the Commission's policy statements. The relevant policy statement, USSG § 1B1.10, precludes a court from reducing a sentence "to a term that is less than the minimum of the amended guideline range" except in limited circumstances. In addition to the two-level reduction authorized by the amendment, Dillon sought a variance below the amended Guidelines range, contending that *United States* v. *Booker*, 543 U. S. 220, authorized the exercise of such discretion. The District Court imposed a sentence at the bottom of the revised range but declined to grant a further reduction. Finding *Booker* inapplicable to § 3582(c)(2) proceedings, the court concluded that the Commission's directives in § 1B1.10 constrained it to impose a sentence within the amended Guidelines range. The Third Circuit affirmed.

Held: *Booker*'s holdings do not apply to § 3582(c)(2) proceedings and therefore do not require treating § 1B1.10(b) as advisory. Pp. 824–831.

(a) The statute's text and narrow scope belie Dillon's characterization of proceedings under § 3582(c)(2) as "resentencing" proceedings governed by the same principles as other sentencing proceedings. Instead, § 3582(c)(2) authorizes only a limited adjustment to an otherwise final sentence. This conclusion is further supported by the substantial role Congress gave the Commission with respect to sentence-modification proceedings, charging it with determining whether and to what extent a Guidelines amendment will be retroactive, 28 U. S. C. § 994(u), and authorizing a court to grant a reduction under § 3582(c)(2) only "if [it] is consistent with applicable policy statements issued by the Sentencing Commission." Section 3582(c)(2) establishes a two-step inquiry: A court must (1) determine the scope of the reduction, if any, authorized

Syllabus

by § 1B1.10, and then (2) consider whether the authorized reduction is warranted according to the applicable § 3553(a) factors. At step one, the court must follow the Commission's instructions in § 1B1.10 to impose a term of imprisonment within the amended Guidelines range unless the sentencing court originally imposed a below-Guidelines sentence. § 1B1.10(b)(2). Because reference to § 3553(a) is appropriate only at step two, that provision does not transform § 3582(c)(2) proceedings into plenary resentencing proceedings. Pp. 824–828.

(b) Given § 3582(c)(2)'s limited scope and purpose, proceedings under that section do not implicate *Booker*. The section represents a congressional act of lenity intended to give prisoners the benefit of later enacted adjustments to the judgments reflected in the Guidelines. Taking the original sentence as given, any facts found by a judge at a § 3582(c)(2) proceeding do not serve to increase the prescribed range of punishment; instead, they affect only the judge's exercise of discretion within that range. That exercise does not contravene the Sixth Amendment, even if it is informed by judge-found facts. *Apprendi* v. *New Jersey*, 530 U. S. 466, 481. Thus, Dillon's Sixth Amendment rights were not violated by the District Court's adherence to § 1B1.10's instruction to consider a reduction only within the amended Guidelines range. Dillon's argument that *Booker*'s remedial opinion nonetheless requires the Guidelines to be treated as advisory in such proceedings is unpersuasive given that proceedings under § 3582(c)(2) are readily distinguishable from other sentencing proceedings. Pp. 828–830.

(c) Also rejected is Dillon's argument that the District Court should have corrected other mistakes in his original sentence, namely, a *Booker* error resulting from the initial sentencing court's treatment of the Guidelines as mandatory and an alleged error in the calculation of his criminal-history category. Because those aspects of Dillon's sentence were not affected by the crack-cocaine Guidelines amendment, they are outside the scope of the § 3582(c)(2) proceeding, and the District Court properly declined to address them. P. 831.

572 F. 3d 146, affirmed.

SOTOMAYOR, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, THOMAS, GINSBURG, and BREYER, JJ., joined. STEVENS, J., filed a dissenting opinion, *post*, p. 831. ALITO, J., took no part in the decision of the case.

Lisa B. Freeland argued the cause for petitioner. With her on the briefs were *Renee D. Pietropaolo*, *Michael J. Novara*, and *Peter R. Moyers*.

Leondra R. Kruger argued the cause for the United States. With her on the brief were *Solicitor General Kagan*, *Assistant Attorney General Breuer*, *Deputy Solicitor General Dreeben*, and *Deborah Watson*.*

JUSTICE SOTOMAYOR delivered the opinion of the Court.

A federal court generally "may not modify a term of imprisonment once it has been imposed." 18 U. S. C. § 3582(c). Congress has provided an exception to that rule "in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission." § 3582(c)(2). In those circumstances, § 3582(c)(2) authorizes a court to reduce the term of imprisonment "if such a reduction is consistent with" applicable Commission policy statements. The policy statement governing § 3582(c)(2) proceedings instructs courts not to reduce a term of imprisonment below the minimum of an amended sentencing range except to the extent the original term of imprisonment was below the range then applicable. See United States Sentencing Commission, Guidelines Manual § 1B1.10(b)(2) (Nov. 2009) (USSG). This case presents the question whether our decision in *United States* v. *Booker*, 543 U. S. 220 (2005), which rendered the Guidelines advisory to remedy the Sixth Amendment problems associated with a mandatory sentencing regime, requires treating § 1B1.10(b) as nonbinding. We conclude that *Booker* does not demand that result.

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*Briefs of *amici curiae* urging reversal were filed for the Federal Public and Community Defenders et al. by *Amy Baron-Evans*, *Michael C. Holley*, *Jennifer Niles Coffin*, *Paul M. Rashkind*, *Frances H. Pratt*, and *Brett G. Sweitzer;* and for the Washington Legal Foundation by *Daniel J. Popeo*, *Cory L. Andrews*, and *Mark Osler*.

David C. Frederick and *Joseph S. Hall* filed a brief for the United States Sentencing Commission as *amicus curiae* urging affirmance.

I

The Sentencing Reform Act of 1984 (SRA or Act), 98 Stat. 1987, established the Sentencing Commission and authorized it to promulgate Sentencing Guidelines and to issue policy statements regarding the Guidelines' application. See 28 U. S. C. §§ 991, 994(a). The Act also charged the Commission with periodically reviewing and revising the Guidelines. See § 994(*o*). When a revision reduces the Guidelines range for a given offense, the Commission must determine "in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced." § 994(u).

As enacted, the SRA made the Sentencing Guidelines binding. See *Booker*, 543 U. S., at 233–234. Except in limited circumstances, district courts lacked discretion to depart from the Guidelines range. See *Burns* v. *United States*, 501 U. S. 129, 133 (1991). Under that regime, facts found by a judge by a preponderance of the evidence often increased the mandatory Guidelines range and permitted the judge to impose a sentence greater than that supported by the facts established by the jury verdict or guilty plea. See *Booker*, 543 U. S., at 235. We held in *Booker* that treating the Guidelines as mandatory in these circumstances violated the Sixth Amendment right of criminal defendants to be tried by a jury and to have every element of an offense proved by the Government beyond a reasonable doubt. *Id.*, at 243–244.

To remedy the constitutional problem, we rendered the Guidelines advisory by invalidating two provisions of the SRA: 18 U. S. C. § 3553(b)(1) (2000 ed., Supp. IV), which generally required a sentencing court to impose a sentence within the applicable Guidelines range, and § 3742(e) (2000 ed. and Supp. IV), which prescribed the standard of review on appeal, including *de novo* review of Guidelines departures. 543 U. S., at 259. "With these two sections excised (and statutory cross-references to the two sections consequently invalidated)," we held that "the remainder of the Act

satisfies the Court's constitutional requirements." *Ibid.* *Booker* thus left intact other provisions of the SRA, including those giving the Commission authority to revise the Guidelines, 28 U. S. C. § 994(*o*) (2006 ed.), and to determine when and to what extent a revision will be retroactive, § 994(u).

With respect to drug-trafficking offenses, the Sentencing Guidelines establish a defendant's base offense level according to the type and weight of the drug. See USSG §§ 2D1.1(a), (c). When the Commission first promulgated the Guidelines in 1987, it adopted the 100-to-1 ratio selected by Congress in setting mandatory minimum sentences in the Anti-Drug Abuse Act of 1986, 100 Stat. 3207. Under that framework, the Commission "treated every gram of crack cocaine as the equivalent of 100 grams of powder cocaine." *Kimbrough* v. *United States*, 552 U. S. 85, 96 (2007). The Commission later sought to alleviate the disparity produced by this ratio. After several failed attempts at reform, see *id.*, at 99, the Commission in 2007 amended the Guidelines to reduce by two levels the base offense level associated with each quantity of crack cocaine. See USSG Supp. App. C, Amdt. 706 (effective Nov. 1, 2007). In 2008, the Commission made that amendment retroactive. See *id.*, Amdt. 713 (effective Mar. 3, 2008).

When the Commission makes a Guidelines amendment retroactive, 18 U. S. C. § 3582(c)(2) authorizes a district court to reduce an otherwise final sentence that is based on the amended provision. Any reduction must be consistent with applicable policy statements issued by the Sentencing Commission. The relevant policy statement, USSG § 1B1.10, instructs courts proceeding under § 3582(c)(2) to substitute the amended Guidelines range while "leav[ing] all other guideline application decisions unaffected." § 1B1.10(b)(1).[1]

[1] The Sentencing Commission substantially revised § 1B1.10 in March 2008, see USSG Supp. App. C, Amdt. 712 (Nov. 2009) (effective Mar. 3, 2008), roughly three months before the District Court's decision in this case. Because the current version of the relevant Guidelines provisions

Under § 3582(c)(2), a court may then grant a reduction within the amended Guidelines range if it determines that one is warranted "after considering the factors set forth in section 3553(a) to the extent that they are applicable."[2] Except in limited circumstances, however, § 1B1.10(b)(2)(A) forecloses a court acting under § 3582(c)(2) from reducing a sentence "to a term that is less than the minimum of the amended guideline range."

II

A jury convicted petitioner Percy Dillon in 1993 of conspiracy to distribute and to possess with the intent to distribute more than 500 grams of powder cocaine and more than 50 grams of crack cocaine in violation of 21 U. S. C. § 846, possession with the intent to distribute more than 500 grams of powder cocaine in violation of § 841(a)(1), and use of a firearm during and in relation to a drug-trafficking offense in violation of 18 U. S. C. § 924(c)(1). Dillon's convictions exposed him to a statutory sentencing range of 10 years to life for the conspiracy, 5 to 40 years for cocaine possession, and a mandatory minimum sentence of 5 years for the firearm offense, to be served consecutively to the sentence for the drug offenses.

At sentencing, the District Court made additional findings of fact and concluded that Dillon was responsible for 1.5 kilograms of crack and 1.6 kilograms of powder cocaine. Under USSG § 2D1.1, those drug quantities produced a base offense level of 38. After offsetting adjustments for acceptance of

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is not meaningfully different from the version in effect at the time of the District Court's decision, references in this opinion are to the current, 2009 edition of the Guidelines.

[2] Section 3553(a) provides that a "court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection," and it enumerates several factors a court "shall consider" in determining an appropriate sentence, including "the nature and circumstances of the offense and the history and characteristics of the defendant," § 3553(a)(1).

responsibility, § 3E1.1, and reckless endangerment during flight, § 3C1.2, Dillon's total offense level remained 38. Coupled with a criminal-history category of II,[3] that offense level produced a then-mandatory Guidelines range of 262 to 327 months' imprisonment for the drug counts.

The court sentenced Dillon at the bottom of the Guidelines range for those counts, followed by a mandatory 60-month sentence for the firearm count, for a total sentence of 322 months' imprisonment. At Dillon's sentencing, the court described the term of imprisonment as "entirely too high for the crime [Dillon] committed." App. 13. Perceiving no basis for departing from the then-mandatory Sentencing Guidelines, the District Court felt constrained to impose a sentence within the prescribed range. The Court of Appeals for the Third Circuit affirmed Dillon's convictions and sentence on appeal. See 100 F. 3d 949 (1996).

After the Sentencing Commission made the amendment to the crack-cocaine Guidelines retroactive in 2008, Dillon filed a *pro se* motion for a sentence reduction pursuant to § 3582(c)(2). In the motion, Dillon asked the court to grant not just the two-level reduction authorized by the amendment but also a further reduction consistent with the sentencing factors found in § 3553(a). Based largely on his post-sentencing conduct, including his determined pursuit of educational and community-outreach opportunities, Dillon contended that a variance from the amended Guidelines range was warranted in his case. He further urged that, after *Booker*, the court was authorized to grant such a variance because the amended Guidelines range was advisory notwithstanding any contrary statement in § 1B1.10.

The District Court reduced Dillon's sentence to 270 months—the term at the bottom of the revised Guidelines

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[3] The probation office based Dillon's criminal-history assessment on two prior misdemeanor convictions, one for possession of marijuana and one for resisting arrest. Dillon did not object to that calculation of his criminal-history score.

range.[4] But the court declined to go further. Concluding that the sentencing proceedings at issue in *Booker* are readily distinguishable from those under § 3582(c)(2), the court found *Booker*'s holdings inapplicable to the instant proceeding and accordingly held that it lacked authority to impose a sentence inconsistent with § 1B1.10.

The Third Circuit affirmed. 572 F. 3d 146, 150 (2009). The court noted that § 3582(c)(2) is codified in a different section than the provisions invalidated in *Booker* and contains no cross-reference to those provisions. Finding no other indication that *Booker* "obviate[d] the congressional directive in § 3582(c)(2) that a sentence reduction pursuant to that section be consistent with Sentencing Commission policy statements," 572 F. 3d, at 149, the Third Circuit held that § 1B1.10 is binding. It therefore agreed that the District Court lacked authority to reduce Dillon's sentence below the amended Guidelines range.

We granted certiorari to consider *Booker*'s applicability to § 3582(c)(2) proceedings. 558 U. S. 1076 (2009).

III

A

"[A] judgment of conviction that includes [a sentence of imprisonment] constitutes a final judgment" and may not be modified by a district court except in limited circumstances. § 3582(b). Section 3582(c)(2) establishes an exception to the general rule of finality "in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U. S. C. 994(*o*)" and made retroactive pursuant to § 994(u). In such cases, Congress has authorized courts to "reduce the term of imprison-

[4] The revised sentence reflects a 210-month term of imprisonment for the narcotics offenses and a mandatory, consecutive 60-month term for the firearm offense.

ment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." § 3582(c)(2).

Characterizing proceedings under § 3582(c)(2) as "resentencing" proceedings, Dillon contends that "[t]here is no practical or functional difference between a resentencing pursuant to § 3582(c)(2) and any other resentencing." Brief for Petitioner 18. Accordingly, Dillon urges, the same principles that govern other sentencing proceedings likewise govern § 3582(c)(2) proceedings, and courts have authority under § 3582(c)(2) to vary from the revised Guidelines range consistent with § 3553(a), see *Kimbrough*, 552 U. S., at 101. Dillon cites as support for this view § 3582(c)(2)'s instruction to consider the factors in § 3553(a) in determining whether a sentence reduction is warranted. Under Dillon's approach, *Booker* would preclude the Commission from issuing a policy statement that generally forecloses below-Guidelines sentences at § 3582(c)(2) proceedings, as USSG § 1B1.10 purports to do. Dillon thus asks us to excise the mandatory language of § 1B1.10(b)(2)(A) and treat that provision as advisory, just as we did the offending statutory provisions in *Booker*.

The language of § 3582(c)(2) belies Dillon's characterization of proceedings under that section. By its terms, § 3582(c)(2) does not authorize a sentencing or resentencing proceeding. Instead, it provides for the "modif[ication of] a term of imprisonment" by giving courts the power to "reduce" an otherwise final sentence in circumstances specified by the Commission. Compare 28 U. S. C. § 994(a)(2)(C) (referring to § 3582(c)(2) as a "sentence modification provisio[n]") with 18 U. S. C. § 3742(f) (authorizing courts of appeals to remand "for further sentencing" upon a finding of error) and § 3742(g) (establishing the terms of "sentencing upon remand" and describing the proceeding as a "resentenc[ing]" (capitalization omitted)). It is also notable that the provision applies only to a limited class of prisoners—namely,

those whose sentence was based on a sentencing range subsequently lowered by the Commission. Section 3582(c)(2)'s text, together with its narrow scope, shows that Congress intended to authorize only a limited adjustment to an otherwise final sentence and not a plenary resentencing proceeding.

The substantial role Congress gave the Commission with respect to sentence-modification proceedings further supports this conclusion. The SRA charges the Commission both with deciding whether to amend the Guidelines, § 994(*o*), and with determining whether and to what extent an amendment will be retroactive, § 994(u).[5] A court's power under § 3582(c)(2) thus depends in the first instance on the Commission's decision not just to amend the Guidelines but to make the amendment retroactive. The court is also constrained by the Commission's statements dictating "by what amount" the sentence of a prisoner serving a term of imprisonment affected by the amendment "may be reduced." § 994(u); see also *Braxton* v. *United States*, 500 U. S. 344, 348 (1991) (noting that the Commission implemented that power through § 1B1.10).

Read in this context, § 3582(c)(2)'s reference to § 3553(a) does not undermine our narrow view of proceedings under the former provision. Section 3582(c)(2) instructs a district court to "conside[r] the factors set forth in section 3553(a) to the extent that they are applicable," but it authorizes a reduction on that basis only "if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission"—namely, § 1B1.10. The statute thus establishes a two-step inquiry. A court must first determine that a reduction is consistent with § 1B1.10 before it may consider whether the authorized reduction is warranted, either in whole or in part, according to the factors set forth in § 3553(a).

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[5] We do not respond to the dissent's separation-of-powers discussion, see *post*, at 841–846 (opinion of STEVENS, J.), as that issue is not fairly encompassed within the questions presented and was not briefed by the parties.

Following this two-step approach, a district court proceeding under § 3582(c)(2) does not impose a new sentence in the usual sense. At step one, § 3582(c)(2) requires the court to follow the Commission's instructions in § 1B1.10 to determine the prisoner's eligibility for a sentence modification and the extent of the reduction authorized. Specifically, § 1B1.10(b)(1) requires the court to begin by "determin[ing] the amended guideline range that would have been applicable to the defendant" had the relevant amendment been in effect at the time of the initial sentencing. "In making such determination, the court shall substitute only the amendments listed in subsection (c) for the corresponding guideline provisions that were applied when the defendant was sentenced and shall leave all other guideline application decisions unaffected." § 1B1.10(b)(1).

Consistent with the limited nature of § 3582(c)(2) proceedings, § 1B1.10(b)(2) also confines the extent of the reduction authorized. Courts generally may "not reduce the defendant's term of imprisonment under 18 U. S. C. § 3582(c)(2) . . . to a term that is less than the minimum of the amended guideline range" produced by the substitution. § 1B1.10(b)(2)(A). Only if the sentencing court originally imposed a term of imprisonment below the Guidelines range does § 1B1.10 authorize a court proceeding under § 3582(c)(2) to impose a term "comparably" below the amended range. § 1B1.10(b)(2)(B).

At step two of the inquiry, § 3582(c)(2) instructs a court to consider any applicable § 3553(a) factors and determine whether, in its discretion, the reduction authorized by reference to the policies relevant at step one is warranted in whole or in part under the particular circumstances of the case. Because reference to § 3553(a) is appropriate only at the second step of this circumscribed inquiry, it cannot serve to transform the proceedings under § 3582(c)(2) into plenary resentencing proceedings.

This understanding of § 3582(c)(2) as a narrow exception to the rule of finality finds further support outside the statute.

Federal Rule of Criminal Procedure 43 requires that a defendant be present at "sentencing," see Rule 43(a)(3), but it excludes from that requirement proceedings that "involv[e] the correction or reduction of sentence under Rule 35 or 18 U. S. C. § 3582(c)," Rule 43(b)(4). Like § 3582(c)(2), Rule 35 delineates a limited set of circumstances in which a sentence may be corrected or reduced. Specifically, it authorizes a court to "correct a sentence that resulted from arithmetical, technical, or other clear error" within 14 days after sentencing, Rule 35(a), and it authorizes a reduction for substantial assistance on the Government's motion, Rule 35(b). Rule 43 therefore sets the proceedings authorized by § 3582(c)(2) and Rule 35 apart from other sentencing proceedings.

B

Given the limited scope and purpose of § 3582(c)(2), we conclude that proceedings under that section do not implicate the interests identified in *Booker*. Notably, the sentence-modification proceedings authorized by § 3582(c)(2) are not constitutionally compelled. We are aware of no constitutional requirement of retroactivity that entitles defendants sentenced to a term of imprisonment to the benefit of subsequent Guidelines amendments. Rather, § 3582(c)(2) represents a congressional act of lenity intended to give prisoners the benefit of later enacted adjustments to the judgments reflected in the Guidelines.

Viewed that way, proceedings under § 3582(c)(2) do not implicate the Sixth Amendment right to have essential facts found by a jury beyond a reasonable doubt. Taking the original sentence as given, any facts found by a judge at a § 3582(c)(2) proceeding do not serve to increase the prescribed range of punishment; instead, they affect only the judge's exercise of discretion within that range. "[J]udges in this country have long exercised discretion of this nature in imposing sentence *within [established] limits* in the individual case," and the exercise of such discretion does not

contravene the Sixth Amendment even if it is informed by judge-found facts. *Apprendi* v. *New Jersey*, 530 U. S. 466, 481 (2000) (emphasis in original). Because § 3582(c)(2) proceedings give judges no more than this circumscribed discretion, "[t]here is no encroachment here by the judge upon facts historically found by the jury, nor any threat to the jury's domain as a bulwark at trial between the State and the accused." *Oregon* v. *Ice*, 555 U. S. 160, 169 (2009). Accordingly, Dillon's Sixth Amendment rights were not violated by the District Court's adherence to the instruction in § 1B1.10 to consider a reduction only within the amended Guidelines range.

Dillon contends that, even if § 3582(c)(2) does not implicate the constitutional rights vindicated in *Booker*—something the dissent appears to concede—the remedial aspect of the Court's decision applies to proceedings under that section and requires that the Guidelines be treated as advisory in such proceedings just as they are in other sentencing proceedings. In support of his position, Dillon invokes the Ninth Circuit's reasoning in *United States* v. *Hicks*, 472 F. 3d 1167, 1170 (2007).[6] Relying on our rejection in *Booker* of a remedy that would have made the Guidelines advisory only in certain cases—namely, when treating them as binding would run afoul of the Sixth Amendment, see 543 U. S., at 265–267—the Ninth Circuit held that *Booker* precludes treating the Guidelines as mandatory for purposes of § 3582(c)(2) and advisory in other contexts, see *Hicks*, 472 F. 3d, at 1171–1172.

This argument is unpersuasive. The incomplete remedy we rejected in *Booker* would have required courts to treat the Guidelines differently in similar proceedings, leading potentially to unfair results and considerable administrative

[6] The Ninth Circuit subsequently agreed to consider en banc *Booker*'s applicability to § 3582(c)(2) proceedings. See *United States* v. *Fox*, 583 F. 3d 596 (2009). The matter was stayed pending our decision in this case. No. 08–30445 (CA9, Dec. 8, 2009).

challenges. See 543 U. S., at 266. As already explained, the sentence-modification proceedings authorized by § 3582(c)(2) are readily distinguishable from other sentencing proceedings. Given the substantially different purpose of § 3582(c)(2) and the circumscribed nature of proceedings under that section, requiring courts to honor § 1B1.10(b)(2)'s instruction not to depart from the amended Guidelines range at such proceedings will create none of the confusion or unfairness that led us in *Booker* to reject the Government's argument for a partial fix.

The dissent's contrary conclusion rests on two erroneous premises. First, the dissent ignores the fundamental differences between sentencing and sentence-modification proceedings and asserts without explanation that "[n]othing turns on" the distinction between them. *Post*, at 841. For the reasons stated above, the statutory differences between the proceedings are highly significant.

Second, the dissent gives short shrift to the fact that, after *Booker*, the Commission retains at least some authority to bind the courts. Through § 994(u), Congress charged the Commission with determining "in what circumstances and by what amount" the sentences of prisoners affected by Guidelines amendments "may be reduced." No one disputes that the Commission's retroactivity determinations made pursuant to the first part of that authorization are binding. See *post*, at 846–847, and n. 8. This aspect of the Commission's power emphatically undermines the dissent's insistence that the Guidelines after *Booker* are "completely advisory." *Post*, at 839. Moreover, while the dissent criticizes our approach for leaving the Commission with only "the tiniest sliver of lawmaking power," *post*, at 841, the dissent would leave the Commission with an even smaller and less explicable sliver by dissecting the authority granted by § 994(u).

For all of these reasons, we conclude that neither *Booker*'s constitutional nor remedial holding requires the result that Dillon urges.

IV

Dillon additionally contends that the District Court erred in failing to correct two mistakes in his original sentence. Under his view of § 3582(c)(2), a district court is required to recalculate a defendant's sentence. Thus, any mistakes committed at the initial sentencing are imposed anew if they are not corrected. According to Dillon, the District Court in the instant proceeding should have corrected the *Booker* error that resulted from the initial sentencing court's treatment of the Guidelines as mandatory, and it should have adjusted his criminal-history category, which he now contends was erroneously inflated.

Dillon's arguments in this regard are premised on the same misunderstanding of the scope of § 3582(c)(2) proceedings dispelled above. As noted, § 3582(c)(2) does not authorize a resentencing. Instead, it permits a sentence reduction within the narrow bounds established by the Commission. The relevant policy statement instructs that a court proceeding under § 3582(c)(2) "shall substitute" the amended Guidelines range for the initial range "and shall leave all other guideline application decisions unaffected." § 1B1.10(b)(1). Because the aspects of his sentence that Dillon seeks to correct were not affected by the Commission's amendment to § 2D1.1, they are outside the scope of the proceeding authorized by § 3582(c)(2), and the District Court properly declined to address them.

* * *

For the foregoing reasons, the judgment of the Court of Appeals is

Affirmed.

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

JUSTICE STEVENS, dissenting.

When sentencing petitioner Percy Dillon for crack-cocaine-related offenses in 1993, the District Court stated

that the punishment Dillon received was "entirely too high for the crime [he] committed." App. 13. Bound by a sentencing regime that was mandatory at the time, the judge had no choice but to sentence Dillon to 322 months of imprisonment—nearly 27 years behind bars. The judge later explained that, were it within his discretion, he would have sentenced Dillon to five years of imprisonment. *Id.*, at 62. Had Dillon been sentenced after our decision in *United States* v. *Booker*, 543 U. S. 220 (2005), the judge would have had substantially more discretion. Instead, the District Court was compelled to mete out a punishment that it believed to be grossly disproportionate to the offense and, therefore, "greater than necessary" to meet the goals of our criminal justice system, 18 U. S. C. § 3553(a).

The punishment Dillon received was so high, in part, because at the time of his conviction our drug laws punished crack cocaine offenses 100 times more severely than powder cocaine offenses. In 2007, as the Court explains, see *ante*, at 821, the United States Sentencing Commission proposed a partial fix to this disparity, lowering its Guidelines Manual[1] ranges for crack cocaine offenses to as high as a 20:1 ratio. See United States Sentencing Commission, Guidelines Manual Supp. App. C, Amdt. 706 (Nov. 2009) (USSG) (effective Nov. 1, 2007). Pursuant to its congressional mandate, see 28 U. S. C. § 994(u), the Commission made this change retroactive for those individuals, like Dillon, who were still serving sentences for crack cocaine offenses. See USSG Supp. App. C, Amdt. 713 (effective Mar. 3, 2008).

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[1] The Guidelines Manual itself contains two types of provisions: guidelines, see 28 U. S. C. § 994(a)(1), and policy statements, see § 994(a)(2). I use "Guidelines" in this opinion to refer to both the guidelines as described in § 994(a)(1), as well as more generally to all of the provisions in the Guidelines Manual. The section numbers of both types of provisions are enumerated identically within the Commission's Guidelines Manual, but their effects, as discussed in more detail herein, are different.

Although Dillon does not have a constitutional right to obtain the benefit of the Commission's change, it is undisputed that he has a statutory right to do so. Under 18 U. S. C. § 3582(c)(2), a federal prisoner "who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered" by the Commission may seek a sentence reduction, but only after the court "consider[s] the factors set forth in section 3553(a)," and only "if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." Dillon sought such relief. His 322-month sentence was reduced to a 270-month sentence—still 17½ years more than the sentencing judge thought necessary as an initial matter.

In his § 3582(c)(2) proceeding, Dillon alleged that his circumstances warranted an additional reduction in light of the fact that his sentence was "greater than necessary" to effectuate the goals of our sentencing system, § 3553(a). He also emphasized that he has been a model inmate during his 17 years in federal prison. Once again, however, the District Court felt that its hands were tied, this time because USSG § 1B1.10(b)(2) purports to place a mandatory limit on the extent of any sentence reduction that a court may order pursuant to § 3582(c)(2). And so, giving the Commission's statement the effect of law, the District Court denied Dillon further relief.

Today, the Court holds that in this one limited nook of sentencing law, the Commission retains the power to bind judges that we struck down in *Booker*. In my view, the Court's decision to treat the Commission's policy statement as a mandatory command rather than an advisory recommendation is unfaithful to *Booker*. It is also on dubious constitutional footing, as it permits the Commission to exercise a barely constrained form of lawmaking authority. And it is manifestly unjust. I would therefore hold that in the context of a § 3582(c)(2) sentence modification proceeding, the

District Court may consider, but is not bound by, any applicable policy statements promulgated by the Commission. In other words, I would apply *Booker*'s remedial holding to § 3582(c)(2) proceedings.

I

Although I did not join JUSTICE BREYER's remedial opinion for the Court in *Booker*, it is nevertheless clear to me that its scope applies to § 3582(c)(2) proceedings.

As an initial matter, it is of no moment that the *Booker* Court did not excise any portion of § 3582 when crafting its remedy. At the time, there was nothing in § 3582(c)(2)—separate and apart from the Guidelines' general mandatory nature—that would have limited the District Court's discretion in a § 3582(c)(2) proceeding. There was, consequently, nothing that needed excising. Relief under § 3582(c)(2) is available if it is "consistent with" the Commission's related policy statement. And when we decided *Booker*, the particular policy statement at issue, § 1B1.10(b), had no explicit binding effect.[2]

Prior to our decision in *Booker*, the Guidelines were mandatory only by virtue of congressional mandate, and not by

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[2] From 1989 to 1994, the policy statement in § 1B1.10 also contained what could be described fairly as a limitation on the "amount" of an available sentence reduction. See USSG § 1B1.10(c)(2) (Nov. 1990) ("[A] reduction in a defendant's term of imprisonment . . . may, in no event, exceed the number of months by which the maximum of the guideline range applicable to the defendant . . . has been lowered"). In 1994, as part of Amendment 504 to the Guidelines Manual, the Commission deleted this provision, explaining that this "rather complex subsection" was an "unnecessary restriction on the court's consideration of a revised sentence." USSG App. C, Amdt. 504 (effective Nov. 1, 1994). Later, in an "Application Note," the Commission indicated that "the amended guideline range" "limit[s] the extent to which an eligible defendant's sentence may be reduced." *Id.*, Amdt. 548 (effective Nov. 1, 1997). The bottom line is that it was the Guidelines' mandatory nature, and not the effect of a policy statement, that made the Guidelines ranges binding in an 18 U. S. C. § 3582(c)(2) proceeding.

virtue of Commission decree. See 18 U. S. C. § 3553(b)(1). Following *Booker*, the Commission's policy statement in § 1B1.10 took effect in March 2008. That statement, I will explain more fully in Part II, *infra*, is now the only source of binding authority in § 3582(c)(2) proceedings, as it purports to have the effect of reinstating a mandatory Guidelines regime within the context of a sentence modification proceeding. It is now the Commission's *policy statement*, and not an explicit congressional mandate, that makes the Guidelines ranges binding under § 3582(c)(2).

As a matter of textual analysis, divorced from judicial precedent, it is certainly reasonable for the Court to find that the Commission can set mandatory limits on sentence reductions under § 3582(c)(2). But it is a mistake, in my view, to take such a narrow approach to the question presented by this case. The Court has turned a blind eye to the fundamental sea change that was our decision in *Booker*.

It is useful to put *Booker* in context. During the deliberations that led to the enactment of the Sentencing Reform Act of 1984, 18 U. S. C. § 3551 *et seq.*, 28 U. S. C. § 991 *et seq.*, Congress considered—and rejected—a proposal that would have made the Guidelines only advisory. See *Mistretta* v. *United States*, 488 U. S. 361, 367 (1989). Ultimately, the decision to authorize the Commission to issue rules that "have the force and effect of laws" generated a serious debate over the constitutionality of the Commission itself. See *id.*, at 413 (SCALIA, J., dissenting).

While we resolved that constitutional debate in the Commission's favor in *Mistretta*, it became apparent during the next two decades that the mandatory character of the Guidelines, coupled with the practice of judicial factfinding, not only produced a host of excessively severe sentences but also created an unacceptable risk of depriving defendants of long-settled constitutional protections. See, *e. g.*, *Apprendi* v. *New Jersey*, 530 U. S. 466, 490 (2000) (holding 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"); *Ring* v. *Arizona*, 536 U. S. 584, 602 (2002) (holding that "[i]f a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt"); *Blakely* v. *Washington*, 542 U. S. 296, 304 (2004) (holding that "[w]hen a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' and the judge exceeds his proper authority" (citation omitted)).

Over a series of cases, we arrived at our present understanding of determinate sentencing schemes: They are constitutionally infirm if they mandate enhanced punishments based on facts found only by a judge by a preponderance of the evidence. By restoring the principles outlined in landmark cases such as *In re Winship*, 397 U. S. 358 (1970), *Apprendi* and its progeny fundamentally changed the landscape of modern sentencing law,[3] and in so doing paved the way for *Booker*.

The *Booker* Court considered whether the Sentencing Reform Act's mandatory determinate sentencing scheme infringed the jury-trial right. In the first of two opinions, we held that the two applications of the Guidelines before us violated the Sixth Amendment because the sentencing judge in each case imposed a more severe sentence than the facts found by the jury warranted. 543 U. S., at 235. We recognized that if the Guidelines "could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amend-

[3] See *United States* v. *O'Brien*, *ante*, at 235–236, and n. 1 (STEVENS, J., concurring) (discussing a significant sentencing policy trend in 1970's and 1980's, involving a shift to mandatory, determinate sentencing schemes based on judicial factfinding by a preponderance standard).

ment." *Id.*, at 233. But we rejected such an advisory reading of the Guidelines, as they then stood. *Id.*, at 234. To satisfy constitutional guarantees, we explained that any fact that has the effect of increasing the mandatory range must be "established by a plea of guilty or . . . must be admitted by the defendant or proved to a jury beyond a reasonable doubt." *Id.*, at 244. Otherwise, the sentence would violate the Sixth (and the Fifth) Amendment.

In light of the potential for mandatory Guidelines sentences to violate the Constitution, the Court had to elect among possible remedies. As I explained in my dissent from the Court's second *Booker* opinion (the remedial one), there was no need to find *any* constitutional infirmity in *any* provision of the Sentencing Reform Act to provide relief for the defendants in *Booker*, or to apply the Guidelines in a mandatory fashion in future cases—so long as juries were allowed to decide the factual issues raised by requests for enhanced sentences. See *id.*, at 272–303 (opinion dissenting in part). Notwithstanding the fact that the Court *could* have retained the Guidelines' mandatory prescriptive effect in a manner consonant with the jury-trial right, the Court nevertheless adopted a broad remedy that recast the Guidelines in their entirety.

That change did not respond to a determination that the mandatory Guidelines regime itself violated the Sixth Amendment. Neither my opinion for the Court with respect to our constitutional holding, nor JUSTICE BREYER's remedial opinion, contained any such determination. Instead, the Court's decision to make the Guidelines discretionary rested entirely on the majority's judgment that Congress would have preferred that result to either an increase in the jury's role in making factual findings or a decision invalidating the entire regime. *Id.*, at 249. When Congress was wrestling with the Sentencing Reform Act of 1984, it did not foresee *Apprendi*, *Ring*, and *Blakely*. The Court made a policy-based prediction that, were Congress to have had such

foresight, it would not have elected—in any respect—a mandatory sentencing regime.

The Court openly acknowledged this methodology:

> "In essence, in what follows, we explain both (1) why Congress would likely have preferred the total invalidation of the Act to an Act with the Court's Sixth Amendment requirement engrafted onto it, and (2) why Congress would likely have preferred the excision of some of the Act, namely the Act's mandatory language, to the invalidation of the entire Act. That is to say, in light of today's holding, we compare maintaining the Act as written with jury factfinding added (the dissenters' proposed remedy) to the total invalidation of the statute, and conclude that Congress would have preferred the latter. We then compare our own remedy to the total invalidation of the statute, and conclude that Congress would have preferred our remedy." 543 U. S., at 249.

Thus, rather than "maintaining the Act as written with jury factfinding added," *ibid.*, the Court opted to alter the Commission's power in a more fundamental way: It did away with a fixed, determinate sentencing regime based on mandatory Guidelines. Henceforth the Commission would guide and advise federal courts in the exercise of their sentencing authority. But the Commission would not bind.

The Court held as follows:

> "We answer the question of remedy by finding the provision of the federal sentencing statute that makes the Guidelines mandatory, 18 U. S. C. § 3553(b)(1) (Supp. IV), incompatible with today's constitutional holding. We conclude that this provision must be severed and excised, as must one other statutory section, § 3742(e) (2000 ed. and Supp. IV), which depends upon the Guidelines' mandatory nature. So modified, the federal sentencing statute, see Sentencing Reform Act of 1984 (Sentencing Act), as amended, 18 U. S. C. § 3551 *et seq.*,

> 28 U. S. C. § 991 *et seq.*, makes the Guidelines effectively advisory. It requires a sentencing court to consider Guidelines ranges, see 18 U. S. C. § 3553(a)(4) (Supp. IV), but it permits the court to tailor the sentence in light of other statutory concerns as well, see § 3553(a)." *Id.*, at 245–246.

The only fair way to read the *Booker* majority's remedy is that it eliminated the mandatory features of the Guidelines—all of them.[4] It is true that the Court explicitly severed only two specific statutory sections. But there was not, at the time, even a whisper of a suggestion that any other mandatory provision existed or that any should be preserved.[5]

Were it not clear from the foregoing discussion of *Booker* itself, our post-*Booker* decisions have repeatedly emphasized the completely advisory nature of the Guidelines. See, *e. g.*, *Cunningham* v. *California*, 549 U. S. 270, 286–287 (2007) ("Under the system described in JUSTICE BREYER's opinion

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[4] See also, *e. g.*, *Booker*, 543 U. S., at 246 (opinion for the Court by BREYER, J.) ("The other approach, which we now adopt, would (through severance and excision of two provisions) *make the Guidelines system advisory* while maintaining a strong connection between the sentence imposed and the offender's real conduct—a connection important to the increased uniformity of sentencing that Congress intended its Guidelines system to achieve" (emphasis added)); *id.*, at 254 ("Congress would have preferred *no* mandatory system to the system the dissenters envisage"); *id.*, at 264 ("Finally, the Act without its 'mandatory' provision and related language remains consistent with Congress' initial and basic sentencing intent. . . . The system remaining after excision, *while lacking the mandatory features that Congress enacted*, retains other features that help to further these objectives" (emphasis added)); *ibid.* ("The district courts, *while not bound to apply the Guidelines*, must consult those Guidelines and take them into account when sentencing" (emphasis added)).

[5] It seems, however, that at least one additional provision of the Sentencing Reform Act should have been excised, but was not, in order to accomplish the Court's remedy. Section 3742(g)(2) prescribes that the Guidelines are to have binding effect upon a remand for a new sentence in a direct appeal: "The court shall not impose a sentence outside the applicable guidelines range . . . ."

for the Court in *Booker*, judges would no longer be tied to the sentencing range indicated in the Guidelines. But they would be obliged to 'take account of' that range along with the sentencing goals Congress enumerated in the [Sentencing Reform Act of 1984] at 18 U. S. C. § 3553(a)"); *Rita* v. *United States*, 551 U. S. 338, 351 (2007) ("[T]he sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply"); *Gall* v. *United States*, 552 U. S. 38, 46 (2007) ("As a result of our decision [in *Booker*], the Guidelines are now advisory, and appellate review of sentencing decisions is limited to determining whether they are 'reasonable' "); *Kimbrough* v. *United States*, 552 U. S. 85, 101 (2007) ("In sum, while the statute still requires a court to give respectful consideration to the Guidelines, *Booker* permits the court to tailor the sentence in light of other statutory concerns as well" (internal quotation marks and citation omitted)); *Spears* v. *United States*, 555 U. S. 261, 265–266 (2009) *(per curiam)* ("[W]e now clarify that district courts are entitled to reject and vary categorically from the crack cocaine Guidelines based on a policy disagreement with those Guidelines").[6] Our case law is quite

[6] See also *Spears*, 555 U. S., at 267 ("[D]istrict courts are entitled to vary from the crack cocaine Guidelines in a mine-run case where there are no 'particular circumstances' that would otherwise justify a variance from the Guidelines' sentencing range"); *Kimbrough*, 552 U. S., at 101 ("The Government acknowledges that the Guidelines 'are now advisory' and that, as a general matter, 'courts may vary [from Guidelines ranges] based solely on policy considerations, including disagreements with the Guidelines' "); *id.*, at 113–114 (SCALIA, J., concurring) ("[T]he district court is free to make its own reasonable application of the § 3553(a) factors, and to reject (after due consideration) the advice of the Guidelines. If there is any thumb on the scales; if the Guidelines *must* be followed even where the district court's application of the § 3553(a) factors is entirely reasonable; then the 'advisory' Guidelines would, over a large expanse of their application, *entitle* the defendant to a lesser sentence *but for* the presence of certain additional facts found by judge rather than jury. This, as we said in *Booker*, would violate the Sixth Amendment"); *Gall*, 552 U. S., at 50 (sentencing court "may not presume that the Guidelines range is reasonable").

clear: The Guidelines no longer have mandatory and binding effect, and the sentencing court may not presume them correct or reasonable when it considers an individual sentencing decision.

In light of this history, the limited nature of the § 3582(c)(2) proceeding is beside the point. Nothing turns on whether the proceeding is best understood as a resentencing or as a sentence modification procedure. Nor is it relevant that Dillon has no right to be present at a proceeding under § 3582(c)(2), *ante*, at 828, or that a sentence reduction proceeding may not be "constitutionally compelled," *ibid.* The Court's general reliance on *Booker* in this case, see *ante*, at 830, is odd because the *Booker* Court explained its belief "that Congress would not have authorized a mandatory system in some cases and a nonmandatory system in others," 543 U. S., at 266. Yet, this is precisely the system the Court approves today.

Approaching this case as the *Booker* Court did, one must ask whether it is likely that a fully informed Congress would have created this kind of Commission: one endowed with vast responsibilities for drafting *advisory* Guidelines and policy statements, but also with the tiniest sliver of lawmaking power to tie the hands of a district court's exercise of grace under § 3582(c)(2). I think the answer is obvious.

II

My understanding of the scope of the *Booker* remedy is reinforced by an additional consideration: The Commission's policy statement, to which the Court today allows binding effect, may exceed the scope of the Commission's powers. No one disputes that Congress could have rejected the Court's remedial holding in *Booker* if it so wished. Instead, it is the Commission that has rejected *Booker*'s application to § 3582(c)(2), by purporting to give mandatory force to its own policy statement. That action presses the bounds of the authority Congress validly gave the Commission in 1984, for it is not clear that Congress has authorized the Commis-

sion to create this type of policy statement or to circumvent a decision such as *Booker* on its own accord.

We have been quite permissive of congressional delegations in our separation-of-powers jurisprudence. "So long as Congress 'shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power.'" *Mistretta*, 488 U. S., at 372 (quoting *J. W. Hampton, Jr., & Co.* v. *United States*, 276 U. S. 394, 409 (1928)). Few legislative actions have been found to offend this principle. 488 U. S., at 373.

More than 20 years ago, the Court upheld the constitutionality of the Commission's work from just such an attack in *Mistretta*. We took sanctuary then in the fact that, in enacting the Sentencing Reform Act and creating the Commission, Congress had "se[t] forth more than merely an 'intelligible principle' or minimal standar[d]" for the exercise of the Commission's discretion, and had "'explain[ed] what the Commission should do and how it should do it, and se[t] out specific directives to govern particular situations.'" *Id.*, at 379. To this end, Congress gave the Commission clear "goals," *id.*, at 374; specified the "'purposes of sentencing,'" *ibid.;* "prescribed the specific tool"—"the guidelines system"—the Commission was to use in its work, *ibid.;* set limits on the appropriate Guidelines ranges the Commission was to promulgate, *id.*, at 375; and set forth "seven factors" and "11 factors," respectively, to assist the Commission with "its formulation of offense categories" and its establishment of "categories of defendants" for sentencing purposes, *id.*, at 375–376.

We explained that "although Congress granted the Commission substantial discretion in formulating guidelines, in actuality it legislated a full hierarchy of punishment—from near maximum imprisonment, to substantial imprisonment, to some imprisonment, to alternatives—and stipulated the

most important offense and offender characteristics to place defendants within these categories." *Id.*, at 377. There was, accordingly, no "concern of encroachment and aggrandizement that has animated our separation-of-powers jurisprudence and aroused our vigilance against the 'hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power.'" *Id.*, at 382 (quoting *INS* v. *Chadha*, 462 U. S. 919, 951 (1983)).

JUSTICE SCALIA disagreed. He argued forcefully that Congress' creation of the Commission was itself "a pure delegation of legislative power" and therefore an abuse of separation of powers. 488 U. S., at 420 (dissenting opinion). "Congress' commitment of such broad policy responsibility to any institution," in JUSTICE SCALIA's view, violated a core principle of our governing system: that "basic policy decisions governing society are to be made by the Legislature." *Id.*, at 415.

Although we acknowledged in *Mistretta* that Congress had permissibly granted substantial powers to the Commission to set law and policy on sentencing generally, we had no occasion to consider whether it had spoken with sufficient clarity respecting the Commission's authority to prescribe sentence reductions. That question has now reared its head, and in my view it raises separation-of-powers concerns significantly more difficult than those presented in *Mistretta*.

First, I am doubtful that Congress authorized the type of "policy statement" we find in USSG §1B1.10. Congress instructed the Commission to promulgate "general policy statements regarding application of the guidelines or any other aspect of sentencing or sentence implementation that in the view of the Commission would further the purposes set forth in section 3553(a)(2) of title 18 . . . including the appropriate use of," *inter alia*, various "sentence modification provisions." 28 U. S. C. §994(a)(2). As envisioned by the Sentencing Reform Act, the role of policy statements was merely to inform the judge's exercise of discretion within

an otherwise mandatory Guidelines regime. See S. Rep. No. 98–225, p. 167 (1983) (explaining that the "sentencing judge is required to take the policy statements into account in deciding what sentence to impose," but that departure from a policy statement is not itself grounds for appeal); see also *id.*, at 166 (identifying potential use of policy statement to "offe[r] recommendations as to how" to "trea[t]" "in the future" "existing disparities which are not adequately cured by the guidelines"). Congress reserved binding effect for the Commission's "guidelines," which the Commission was to promulgate pursuant to a distinct statutory provision, § 994(a)(1). The Sentencing Reform Act thus drew a basic distinction: Guidelines would bind; policy statements would advise.

Given that distinction, it is significant that Congress elected to use the Commission's policy-statement power to set limitations on the sentencing modification procedures, rather than invoking the Commission's Guidelines power. The Commission is now trying to use a policy statement to have the mandatory effect of a guideline—inverting the Sentencing Reform Act's original design. I find no provision within § 994(a)(2) that would authorize the Commission, via a policy statement, to create a binding Guidelines regime. With respect to the type of action the Commission has taken, there is certainly no provision that even approximates the detailed prescriptions on the Commission's power we considered in *Mistretta*.

Moreover, not only does nothing in § 994(a)(2) appear to authorize this type of policy statement, but there is also nothing that appears to authorize the Commission, by its own fiat, to limit the effect of our decision in *Booker*.

How to respond to *Booker*, and whether to retain mandatory Guidelines, was a decision for Congress—and Congress alone. *Booker* expressly left "[t]he ball" "in Congress' court," explaining that "[t]he National Legislature is equipped to devise and install, long term, the sentencing sys-

tem, compatible with the Constitution, that Congress judges best for the federal system of justice." 543 U. S., at 265; see also *supra*, at 834–835. That Congress has declined to disturb *Booker* in the five years since its issuance demonstrates not only that JUSTICE BREYER is more clairvoyant than I am, but also that Congress has acquiesced to a discretionary Guidelines regime. Congress' silence has deprived the Commission of any "intelligible principle[s]," *J. W. Hampton*, 276 U. S., at 409, by which to steer its consideration of the appropriate response to *Booker*. And without such guidance, I fear that, in promulgating USSG § 1B1.10, the Commission may have made the type of "basic policy decisio[n]" that JUSTICE SCALIA reminded us is the province of the Legislature, *Mistretta*, 488 U. S., at 415 (dissenting opinion).

Prior to the Commission's 2008 overhaul of its policy statement in § 1B1.10—and even under the applicable policy statement in effect when the Court decided *Booker*—nothing in the Guidelines, see *supra*, at 834–835, and n. 2, as understood in light of *Booker*, would have precluded Dillon from obtaining the type of discretionary sentence reduction he now seeks (assuming he was so eligible). Standing in Dillon's way presently are two provisions of § 1B1.10, revised contemporaneously with the Commission's decision to make its amendments to the crack cocaine offense Guidelines retroactive.

There can be no question that the purpose of the Commission's amendments to its policy statement in § 1B1.10 was to circumvent the *Booker* remedy. See Brief for Federal Public and Community Defenders et al. as *Amici Curiae* 3–9 (describing history of promulgation of current version of § 1B1.10). To this end, the Commission disclaimed that proceedings under § 3582(c)(2) "constitute a full resentencing of the defendant." USSG § 1B1.10(a)(3). And it advised that "the court shall not reduce the defendant's term of imprisonment under 18 U. S. C. § 3582(c)(2) and this policy statement to a term that is less than the minimum of the amended guideline range determined" under the new range.

§ 1B1.10(b)(2)(A). In other words, the Commission told federal courts that its Guidelines, at least in § 3582(c)(2) proceedings, remain mandatory and binding.

Had the Commission taken it upon itself, by issuance of a general policy statement, to make its Guidelines mandatory but subject to jury findings in all cases, we would either strike down such an act on separation-of-powers grounds or apply the same remedy we did in *Booker* to render the statement advisory. It makes little difference, in my view, that the Commission has only rejected the *Booker* remedy in this single procedure. The encroachment is the same, if only more subtle. Any legislative response to *Booker* was a decision for Congress to make—not the Commission.

III

Separate from the arguments noted above, the Court's decision today may reflect a concern that a contrary holding would discourage the Commission from issuing retroactive amendments to the Guidelines, owing to a fear of burdening the district courts. In what might be described as a subtle threat, the Commission has highlighted this point in its *amicus* brief supporting the Government. The brief explains that holding for Dillon would introduce uncertainty into the Commission's "assessments about the effects of retroactivity decisions," making these decisions "very difficult" and "weigh[ing] against making Guideline amendments retroactive in the future." Brief for United States Sentencing Commission as *Amicus Curiae* 21.[7]

Even if that explanation were accurate, it should not influence our assessment of the legal question before us. The Commission has a statutory obligation to review and amend

[7] The Government's argument along these lines is less subtle: "To forbid the Sentencing Commission from limiting the scope of Section 3582(c)(2) sentence reduction proceedings to the scope of the amendments themselves would inevitably discourage the Sentencing Commission from ever authorizing sentence reductions." Brief for United States 37.

Guidelines ranges. 28 U. S. C. § 994(*o*). And Congress has commanded that the Commission "shall specify in what circumstances" an amendment is retroactive, indicating that most, if not all, substantial amendments are to receive some type of retroactive effect. § 994(u); see also S. Rep. No. 98–225, at 180 ("It should be noted that the Committee does not expect that the Commission will recommend adjusting existing sentences under [§ 3582(c)(2)] when guidelines are simply refined in a way that might cause isolated instances of existing sentences falling above the old guidelines or when there is only a minor downward adjustment in the guidelines"). In other words, while Congress has left the retroactivity decision to the Commission's discretion, it has done so with the presumption that some form of retroactive relief is appropriate when a Guidelines amendment is nontrivial.[8] I cannot accept that the Commission would ignore its obligations, and would withhold retroactive application of a Guidelines reduction, simply because a judge would

[8] As the Court notes, I do agree that § 994(u) authorizes the Commission to determine the retroactive effect of sentence reductions. *Ante*, at 830. I understand § 994(u) as directing the Commission to prescribe the retroactive effect, if any, of its Guidelines amendments. The power to make retroactivity determinations is meaningfully different, however, from the other power the Court claims for the Commission. In granting the former power, Congress has instructed the Commission to perform a gatekeeping function by determining which individuals are eligible for relief pursuant to § 3582(c)(2). By contrast, the other power the Court claims for the Commission today is the type of mandatory sentencing authority at issue in *Booker*. Contrary to the Court's conclusion, the Commission after *Booker* does not have the power to bind the district court in setting a particular sentence.

I also cannot accept the Court's broad understanding of the power the Commission derives from § 994(u), see *ante*, at 826, because it suffers from the same delegation concerns I discussed above, see *supra*, at 841–846. I do not think the Commission's authority encompasses the ability to promulgate binding Guidelines via policy statements. And this matter is separate from its power to promulgate Guidelines—a power unaffected by our decision in *Booker*.

have discretion to enter a below-Guidelines sentence in a § 3582(c)(2) proceeding.

Undoubtedly, discretionary application of the Guidelines in § 3582(c)(2) proceedings would impose a greater burden on the district courts. Such a process would require case-specific evaluations rather than the rote, two-level reductions the Commission envisioned when it made Amendment 706 retroactive. But it is important to remember that § 3582(c)(2) already requires the district court to consider the § 3553(a) factors when it determines whether to grant a reduction, as well as the extent of the reduction. And any additional consideration of evidence proffered to justify a downward departure need not create a great deal of work. Indeed, it need not create any particular adversarial process at all: The Commission could simply advise the district courts to review paper submissions, including the original presentence report and objections, as well as any new submissions. By now, courts are intimately familiar with our post-*Booker* sentencing regime and the discretionary application of the § 3553(a) factors.

The facts of Dillon's case show why any additional burden on the courts caused by applying *Booker*'s remedial holding likely pales in comparison to the benefit of achieving more tailored, proportionate sentences for those individuals currently serving terms of imprisonment that exceed what is "necessary" to meet the goals of our sentencing system, § 3553(a). Dillon was 23 years old when he was sentenced to nearly 27 years' imprisonment for his drug crimes. His attorney urged the District Court to enter a below-Guidelines sentence because of, *inter alia*, the gross disparity between sentences for crack and powder cocaine offenses. App. 8–9. It would take another 14 years for this Court to agree, finally, in *Kimbrough*, 552 U. S. 85, that sentencing courts could consider this unjust disparity.

But the District Court, constrained by the then-mandatory Guidelines, increased Dillon's sentence based on judge-found

facts by more than 10 years over the sentence authorized by the jury's verdict. See Brief for Petitioner 2, and n. 2. The court could only lament: "I personally don't believe that you should be serving 322 months. But I feel I am bound by those Guidelines and I don't feel there is any grounds for . . . depart[ing] from those Guidelines." App. 12–13. The court acknowledged: "I don't say to you that these penalties are fair. I don't think they are fair." *Id.*, at 13. The court also implored Dillon to make something of the hand he had dealt himself: "I hope that while you are in prison . . . that you will take some time to consider the direction that your life will take when you do return to society. . . . It is only through people like you if you spread the word that other young men of your age will hesitate to get involved in [dealing drugs]." *Ibid.*

Dillon has done just that. He has participated in outreach efforts in the communities in which he has been imprisoned, doing extensive work with adolescents to steer them away from a life of drugs and crime. Brief for Petitioner 5–6. Working with two universities, he has facilitated the initiation of an African-American Studies program at Hunters Point Family, a bay area organization devoted to assisting at-risk youth. He has also played a large role in initiating a similar program at his prison facility. Berkeley's Prison Outreach Coordinator stated to the District Court that "without [Dillon's] insight and advice, our project would not have succeeded and grown the way it has." *Id.*, at 6 (internal quotation marks omitted). Dillon has also prepared himself for a successful life once he returns to society. He has obtained his general equivalency diploma (GED), taken vocational classes in property management, and has job prospects awaiting him upon release. *Id.*, at 6–7.

The Government concedes that Dillon has undertaken "significant institutional rehabilitation and education." Brief for United States 11. The Court of Appeals acknowledged that "[i]f *Booker* did apply in proceedings pursuant to

§3582, Dillon would likely be an ideal candidate for a non-Guidelines sentence." 572 F. 3d 146, 147 (CA3 2009). And yet, now, the Government will continue to spend more than $25,000 a year to keep Dillon behind bars until his release date.[9]

Given the circumstances of his case, I can scarcely think of a greater waste of this Nation's precious resources. Cf. *Barber* v. *Thomas*, *ante*, at 494 (KENNEDY, J., dissenting) ("And if the only way to call attention to the human implications of this case is to speak in terms of economics, then it should be noted that the Court's interpretation comes at a cost to the taxpayers of untold millions of dollars"). Dillon's continued imprisonment is a truly sad example of what I have come to view as an exceptionally, and often mindlessly, harsh federal punishment scheme.

IV

Neither the interests of justice nor common sense lends any support to the decision to preserve the single sliver of the Commission's lawmaking power that the Court resurrects today. I had thought *Booker* dismantled the mandatory Guidelines regime. The Court ought to finish the job.

I respectfully dissent.

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[9] See Hanlon, Hecker, & Gopstein, Expanding the Zones: A Modest Proposal To Increase the Use of Alternatives to Incarceration in Federal Sentencing, 24 ABA Criminal Justice, No. 4, pp. 26, 28 (Winter 2010) ("In fiscal year 2008, it cost $25,894.50 to incarcerate an offender in a federal Bureau of Prisons facility for 12 months").

Reporter's Note

The next page is purposely numbered 901. The numbers between 850 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 MAY 17 THROUGH
JUNE 17, 2010

MAY 17, 2010

Certiorari Granted—Vacated and Remanded

No. 09–650. DA SILVA NEVES *v.* HOLDER, ATTORNEY GENERAL. C. A. 1st Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Kucana* v. *Holder*, 558 U. S. 233 (2010). Reported below: 568 F. 3d 41.

Certiorari Dismissed

No. 09–9637. WASHINGTON *v.* SCHWARZENEGGER ET AL. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 09–9642. LASKEY *v.* PLATT ELECTRIC SUPPLY. Ct. App. Cal., 1st App. Dist. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 09–9773. BLOOM *v.* SELZER-LIPPERT ET AL. Ct. App. Kan. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 42 Kan. App. 2d xi, 214 P. 3d 1226.

No. 09–10037. SILER *v.* UNITED STATES. C. A. Fed. Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) *(per curiam)*. JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein. Reported below: 363 Fed. Appx. 750.

Miscellaneous Orders

No. D–2467. IN RE DISBARMENT OF SIBLEY. Disbarment entered. [For earlier order herein, see 559 U. S. 1002.]

No. 09M93. WILSON *v.* ILLINOIS;

No. 09M95. SMITH *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS; and

No. 09M96. BISHAY *v.* MECHANICS COOPERATIVE BANK. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 09M94. ENDICOTT *v.* ICICLE SEAFOODS, INC. Motion for leave to proceed as a seaman granted.

No. 09–945. LOUISIANA SAFETY ASSOCIATION OF TIMBERMEN-SELF INSURERS FUND *v.* CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, ET AL. C. A. 5th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 09–8429. MILLER *v.* GEORGIA. Ct. App. Ga. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [559 U. S. 999] denied.

No. 09–9064. JACKSON *v.* MINNESOTA. Ct. App. Minn. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [559 U. S. 1035] denied.

No. 09–9459. O'CONNOR *v.* UNITED STATES. C. A. Fed. Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [559 U. S. 1047] denied.

No. 09–9605. MEDLEY *v.* FIRST HORIZON HOME LOAN CORP. ET AL. C. A. 9th Cir.;

No. 09–10116. RUIZ *v.* SUN LIFE ASSURANCE COMPANY OF CANADA. C. A. 5th Cir.;

No. 09–10213. IN RE MINOR; and

No. 09–10216. JAHAGIRDAR *v.* UNITED STATES. C. A. 1st Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until June 7, 2010, 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. 09–10082. GRIER *v.* UNITED STATES. C. A. 2d Cir. Motion of petitioner for leave to proceed *in forma pauperis* de-

nied. Petitioner is allowed until June 7, 2010, 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. JUSTICE SOTOMAYOR took no part in the consideration or decision of this motion.

No. 09–9665. IN RE CANNADY; and

No. 09–10298. IN RE MARQUARDT. Petitions for writs of habeas corpus denied.

No. 09–1101. IN RE MCGEE; and

No. 09–10209. IN RE SHAW. Petitions for writs of mandamus denied.

No. 09–9507. IN RE WARREN; and

No. 09–9541. IN RE WARREN. Motions of petitioner for leave to proceed *in forma pauperis* denied, and petitions for writs of mandamus dismissed. See this Court's Rule 39.8

Certiorari Granted

No. 09–868. WALL, DIRECTOR, RHODE ISLAND DEPARTMENT OF CORRECTIONS *v.* KHOLI. C. A. 1st Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 582 F. 3d 147.

Certiorari Denied

No. 09–594. DE LA ROSA *v.* HOLDER, ATTORNEY GENERAL. C. A. 11th Cir. Certiorari denied. Reported below: 579 F. 3d 1327.

No. 09–600. ABEBE *v.* HOLDER, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied. Reported below: 554 F. 3d 1203.

No. 09–767. SKF USA, INC. *v.* CUSTOMS AND BORDER PROTECTION ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 556 F. 3d 1337.

No. 09–830. CONTRERAS-MARTINEZ *v.* HOLDER, ATTORNEY GENERAL. C. A. 4th Cir. Certiorari denied. Reported below: 346 Fed. Appx. 956.

No. 09–862. MAGYAR *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 18 So. 3d 807.

No. 09–877. PUDELSKI *v.* WILSON, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 576 F. 3d 595.

No. 09–885. STANDARD INSURANCE CO. *v.* LINDEEN, STATE AUDITOR, EX OFFICIO COMMISSIONER OF INSURANCE. C. A. 9th Cir. Certiorari denied. Reported below: 584 F. 3d 837.

No. 09–982. MOORE *v.* HOSEMANN, SECRETARY OF STATE OF MISSISSIPPI. C. A. 5th Cir. Certiorari denied. Reported below: 591 F. 3d 741.

No. 09–1056. CUTTS *v.* OHIO. Ct. App. Ohio, Stark County. Certiorari denied.

No. 09–1057. BILDMAN *v.* ASTRA USA, INC., ET AL. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 455 Mass. 116, 914 N. E. 2d 36.

No. 09–1062. GREAVES *v.* MASSAD. App. Ct. Conn. Certiorari denied. Reported below: 116 Conn. App. 672, 977 A. 2d 662.

No. 09–1064. NWOKE *v.* VILLAGE OF BOLINGBROOK, ILLINOIS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 355 Fed. Appx. 59.

No. 09–1066. T. Y. ET AL., ON BEHALF OF T. Y. *v.* NEW YORK CITY DEPARTMENT OF EDUCATION, REGION 4. C. A. 2d Cir. Certiorari denied. Reported below: 584 F. 3d 412.

No. 09–1073. SHAW *v.* LYNCHBURG DEPARTMENT OF SOCIAL SERVICES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 332 Fed. Appx. 883.

No. 09–1076. MATEEN *v.* MARSHALL, TRUSTEE, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 341 Fed. Appx. 581.

No. 09–1081. MURESAN ET UX. *v.* FISH ET AL. Ct. App. Wash. Certiorari denied. Reported below: 151 Wash. App. 1007.

No. 09–1082. NEELY *v.* CITY OF RIVERDALE, GEORGIA, ET AL. C. A. 11th Cir. Certiorari denied.

No. 09–1085. LOUISIANA *v.* GOZA ET UX. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 21 So. 3d 320.

No. 09–1086. MR Crescent City, LLC, et al. *v.* Draper et al. C. A. 4th Cir. Certiorari denied. Reported below: 588 F. 3d 822.

No. 09–1090. Rawlins *v.* Miller, Warden. C. A. 10th Cir. Certiorari denied. Reported below: 346 Fed. Appx. 360.

No. 09–1091. Oceanic Exploration Co. et al. *v.* Phillips Petroleum Company ZOC et al. C. A. 5th Cir. Certiorari denied. Reported below: 352 Fed. Appx. 945.

No. 09–1092. Williams *v.* Louisiana. Sup. Ct. La. Certiorari denied. Reported below: 22 So. 3d 867.

No. 09–1095. Daily et ux. *v.* Oklahoma ex rel. Oklahoma Department of Human Services et al. Ct. Civ. App. Okla. Certiorari denied. Reported below: 228 P. 3d 1199.

No. 09–1103. Ute Distribution Corp. *v.* Salazar, Secretary of the Interior, et al. C. A. 10th Cir. Certiorari denied. Reported below: 584 F. 3d 1275.

No. 09–1104. Whittier, Personal Representative of the Estate of Diotaiuto, et al. *v.* Kobayashi (Reported below: 581 F. 3d 1304); Whittier, Personal Representative of the Estate of Diotaiuto, et al. *v.* Goldstein et al. (343 Fed. Appx. 517); and Whittier, Personal Representative of the Estate of Diotaiuto, et al. *v.* Bruna et al. (343 Fed. Appx. 505). C. A. 11th Cir. Certiorari denied.

No. 09–1105. AIG Baker Sterling Heights, LLC, et al. *v.* American Multi-Cinema, Inc. C. A. 11th Cir. Certiorari denied. Reported below: 579 F. 3d 1268.

No. 09–1106. Dolenz *v.* Vail, Executrix of the Estate of Vail, Deceased. Ct. App. Tex., 5th Dist. Certiorari denied. Reported below: 293 S. W. 3d 842.

No. 09–1109. Thomas *v.* Walt Disney Co. et al. C. A. 9th Cir. Certiorari denied. Reported below: 337 Fed. Appx. 694.

No. 09–1112. Madrid et al. *v.* Kaiser et al. Ct. App. Ariz. Certiorari denied.

No. 09–1113. Bader *v.* Blankfein et al. C. A. 2d Cir. Certiorari denied. Reported below: 356 Fed. Appx. 471.

No. 09–1114. ALBERTO-CULVER CO. *v.* SUNSTAR, INC., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 586 F. 3d 487.

No. 09–1117. HUGHES *v.* ARNOLD ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 347 Fed. Appx. 359.

No. 09–1118. CURIOUS THEATRE CO. ET AL. *v.* COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT ET AL. Sup. Ct. Colo. Certiorari denied. Reported below: 220 P. 3d 544.

No. 09–1122. EVANS *v.* BURT, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 09–1170. SEPULVEDA *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 278 Neb. 972, 775 N. W. 2d 40.

No. 09–1171. SMITH *v.* PSYCHIATRIC SOLUTIONS, INC., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 358 Fed. Appx. 76.

No. 09–1173. FLORANCE *v.* TEXAS. Ct. App. Tex., 5th Dist. Certiorari denied.

No. 09–1174. LAKE *v.* NEAL ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 585 F. 3d 1059.

No. 09–1182. PATEL *v.* UNITED STATES; and
No. 09–10049. SKRIPKA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 354 Fed. Appx. 216.

No. 09–1190. WALLACE, ADMINISTRATOR OF THE ESTATE OF WALLACE *v.* CASE WESTERN RESERVE UNIVERSITY. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 09–1193. LEVY ET UX. *v.* ENGLUND. Ct. App. Ariz. Certiorari denied.

No. 09–1197. VANNATTA ET AL. *v.* OREGON GOVERNMENT ETHICS COMMISSION, FKA OREGON GOVERNMENT STANDARDS AND PRACTICES COMMISSION, ET AL. Sup. Ct. Ore. Certiorari denied. Reported below: 347 Ore. 449, 222 P. 3d 1077.

No. 09–1200. DYNO *v.* BINGHAMTON UNIVERSITY, STATE UNIVERSITY OF NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied.

No. 09–1207. CARSON *v.* MERIT SYSTEMS PROTECTION BOARD. C. A. Fed. Cir. Certiorari denied. Reported below: 257 Fed. Appx. 268.

No. 09–1224. EKPERIGIN *v.* DEPARTMENT OF HEALTH AND HUMAN SERVICES. C. A. Fed. Cir. Certiorari denied. Reported below: 351 Fed. Appx. 441.

No. 09–1230. JEWELL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 586 F. 3d 1089.

No. 09–7472. PROPES *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 573 F. 3d 225.

No. 09–7758. ALEXANDER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 574 F. 3d 484.

No. 09–8515. KILES *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 222 Ariz. 25, 213 P. 3d 174.

No. 09–8521. AVALOS ALBA *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 346 Fed. Appx. 994.

No. 09–8700. WHITE *v.* FAIRFAX COUNTY, VIRGINIA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 332 Fed. Appx. 98.

No. 09–9079. JONES *v.* MINNESOTA. Sup. Ct. Minn. Certiorari denied. Reported below: 772 N. W. 2d 496.

No. 09–9405. LIVINGSTON *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 09–9446. HAILE *v.* ZULA, LLC. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 09–9458. NORTON *v.* FANNIE MAE. Ct. App. Ga. Certiorari denied.

No. 09–9466. CUTAIA *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 09–9468. FICKES *v.* CALIFORNIA. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 09–9469. HENDERSON *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 09–9470. HILLMAN *v.* SIMMS ET AL. C. A. 6th Cir. Certiorari denied.

No. 09–9472. HARDY *v.* WOOD. C. A. 11th Cir. Certiorari denied. Reported below: 342 Fed. Appx. 441.

No. 09–9474. GARRISON *v.* TROMBLEY, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 09–9483. BROWN *v.* INDUSTRIAL BANK ET AL. C. A. D. C. Cir. Certiorari denied.

No. 09–9485. BROWN *v.* MILLER. C. A. D. C. Cir. Certiorari denied. Reported below: 360 Fed. Appx. 164.

No. 09–9490. MARTYNOWICZ *v.* KANSAS DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES. Ct. App. Kan. Certiorari denied. Reported below: 41 Kan. App. 2d xiv, 201 P. 3d 1.

No. 09–9491. JAMERSON *v.* GREYHOUND. C. A. 9th Cir. Certiorari denied.

No. 09–9493. PAIGE *v.* CUOMO, ATTORNEY GENERAL OF NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied.

No. 09–9498. MURDENT *v.* MINNESOTA. Ct. App. Minn. Certiorari denied.

No. 09–9499. BERRIOS ET AL. *v.* NEW YORK ET AL. C. A. 2d Cir. Certiorari denied.

No. 09–9500. BROWN *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied.

No. 09–9501. BARROS *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 09–9502. PLEASANT-BEY *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied.

No. 09–9505. VILLA *v.* TEXAS. Ct. App. Tex., 7th Dist. Certiorari denied.

No. 09–9506. WALKER *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 09–9508. WILSON *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 332 Fed. Appx. 903.

No. 09–9513. RIVERA *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 603 Pa. 340, 983 A. 2d 1211.

No. 09–9514. BROWN *v.* SUBURBAN PROPANE, L. P. C. A. D. C. Cir. Certiorari denied. Reported below: 367 Fed. Appx. 165.

No. 09–9522. WILSON *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 21 So. 3d 572.

No. 09–9524. MUSSER *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist., Div. 1. Certiorari denied.

No. 09–9528. EVANS, AKA WILSON *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 09–9545. JENKINS *v.* MURPHY. C. A. 2d Cir. Certiorari denied. Reported below: 356 Fed. Appx. 500.

No. 09–9547. CALLIGAN *v.* WILSON, SUPERINTENDENT, INDIANA STATE PRISON. C. A. 7th Cir. Certiorari denied.

No. 09–9548. CALLIGAN *v.* WILSON, SUPERINTENDENT, INDIANA STATE PRISON. C. A. 7th Cir. Certiorari denied.

No. 09–9551. CHARLEY *v.* RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied.

No. 09–9559. ALLEN *v.* HEINZL ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 351 Fed. Appx. 145.

No. 09–9564. SHARPE *v.* FELKER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 09–9565. RICHARDS *v.* ELI LILLY & Co. C. A. 7th Cir. Certiorari denied. Reported below: 355 Fed. Appx. 74.

No. 09–9572. COULOMBE *v.* SUPERIOR COURT OF CALIFORNIA, VENTURA COUNTY, ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 09–9573. CHAMBERS *v.* TEXAS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 331 Fed. Appx. 294.

No. 09–9574. EDWARDS *v.* ASTORIA FEDERAL SAVINGS. C. A. 4th Cir. Certiorari denied. Reported below: 353 Fed. Appx. 789.

No. 09–9579. SEALS *v.* RUSSELL ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 355 Fed. Appx. 102.

No. 09–9580. RICHARDSON *v.* COUNTS. C. A. 4th Cir. Certiorari denied. Reported below: 363 Fed. Appx. 219.

No. 09–9584. MANIKOWSKI *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 23 So. 3d 113.

No. 09–9585. KING *v.* MCDANIEL, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 357 Fed. Appx. 856.

No. 09–9602. WILLIAMS *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 09–9603. TRIGGS *v.* CHRONES, ACTING WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 346 Fed. Appx. 173.

No. 09–9606. LAGUNAS *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 09–9607. PHILLIPS *v.* LAFLER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 09–9614. BECHLER *v.* SCRIBNER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 09–9618. BAKER *v.* YATES, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 339 Fed. Appx. 690.

No. 09–9619. MCNEILL *v.* LANESBORO CORRECTIONAL ADMINISTRATION STAFF. C. A. 4th Cir. Certiorari denied.

No. 09–9630. LANCASTER *v.* TEXAS. Ct. App. Tex., 3d Dist. Certiorari denied.

No. 09–9631. MARVIN *v.* SUPERVISOR OF THE ORANGE COUNTY SUPPORT COLLECTION ET AL. C. A. 2d Cir. Certiorari denied.

No. 09–9640. BANOS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 178 Cal. App. 4th 483, 100 Cal. Rptr. 3d 476.

No. 09–9643. JAMES *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 09–9649. MCNEILL *v.* ASHLEY ET AL. C. A. 4th Cir. Certiorari denied.

No. 09–9651. TERRY *v.* WALKER ET AL. C. A. 7th Cir. Certiorari denied.

No. 09–9652. TOTTEN *v.* JOHNSON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 331 Fed. Appx. 214.

No. 09–9661. MATTIS *v.* LEE, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 09–9667. CRAWFORD *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 57 So. 3d 203.

No. 09–9668. C. E. L. *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 24 So. 3d 1181.

No. 09–9676. GRIFFEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 589 F. 3d 1363.

No. 09–9677. HUGHEN *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 297 S. W. 3d 330.

No. 09–9680. SEVERIN *v.* JEFFERSON PARISH, LOUISIANA, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 357 Fed. Appx. 601.

No. 09–9695. SCOTT *v.* MILYARD, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 350 Fed. Appx. 213.

No. 09–9707. THOMAS *v.* HOWZE ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 348 Fed. Appx. 474.

No. 09–9709. WEEMS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 391 Ill. App. 3d 1123, 982 N. E. 2d 990.

No. 09–9731. SMITH *v.* ATLANTA POSTAL CREDIT UNION. C. A. 11th Cir. Certiorari denied. Reported below: 350 Fed. Appx. 347.

No. 09–9735. PAPENFUS *v.* HILL, SUPERINTENDENT, POWDER RIVER CORRECTIONAL FACILITY. C. A. 9th Cir. Certiorari denied.

No. 09–9736. PICKETT *v.* HALL, SUPERINTENDENT, TWO RIVERS CORRECTIONAL INSTITUTION. C. A. 9th Cir. Certiorari denied. Reported below: 357 Fed. Appx. 902.

No. 09–9752. CHERNETSKY *v.* CORTEZ MASTO, ATTORNEY GENERAL OF NEVADA, ET AL. C. A. 9th Cir. Certiorari denied.

No. 09–9761. JACKSON *v.* MONTANA. Sup. Ct. Mont. Certiorari denied. Reported below: 354 Mont. 63, 221 P. 3d 1213.

No. 09–9764. CRUZ SARINANA *v.* FARWELL, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 09–9768. STANTON *v.* MCDANIEL, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 09–9769. STASZ *v.* EISENBERG, TRUSTEE AND EXECUTOR FOR THE TRUST AND ESTATE OF QUACKENBUSH, DECEASED. C. A. 9th Cir. Certiorari denied. Reported below: 352 Fed. Appx. 154.

No. 09–9778. LAWRENCE *v.* PIAZZA ET AL. C. A. 3d Cir. Certiorari denied.

No. 09–9787. MOHSEN *v.* WU, CHAPTER 7 TRUSTEE, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 358 Fed. Appx. 951.

No. 09–9797. FIGUEROA *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 151 Wash. App. 1001.

No. 09–9800. HUDSON *v.* VASBINDER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 09–9827. JACKSON *v.* ADAMS, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 360 Fed. Appx. 874.

No. 09–9829. JOHNSON *v.* WERTANEN. C. A. 6th Cir. Certiorari denied.

No. 09–9832. MILLER *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 393 Ill. App. 3d 629, 913 N. E. 2d 659.

No. 09–9835. HAIRSTON *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 603 Pa. 660, 985 A. 2d 804.

No. 09–9841. COOK *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied.

No. 09–9842. SCHMIDT *v.* HUBERT, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 09–9846. WILSON *v.* DIGUGLIELMO, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD, ET AL. C. A. 3d Cir. Certiorari denied.

No. 09–9854. LOGAN *v.* HICKS, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 09–9864. TITUS *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 09–9875. GONZALES *v.* MCDANIEL, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 09–9877. ROSHANDELL *v.* SEARS, ROEBUCK & CO. ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 09–9900. MCCLAIN *v.* RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 369 Fed. Appx. 849.

No. 09–9906. LUDY *v.* TERRY, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 09–9907. SCHUSTER *v.* BLADES, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 357 Fed. Appx. 21.

No. 09–9908. REEVE *v.* CAMPBELL, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 357 Fed. Appx. 20.

No. 09–9918. ALBERTS *v.* WHEELING JESUIT UNIVERSITY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 363 Fed. Appx. 276.

No. 09–9966. HANN *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied. Reported below: 484 Mich. 865, 769 N. W. 2d 667.

No. 09–9967. LORD *v.* MCDANIEL, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 09–9983. CASON *v.* DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS ET AL. C. A. D. C. Cir. Certiorari denied.

No. 09–10004. RICHARDS *v.* MACDONALD, JUDGE, CIRCUIT COURT OF MICHIGAN, WAYNE COUNTY, ET AL. C. A. 6th Cir. Certiorari denied.

No. 09–10008. CARVER *v.* BENNETT ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 353 Fed. Appx. 859.

No. 09–10013. FORTENBERRY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 350 Fed. Appx. 906.

No. 09–10016. COLEMAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 575 F. 3d 316.

No. 09–10020. MILLS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 364 Fed. Appx. 217.

No. 09–10027. MADEIRA *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 982 A. 2d 81.

No. 09–10033. SMITH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 359 Fed. Appx. 491.

No. 09–10038. ALEXANDER *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 09–10050. STANDIFER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 359 Fed. Appx. 530.

No. 09–10054. BERNARD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 09–10056. BENITEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 359 Fed. Appx. 93.

No. 09–10057. CARDINAS GARCIA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 596 F. 3d 788.

No. 09–10058. HERRERA-GONZALEZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 359 Fed. Appx. 299.

No. 09–10060. HORTON *v.* DONLEY, SECRETARY OF THE AIR FORCE. C. A. 4th Cir. Certiorari denied. Reported below: 367 Fed. Appx. 400.

No. 09–10062. CHATMAN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 359 Fed. Appx. 62.

No. 09–10063. DUQUE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 360 Fed. Appx. 33.

No. 09–10064. MITCHELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 359 Fed. Appx. 396.

No. 09–10066. MCCARTHY *v.* DREW, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 294 Fed. Appx. 758.

No. 09–10072. CRUZ-ALONZO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 360 Fed. Appx. 554.

No. 09–10073. COFFMAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 364 Fed. Appx. 192.

No. 09–10074. FRANCIS *v.* KENTUCKY RIVER COAL CORP. Ct. App. Ky. Certiorari denied.

No. 09–10088. KING *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 352 Fed. Appx. 450.

No. 09–10092. HOWARD *v.* BALLARD, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 361 Fed. Appx. 460.

No. 09–10103. REILLY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 359 Fed. Appx. 662.

No. 09–10106. BURTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 359 Fed. Appx. 430.

No. 09–10108. AKERS *v.* CROW, JUDGE, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 343 Fed. Appx. 319.

No. 09–10109. CRAFT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 09–10110. CANDELARIO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 359 Fed. Appx. 958.

No. 09–10113. ALDACO *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 09–10129. FREES *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA. C. A. 8th Cir. Certiorari denied.

No. 09–10130. WEST *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 589 F. 3d 936.

No. 09–10137. HOLLIE *v.* MINNESOTA. Ct. App. Minn. Certiorari denied.

No. 09–10140. GARROTT *v.* MILLER-STOUT, SUPERINTENDENT, AIRWAY HEIGHTS CORRECTIONAL CENTER. C. A. 9th Cir. Certiorari denied. Reported below: 328 Fed. Appx. 506.

No. 09–10144. ANAMANYA *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 988 A. 2d 509.

No. 09–10147. SANTOS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 09–10148. ROLDAN-VEGA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 584 F. 3d 351.

No. 09–10150. WILKINS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 354 Fed. Appx. 748.

No. 09–10158. YEJE-CABRERA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 09–10159. WAMPLER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 361 Fed. Appx. 490.

No. 09–10162. HERNANDEZ *v.* VILLICANA. C. A. 9th Cir. Certiorari denied. Reported below: 344 Fed. Appx. 380.

No. 09–10164. WESLEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 356 Fed. Appx. 646.

No. 09–10166. MCNEILL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 360 Fed. Appx. 363.

No. 09–10169. NEGRON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 372 Fed. Appx. 788.

No. 09–10170. LEMON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 590 F. 3d 612.

No. 09–10179. SAWYERS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 360 Fed. Appx. 621.

No. 09–10180. SHADE *v.* GEORGE, CHIEF JUSTICE, SUPREME COURT OF CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied.

No. 09–10186. LONEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 343 Fed. Appx. 937.

No. 09–10187. WRIGHT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 09–10190. DAVIS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 361 Fed. Appx. 632.

No. 09–10191. ADEYI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 09–10193. BROWN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 364 Fed. Appx. 835.

No. 09–10196. KNIGHT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 09–10199. MYERS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 589 F. 3d 117.

No. 09–10200. LIGHTBOURN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 357 Fed. Appx. 259.

No. 09–10207. SINGLETON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 360 Fed. Appx. 444.

No. 09–10211. PURNELL, AKA SPENCER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 361 Fed. Appx. 384.

No. 09–10212. DELEON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 356 Fed. Appx. 319.

No. 09–10218. MEDINA-MONTES *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 359 Fed. Appx. 943.

No. 09–10223. LOPEZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 09–10225. TODD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 09–10226. WILLIAMS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 09–10227. HARRIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 09–10228. HINOJOSA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 09–10229. RAINES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 359 Fed. Appx. 966.

No. 09–10233. EVANS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 361 Fed. Appx. 524.

No. 09–10235. CARTER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 591 F. 3d 656.

No. 09–10239. FRAZIER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 09–10241. HERNANDEZ-LUNA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 360 Fed. Appx. 530.

No. 09–10244. GORE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 592 F. 3d 489.

No. 09–10248. DAWSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 352 Fed. Appx. 823.

No. 09–820. SHARP *v.* UNITED STATES ET AL. C. A. 9th Cir. Motion of Bay Planning Coalition et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 583 F. 3d 1174.

No. 09–889. ZACHEM *v.* ATHERTON. C. A. D. C. Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. Reported below: 567 F. 3d 672.

No. 09–901. CABLEVISION SYSTEMS CORP. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 570 F. 3d 83.

No. 09–1059. ELECTRONIC TRADING GROUP, LLC *v.* BANC OF AMERICA SECURITIES LLC ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 588 F. 3d 128.

No. 09–7909. DE JOHNSON *v.* HOLDER, ATTORNEY GENERAL. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 564 F. 3d 95.

No. 09–9943. MYERS *v.* LEE, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 345 Fed. Appx. 686.

No. 09–10234. EKEAGWU *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 369 Fed. Appx. 252.

Rehearing Denied

No. 09–823. STINGLEY *v.* DEN-MAR INC. ET AL., 559 U. S. 1006;

No. 09–843. THANH VONG HOAI ET AL. *v.* SUPERIOR COURT OF THE DISTRICT OF COLUMBIA ET AL., 559 U. S. 1007;

No. 09–848. WILLIAMS *v.* THORSEN, 559 U. S. 1007;

No. 09–7938. MANNING *v.* PALMER, WARDEN, 559 U. S. 946;

No. 09–8044. SORROW *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 559 U. S. 948;

No. 09–8122. PARMELEE *v.* MCCOLLUM, ATTORNEY GENERAL OF FLORIDA, ET AL., 559 U. S. 950;

No. 09–8168. HALE *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 559 U. S. 976;

No. 09–8212. REESE *v.* UNITED STATES, 559 U. S. 951;

No. 09–8213. THIBEAU *v.* MASSACHUSETTS, 559 U. S. 978;

No. 09–8317. TUCKER *v.* GEORGIA, 559 U. S. 980;

No. 09–8329. SHAPIRO *v.* AGNER, 559 U. S. 993;

No. 09–8357. LEATH *v.* UNITED STATES, 559 U. S. 980;

No. 09–8377. PATEL *v.* OWENS, COMMISSIONER, GEORGIA DEPARTMENT OF CORRECTIONS, ET AL., 559 U. S. 994;

No. 09–8389. SABEDRA *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 559 U. S. 994;

No. 09–8424. MCCARTNEY ET AL. *v.* MCCORMICK ET AL., 559 U. S. 995;

No. 09–8427. JUDD *v.* NEW MEXICO, 559 U. S. 1010;

No. 09–8507. FLOYD *v.* FLORIDA, 559 U. S. 1011;

No. 09–8568. COOLEY *v.* KELLY ET UX., 559 U. S. 1012;

No. 09–8665. NGHIEM *v.* KERESTES, DISTRICT ATTORNEY, COUNTY OF DELAWARE, PENNSYLVANIA, ET AL., 559 U. S. 1014;

No. 09–8797. SORRELL *v.* UNITED STATES, 559 U. S. 986;

No. 09–8817. JAMES *v.* NORTH CAROLINA, 559 U. S. 1016;

No. 09–8835. ALEJO *v.* MALFI, WARDEN, 559 U. S. 1016;

No. 09–8904. MOORE *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 559 U. S. 1051; and

No. 09–9395. GONZALEZ *v.* UNITED STATES, 559 U. S. 1055. Petitions for rehearing denied.

No. 09–895. DEANGELIS ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE, 559 U. S. 1007. Petition for rehearing denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition.

MAY 19, 2010

Miscellaneous Order

No. 09–10822 (09A1097). IN RE REYES CANNADY. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

MAY 20, 2010

Dismissal Under Rule 46

No. 09–1063. CORBITT ET AL. *v.* HOME DEPOT USA, INC. C. A. 11th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 589 F. 3d 1136.

Certiorari Denied

No. 09–1345 (09A1061). WALKER *v.* KELLY, WARDEN. C. A. 4th Cir. Application for stay of execution of sentence of death,

presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. Motions of Arc of the United States and Constitution Project for leave to file briefs as *amici curiae* granted. Certiorari denied. JUSTICE STEVENS, JUSTICE GINSBURG, and JUSTICE SOTOMAYOR would grant the application for stay of execution. Reported below: 589 F. 3d 127.

No. 09–1346 (09A1062). WALKER *v.* KELLY, WARDEN. C. A. 4th Cir. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. Motion of Arc of the United States for leave to file a brief as *amicus curiae* granted. Certiorari denied. JUSTICE STEVENS, JUSTICE GINSBURG, and JUSTICE SOTOMAYOR would grant the application for stay of execution. Reported below: 593 F. 3d 319.

No. 09–10888 (09A1115). HOLLAND *v.* MISSISSIPPI. Sup. Ct. Miss. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied.

MAY 24, 2010

Dismissal Under Rule 46

No. 09–9979. GOODSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 358 Fed. Appx. 533.

Certiorari Granted—Vacated and Remanded. (See also No. 09–8852, *ante*, p. 284.)

No. 08–775. VILLEGAS DURAN *v.* ARRIBADA BEAUMONT. C. A. 2d Cir. Motion of National Center for Missing and Exploited Children for leave to file a brief as *amicus curiae* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Abbott* v. *Abbott*, *ante*, p. 1. JUSTICE SOTOMAYOR took no part in the consideration or decision of this motion and this petition. Reported below: 534 F. 3d 142.

Certiorari Dismissed

No. 09–9687. ROCHON *v.* CAIN, WARDEN, ET AL. Ct. App. La., 1st Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's

Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) *(per curiam)*. JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein. Reported below: 6 So. 3d 890.

No. 09–9830. JOHNSON *v.* DEPARTMENT OF VETERANS AFFAIRS. C. A. 10th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 351 Fed. Appx. 288.

Miscellaneous Orders

No. 09A816 (09–10152). QIAN ZHAO *v.* HOLDER, ATTORNEY GENERAL. C. A. 5th Cir. Application for stay, addressed to JUSTICE SOTOMAYOR and referred to the Court, denied.

No. 09A885. FLEMING *v.* UNITED STATES. D. C. Neb. Application for certificate of appealability, addressed to JUSTICE KENNEDY and referred to the Court, denied.

No. D–2466. IN RE DISBARMENT OF RODRIGUEZ. Disbarment entered. [For earlier order herein, see 559 U. S. 1002.]

No. 09M97. SEGOVIA *v.* BACH CONSTRUCTION, INC. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 09–559. DOE ET AL. *v.* REED, SECRETARY OF STATE OF WASHINGTON, ET AL. C. A. 9th Cir. [Certiorari granted, 558 U. S. 1142.] Motion of Center for Constitutional Jurisprudence for leave to file a brief as *amicus curiae* granted.

No. 09–846. UNITED STATES *v.* TOHONO O'ODHAM NATION. C. A. Fed. Cir. [Certiorari granted, 559 U. S. 1066.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 09–958. MAXWELL-JOLLY, DIRECTOR, CALIFORNIA DEPARTMENT OF HEALTH CARE SERVICES *v.* INDEPENDENT LIVING CENTER OF SOUTHERN CALIFORNIA, INC., ET AL. (two judgments). C. A. 9th Cir.;

No. 09–993. PLIVA, INC., ET AL. *v.* MENSING. C. A. 8th Cir.; and

No. 09–1039. ACTIVIS ELIZABETH, LLC *v.* MENSING. C. A. 8th Cir. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 09–8342. KELLY *v.* DAY ET AL. C. A. 1st Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [559 U. S. 969] denied.

No. 09–9042. LASKEY *v.* RCN CORP. C. A. 9th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [559 U. S. 1064] denied.

No. 09–10157. TRIMBLE *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until June 14, 2010, 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. 09–8355. IN RE MIERZWA. Petition for writ of mandamus denied.

No. 09–9758. IN RE BAYS. Petition for writ of mandamus and/or prohibition denied.

Certiorari Granted

No. 08–1314. WILLIAMSON ET AL. *v.* MAZDA MOTOR OF AMERICA, INC., ET AL. Ct. App. Cal., 4th App. Dist., Div. 3. Certiorari granted limited to Question 1 presented by the petition. Reported below: 167 Cal. App. 4th 905, 84 Cal. Rptr. 3d 545.

No. 08–1438. SOSSAMON *v.* TEXAS ET AL. C. A. 5th Cir. Certiorari granted limited to the following question: "Whether an individual may sue a State or state official in his official capacity for damages for violations of the Religious Land Use and Institutionalized Persons Act, 42 U. S. C. § 2000cc *et seq.* (2000 ed.)." Reported below: 560 F. 3d 316.

No. 09–893. AT&T MOBILITY LLC *v.* CONCEPCION ET UX. C. A. 9th Cir. Certiorari granted. Reported below: 584 F. 3d 849.

No. 09–987. ARIZONA CHRISTIAN SCHOOL TUITION ORGANIZATION *v.* WINN ET AL.; and

No. 09–991. GARRIOTT, DIRECTOR, ARIZONA DEPARTMENT OF REVENUE *v.* WINN ET AL. C. A. 9th Cir. Certiorari granted, cases consolidated, and a total of one hour is allotted for oral argument. Reported below: 562 F. 3d 1002.

No. 09–9000. SKINNER *v.* SWITZER, DISTRICT ATTORNEY FOR THE 31ST JUDICIAL DISTRICT OF TEXAS. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 363 Fed. Appx. 302.

Certiorari Denied

No. 08–1131. PHON *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 08–10940. DIAZ *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 09–697. ROBINSON ET AL. *v.* LEHMAN, ADMINISTRATOR OF THE ESTATE OF LEHMAN. C. A. 9th Cir. Certiorari denied. Reported below: 346 Fed. Appx. 188.

No. 09–745. ANDREWS ET AL. *v.* FAIRLEY ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 578 F. 3d 518.

No. 09–750. TEXTRON INC. ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 577 F. 3d 21.

No. 09–774. KOSTIC *v.* HOLDER, ATTORNEY GENERAL. C. A. 6th Cir. Certiorari denied. Reported below: 340 Fed. Appx. 249.

No. 09–812. ILETO *v.* GLOCK, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 565 F. 3d 1126.

No. 09–871. CURR-SPEC PARTNERS, L. P. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. Reported below: 579 F. 3d 391.

No. 09–882. RUELAS *v.* WOLFENBARGER, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 580 F. 3d 403.

No. 09–908. COONEY *v.* ROSSITER ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 583 F. 3d 967.

No. 09–953. REISCH ET AL. *v.* SISNEY ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 581 F. 3d 639.

No. 09–962. LASALLE GROUP, INC. *v.* TRUSTEES OF THE DETROIT CARPENTERS FRINGE BENEFIT FUNDS. C. A. 6th Cir. Certiorari denied. Reported below: 581 F. 3d 313.

No. 09–965. POLLARD *v.* ESTATE OF MERKEL, DECEASED, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 354 Fed. Appx. 88.

No. 09–998. DRAKE *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 25 So. 3d 782.

No. 09–1108. ZMYSLY *v.* UNITED STATES ET AL. C. A. 7th Cir. Certiorari denied.

No. 09–1119. SMITH *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 192 N. C. App. 690, 666 S. E. 2d 191.

No. 09–1125. ADAIR, DBA SUPER D 229, ET AL. *v.* LEASE PARTNERS, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 587 F. 3d 238.

No. 09–1128. SEGAL *v.* FIFTH THIRD BANK, N. A., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 581 F. 3d 305.

No. 09–1130. SCHOLWIN *v.* DEPARTMENT OF CHILDREN AND FAMILIES. App. Ct. Mass. Certiorari denied. Reported below: 74 Mass. App. 1125, 909 N. E. 2d 1193.

No. 09–1134. DAVIS *v.* DAVIS ET AL. Sup. Ct. Va. Certiorari denied.

No. 09–1137. JEFFREDO ET AL. *v.* MACARRO ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 599 F. 3d 913.

No. 09–1144. DOLENZ *v.* WTG GAS PROCESSING, L. P., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 359 Fed. Appx. 479.

No. 09–1145. MAX *v.* REPUBLICAN COMMITTEE OF LANCASTER COUNTY ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 587 F. 3d 198.

No. 09–1147. LOHMAN *v.* BOROUGH ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 574 F. 3d 163.

No. 09–1148. DILLON *v.* INDIANA ET AL. C. A. 7th Cir. Certiorari denied.

No. 09–1151. BALDWIN *v.* BOARD OF SUPERVISORS FOR THE UNIVERSITY OF LOUISIANA SYSTEM ET AL. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 11 So. 3d 1247.

No. 09–1154. FOX *v.* FLORIDA UNEMPLOYMENT APPEALS COMMISSION ET AL. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 26 So. 3d 595.

No. 09–1155. SHUKERT *v.* MASSACHUSETTS. App. Ct. Mass. Certiorari denied. Reported below: 73 Mass. App. 1117, 899 N. E. 2d 919.

No. 09–1157. MONTANANS FOR MULTIPLE USE ET AL. *v.* BARBOULETOS ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 568 F. 3d 225.

No. 09–1165. MARUMOTO *v.* APOLIONA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 334 Fed. Appx. 121.

No. 09–1180. DICKEY *v.* WARREN. App. Ct. Mass. Certiorari denied. Reported below: 75 Mass. App. 585, 915 N. E. 2d 584.

No. 09–1181. FLORANCE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 09–1189. WATI *v.* HOLDER, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied. Reported below: 364 Fed. Appx. 332.

No. 09–1203. FRANTZ *v.* GRESS ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 359 Fed. Appx. 301.

No. 09–1236. SIEGEL *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. D. C. Cir. Certiorari denied. Reported below: 592 F. 3d 147.

No. 09–1239. JUELS *v.* UNITED STATES POSTAL SERVICE. C. A. Fed. Cir. Certiorari denied. Reported below: 347 Fed. Appx. 597.

No. 09–1241. SOLOMON AND SOLOMON, P. C., ET AL. *v.* ELLIS. C. A. 2d Cir. Certiorari denied. Reported below: 591 F. 3d 130.

No. 09–1244. GRAHAM *v.* METROPOLITAN LIFE INSURANCE CO. C. A. 5th Cir. Certiorari denied. Reported below: 349 Fed. Appx. 957.

No. 09–1247. CERTAIN REAL PROPERTY, LOCATED AT 317 NICK FITCHARD ROAD, N. W., HUNTSVILLE, ALABAMA, ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 579 F. 3d 1315.

No. 09–1250. FINE *v.* BACA, SHERIFF, LOS ANGELES COUNTY, CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 356 Fed. Appx. 998.

No. 09–1266. DELALIO *v.* WYOMING. C. A. 10th Cir. Certiorari denied. Reported below: 363 Fed. Appx. 626.

No. 09–1267. DAVIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 360 Fed. Appx. 457.

No. 09–1294. MCCLENDON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 362 Fed. Appx. 475.

No. 09–1296. HAMPTON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 585 F. 3d 1033.

No. 09–5818. TOM *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 565 F. 3d 497.

No. 09–8202. MCGILL *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 17 So. 3d 293.

No. 09–8320. VINCENT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 575 F. 3d 820.

No. 09–8388. PARADA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 577 F. 3d 1275.

No. 09–8445. CULPS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 329 Fed. Appx. 134.

No. 09–8461. DYLESKI *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 09–8603. GUZMAN *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 227 Ore. App. 361, 206 P. 3d 210.

No. 09–8643. MADRID *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 333 Fed. Appx. 882.

No. 09–8674. BENFORD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 574 F. 3d 1228.

No. 09–8861. BOBB *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 577 F. 3d 1366.

No. 09–8949. JOHNSON *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 983 A. 2d 904.

No. 09–9036. TAYLOR *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 298 S. W. 3d 482.

No. 09–9054. CHAMBERS *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 602 Pa. 224, 980 A. 2d 35.

No. 09–9673. HARTLEY *v.* HALL, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 335 Fed. Appx. 686.

No. 09–9675. HAMMON *v.* MILLER, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 350 Fed. Appx. 222.

No. 09–9678. SPEAKS *v.* MISSOURI. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 298 S. W. 3d 70.

No. 09–9683. REAVES *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. Sup. Ct. Va. Certiorari denied.

No. 09–9688. BUTLER *v.* SCRIBNER, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 09–9690. ALLAH *v.* HALL, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 09–9697. ABRAHAM *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied.

No. 09–9699. BARBEE *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist., Div. 2. Certiorari denied.

No. 09–9703. JONES *v.* DINWIDDIE, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 364 Fed. Appx. 428.

No. 09–9704. DANIELS *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 09–9708. WOOLRIDGE *v.* YATES, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 09–9720. MILES *v.* UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT. C. A. 9th Cir. Certiorari denied.

No. 09–9721. BATES *v.* PRATT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 357 Fed. Appx. 610.

No. 09–9724. ESPINOZA *v.* MATTOON. C. A. 9th Cir. Certiorari denied.

No. 09–9725. SERRANO *v.* SMITH, SUPERINTENDENT, SHAWANGUNK CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 09–9730. CHANG *v.* ROCKRIDGE MANOR CONDOMINIUM ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 344 Fed. Appx. 365.

No. 09–9740. MARSH *v.* FLORIDA DEPARTMENT OF CHILDREN AND FAMILIES ET AL. C. A. 11th Cir. Certiorari denied.

No. 09–9743. RUVALCABA *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied.

No. 09–9744. ROBERTS *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 09–9746. BROWN *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA. C. A. D. C. Cir. Certiorari denied.

No. 09–9747. BURGOS *v.* SUPERIOR COURT OF PENNSYLVANIA. C. A. 3d Cir. Certiorari denied. Reported below: 355 Fed. Appx. 585.

No. 09–9756. ALLEN *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 386 S. C. 93, 687 S. E. 2d 21.

No. 09–9757. BAYS *v.* HOLMES ET AL. Sup. Ct. Wash. Certiorari denied.

No. 09–9762. LACY *v.* PARKER, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 359 Fed. Appx. 25.

No. 09–9767. PICKETT *v.* TEXAS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 356 Fed. Appx. 756.

No. 09–9770. SCHMIDT *v.* FROEDTERT MEMORIAL LUTHERAN ET AL. Ct. App. Wis. Certiorari denied. Reported below: 316 Wis. 2d 773, 766 N. W. 2d 241.

No. 09–9772. ARANGO *v.* WINSTEAD, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT CAMBRIDGE SPRINGS. C. A. 3d Cir. Certiorari denied. Reported below: 352 Fed. Appx. 664.

No. 09–9774. BENJAMIN *v.* WHITE. C. A. 4th Cir. Certiorari denied. Reported below: 367 Fed. Appx. 385.

No. 09–9775. AMIR-SHARIF *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 09–9776. WILLIAMS *v.* CALIFORNIA DEPARTMENT OF CORRECTIONS ET AL. C. A. 9th Cir. Certiorari denied.

No. 09–9779. NITZ *v.* HARVEY ET AL. C. A. 7th Cir. Certiorari denied.

No. 09–9790. RIVERA *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 09–9793. DAVIS *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 22 So. 3d 89.

No. 09–9794. DIXON *v.* KILGORE ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 343 Fed. Appx. 530.

No. 09–9795. EDWARDS *v.* BOEING CO. ET AL. C. A. 10th Cir. Certiorari denied.

No. 09–9885. SERRANO *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 09–9945. CARMEN P. *v.* SAN DIEGO COUNTY HEALTH & HUMAN SERVICES AGENCY. Ct. App. Cal., 4th App. Dist., Div. 1. Certiorari denied.

No. 09–10048. JOHNSON-EL *v.* COOPER, ATTORNEY GENERAL OF NORTH CAROLINA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 333 Fed. Appx. 764.

No. 09–10093. GLOVER *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 09–10099. PARDO *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 587 F. 3d 1093.

No. 09–10104. BONILLA *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist., Div. 2. Certiorari denied.

No. 09–10111. COLOSI *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 351 Fed. Appx. 803.

No. 09–10122. HARRISON *v.* HARTLEY, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 345 Fed. Appx. 361.

No. 09–10135. GRAY *v.* KERESTES, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT MAHANOY. C. A. 3d Cir. Certiorari denied.

No. 09–10139. GAUSE *v.* DIGUGLIELMO, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD, ET AL. C. A. 3d Cir. Certiorari denied.

No. 09–10145. LEISER *v.* PUGH, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 09–10160. GARCIA-LOPEZ *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 125 Nev. 1038, 281 P. 3d 1174.

No. 09–10197. PETERSON *v.* MISSISSIPPI. Ct. App. Miss. Certiorari denied. Reported below: 28 So. 3d 667.

No. 09–10206. QUEZADA-MEZA *v.* ARIZONA. Ct. App. Ariz. Certiorari denied.

No. 09–10215. LONG *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 09–10249. DAVILA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 09–10252. PATTERSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 361 Fed. Appx. 620.

No. 09–10258. LEONARD *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 357 Fed. Appx. 191.

No. 09–10259. PEAK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 361 Fed. Appx. 619.

No. 09–10262. BLAND *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 361 Fed. Appx. 386.

No. 09–10263. BARBER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 361 Fed. Appx. 671.

No. 09–10264. AAMES *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist., Div. 2. Certiorari denied.

No. 09–10265. SALAZAR-GALLARDO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 361 Fed. Appx. 888.

No. 09–10266. VEASEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 09–10268. WILLIAMS *v.* UNITED STATES;
No. 09–10375. DORSEY *v.* UNITED STATES; and
No. 09–10428. ORTIZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 359 Fed. Appx. 984.

No. 09–10269. SLAYDON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 360 Fed. Appx. 538.

No. 09–10270. CORBETT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 374 Fed. Appx. 372.

No. 09–10272. DELGADO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 354 Fed. Appx. 955.

No. 09–10274. LEWIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 362 Fed. Appx. 402.

No. 09–10275. KOSACK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 366 Fed. Appx. 642.

No. 09–10277. SOTO-LOPEZ, AKA SOTO, AKA URIAS-CASTRO, AKA MENDOZA-CAMACHO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 361 Fed. Appx. 808.

No. 09–10278. TAYLOR *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 592 F. 3d 1104.

No. 09–10289. STEELE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 353 Fed. Appx. 908.

No. 09–10296. KENDLE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 09–10297. MAYS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 593 F. 3d 603.

No. 09–10301. LIGHTNER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 359 Fed. Appx. 398.

No. 09–10303. PARKER *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 985 A. 2d 464.

No. 09–10307. TORRES *v.* MCCANN, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 09–10308. SANTIAGO VERA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 362 Fed. Appx. 199.

No. 09–10309. THIGPEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 363 Fed. Appx. 489.

No. 09–10310. WILSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 344 Fed. Appx. 559.

No. 09–10317. ARIAS-GONZALES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 356 Fed. Appx. 895.

No. 09–10325. EVANS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 09–10326. ESTEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 595 F. 3d 836.

No. 09–10330. MANNING *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 09–10331. SOLANO-MORETA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 09–10333. RAMOS-MORALES *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 09–10339. ROLLINS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 09–10341. VASSAR *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 346 Fed. Appx. 17.

No. 09–10349. CANNON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 340 Fed. Appx. 826.

No. 09–10354. THORNTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 609 F. 3d 373.

No. 09–10356. AVINA-BILLA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 360 Fed. Appx. 937.

No. 09–10357. ALBA-FLORES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 577 F. 3d 1104.

No. 09–10358. BALL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 09–10359. JONES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 362 Fed. Appx. 416.

No. 09–10360. MAYFIELD *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 361 Fed. Appx. 425.

No. 09–10361. SUESUE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 362 Fed. Appx. 877.

No. 09–10364. CARTWRIGHT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 09–10374. CAVE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 361 Fed. Appx. 534.

No. 09–10379. KHAMI *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 362 Fed. Appx. 501.

No. 09–10384. WILLIAMS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 363 Fed. Appx. 682.

No. 09–10385. MILLS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 334 Fed. Appx. 946.

No. 09–10386. MOORE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 357 Fed. Appx. 14.

No. 09–10389. DADE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 09–10391. WILLIAMS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 357 Fed. Appx. 726.

No. 09–10392. ESPINAL *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 09–10399. BENSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 363 Fed. Appx. 483.

No. 09–10401. JOHNSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 592 F. 3d 442.

No. 09–10404. LARIOS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 593 F. 3d 82.

No. 09–10408. PALMERA PINEDA *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 348 Fed. Appx. 591.

No. 09–10409. MORRISON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 594 F. 3d 626.

No. 09–10410. GLASS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 357 Fed. Appx. 58.

No. 09–10412. ORREGO-MARTINEZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 575 F. 3d 1.

No. 09–10420. MCCANEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 09–981. JOHNSON CONTROLS, INC., ET AL. *v.* MILLER, SECRETARY, KENTUCKY FINANCE AND ADMINISTRATION CABINET, ET AL. Sup. Ct. Ky. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 296 S. W. 3d 392.

No. 09–1006. MICROSOFT CORP. *v.* LUCENT TECHNOLOGIES, INC. C. A. Fed. Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. Reported below: 580 F. 3d 1301.

No. 09–10219. PHIPPS *v.* UNITED STATES. C. A. 5th Cir. Motion of petitioner to defer consideration of petition for writ of certiorari denied. Certiorari denied. Reported below: 595 F. 3d 243.

No. 09–10283. ROJAS, AKA JOHN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 361 Fed. Appx. 233.

No. 09–10323. CALVERT *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 351 Fed. Appx. 475.

Rehearing Denied

No. 08–304. GRAHAM COUNTY SOIL AND WATER CONSERVATION DISTRICT ET AL. *v.* UNITED STATES EX REL. WILSON, 559 U. S. 280;

No. 09–880. BIRKS *v.* PARK ET AL., 559 U. S. 1037;

No. 09–8280. BROWN *v.* PHELPS, WARDEN, ET AL., 559 U. S. 952;

No. 09–8660. WHEELER *v.* LAPPIN, DIRECTOR, FEDERAL BUREAU OF PRISONS, ET AL., 559 U. S. 983;

No. 09–8712. CROCKETT *v.* WOUGHTER, SUPERINTENDENT, MOHAWK CORRECTIONAL FACILITY, 559 U. S. 1015;

No. 09–9140. CRAIN *v.* CLARK COUNTY PUBLIC DEFENDER ET AL., 559 U. S. 1076;

No. 09–9210. WRIGHT *v.* POTTER, POSTMASTER GENERAL, 559 U. S. 1042;

No. 09–9231. GRANDOIT *v.* COOPERATIVE FOR HUMAN SERVICES, INC., 559 U. S. 1077; and

No. 09–9433. BROWN *v.* UNITED STATES, 559 U. S. 1056. Petitions for rehearing denied.

MAY 25, 2010

Dismissal Under Rule 46

No. 09–9464. MUSALL *v.* OWENS ET AL. Sup. Ct. Nev. Certiorari dismissed under this Court's Rule 46.1. Reported below: 125 Nev. 1064, 281 P. 3d 1204.

Certiorari Denied

No. 09–11000 (09A1128). AVALOS ALBA *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.

JUNE 1, 2010

Certiorari Dismissed

No. 09–9828. LASKEY *v.* PROCTER & GAMBLE CO. Ct. App. Cal., 1st App. Dist. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) *(per curiam)*. JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein.

No. 09–9869. BROWN *v.* PRINCE GEORGE'S COUNTY POLICE DEPARTMENT ET AL. C. A. D. C. Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 368 Fed. Appx. 147.

No. 09–9870. BROWN *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA. C. A. D. C. Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 09–9888. DOUGLAS *v.* HAYNES ET AL. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 354 Fed. Appx. 163.

No. 09–10028. BISHOP *v.* DEPARTMENTAL DISCIPLINARY COMMITTEE FOR THE FIRST JUDICIAL DEPARTMENT. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 54 App. Div. 3d 1, 863 N. Y. S. 2d 1.

Miscellaneous Orders

No. 09A981. CHAWLA *v.* UNITED STATES. Application for bail, addressed to JUSTICE SCALIA and referred to the Court, denied.

No. 09A1133. McComish et al. *v.* Bennett, Secretary of State of Arizona, et al. C. A. 9th Cir. Application to vacate stay, presented to Justice Kennedy, and by him referred to the Court, denied without prejudice to a renewed application if the parties represent that they intend to file a timely petition for writ of certiorari before this Court. Motion of Buzz Mills for Governor Campaign for leave to file a brief as *amicus curiae* granted.

No. 09M98. D. S. *v.* Los Angeles County Department of Children and Family Services. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 09–9871. Jones *v.* Shaw Group et al. C. A. 11th Cir.;
No. 09–9986. Jaiyeola *v.* Carrier Corp. C. A. 2d Cir.;
No. 09–10192. Bell *v.* United Parcel Service, Inc. C. A. 6th Cir.; and
No. 09–10453. Gravenhorst *v.* United States. C. A. 1st Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until June 22, 2010, 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. 09–10613. In re Davis. Petition for writ of habeas corpus denied.

No. 09–10500. In re Akpan. Petition for writ of mandamus denied.

Certiorari Granted

No. 09–837. Mayo Foundation for Medical Education and Research et al. *v.* United States. C. A. 8th Cir. Certiorari granted. Reported below: 568 F. 3d 675.

Certiorari Denied

No. 09–597. United States *v.* O'Brien. C. A. 1st Cir. Certiorari denied.

No. 09–617. Basham *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 561 F. 3d 302.

No. 09–911. R. J. Reynolds Tobacco Co. et al. *v.* Montana ex rel. Bullock. Sup. Ct. Mont. Certiorari denied. Reported below: 352 Mont. 30, 217 P. 3d 475.

No. 09–1011. TRULL *v.* FEINBERG ET AL. Sup. Ct. Ill. Certiorari denied. Reported below: 235 Ill. 2d 256, 919 N. E. 2d 888.

No. 09–1021. JOHN *v.* DOUGLAS COUNTY SCHOOL DISTRICT ET AL. Sup. Ct. Nev. Certiorari denied. Reported below: 125 Nev. 746, 219 P. 3d 1276.

No. 09–1028. CLIFFORD *v.* MISSNER. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 393 Ill. App. 3d 751, 914 N. E. 2d 540.

No. 09–1052. KEITH *v.* OHIO. Ct. App. Ohio, Crawford County. Certiorari denied.

No. 09–1111. CITY OF LOS ANGELES, CALIFORNIA, ET AL. *v.* KERN COUNTY, CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 581 F. 3d 841.

No. 09–1162. CAROLYN *v.* ORANGE PARK COMMUNITY ASSN. Ct. App. Cal., 4th App. Dist., Div. 3. Certiorari denied. Reported below: 177 Cal. App. 4th 1090, 99 Cal. Rptr. 3d 699.

No. 09–1166. AHMADI *v.* STATIC CONTROL COMPONENTS, INC. C. A. 4th Cir. Certiorari denied. Reported below: 358 Fed. Appx. 416.

No. 09–1167. CLARK *v.* EPPS, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 349 Fed. Appx. 481.

No. 09–1168. CHAGBY *v.* TARGET CORP. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 358 Fed. Appx. 805.

No. 09–1169. GRAHAM *v.* HARTFORD LIFE & ACCIDENT INSURANCE CO. C. A. 10th Cir. Certiorari denied. Reported below: 589 F. 3d 1345.

No. 09–1179. BOLTE *v.* SUPREME COURT OF WISCONSIN ET AL. C. A. 9th Cir. Certiorari denied.

No. 09–1185. SAFFO ET UX. *v.* FOXWORTHY, INC., ET AL. Sup. Ct. Ga. Certiorari denied. Reported below: 286 Ga. 284, 687 S. E. 2d 463.

No. 09–1194. BIGGS ET VIR *v.* EAGLEWOOD MORTGAGE, LLC, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 353 Fed. Appx. 864.

No. 09–1201. JORDAN *v.* DEPARTMENT OF LABOR. C. A. 9th Cir. Certiorari denied. Reported below: 352 Fed. Appx. 187.

No. 09–1216. JONES *v.* SUPERIOR PROTECTION SERVICES, INC., AKA SUPERIOR SECURITY SERVICES. C. A. 5th Cir. Certiorari denied.

No. 09–1220. ALLIED ELECTRICAL CONTRACTORS, INC. *v.* LINE CONSTRUCTION BENEFIT FUND. C. A. 7th Cir. Certiorari denied. Reported below: 591 F. 3d 576.

No. 09–1252. LUBIT *v.* LUBIT. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 65 App. Div. 3d 957, 885 N. Y. S. 2d 492.

No. 09–1263. MADYUN *v.* LINJER. C. A. 7th Cir. Certiorari denied. Reported below: 333 Fed. Appx. 132.

No. 09–1304. RAO *v.* CITY OF EVANSTON, ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 391 Ill. App. 3d 1109, 982 N. E. 2d 984.

No. 09–1306. MONTALVO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 581 F. 3d 1147.

No. 09–1311. THOMPSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 582 F. 3d 787.

No. 09–1323. GOTTI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 09–8318. TELLEZ *v.* FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 09–8569. CLAY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 579 F. 3d 919.

No. 09–8758. HAFED *v.* DEPARTMENT OF STATE ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 331 Fed. Appx. 757.

No. 09–8791. WILLIAMS *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 602 Pa. 360, 980 A. 2d 510.

No. 09–8894. DAVIS *v.* FEDERAL BUREAU OF PRISONS ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 334 Fed. Appx. 332.

No. 09–8901. KAMBULE *v.* MISSISSIPPI. Ct. App. Miss. Certiorari denied. Reported below: 19 So. 3d 120.

No. 09–9143. BEANE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 584 F. 3d 767.

No. 09–9186. BONNELL *v.* BOBBY, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 09–9302. EGGERS *v.* HETZEL, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 09–9798. HUYNH *v.* BOARD OF EDUCATION OF THE CITY OF CHICAGO ET AL. C. A. 7th Cir. Certiorari denied.

No. 09–9808. GUMAN *v.* BISSONNETTE, JUDGE, CIRCUIT COURT OF WISCONSIN, DODGE COUNTY. Ct. App. Wis. Certiorari denied.

No. 09–9813. CRAWLEY *v.* DINWIDDIE, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 584 F. 3d 916.

No. 09–9819. GOLTSMAN *v.* ALMQUIST & GILBERT, P. C., ET AL. Ct. App. Ariz. Certiorari denied.

No. 09–9820. OSBORNE *v.* AMERICAN MULTI-CINEMA, INC., DBA AMC THEATERS PARKWAY POINT 15, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 348 Fed. Appx. 535.

No. 09–9821. PHAM *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 09–9831. GOLDEN *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 299 Ga. App. 407, 683 S. E. 2d 618.

No. 09–9837. CRAWFORD *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 09–9845. TOTTEN *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 09–9849. PADIN *v.* LAMARQUE, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 358 Fed. Appx. 968.

No. 09–9852. KELLY *v.* SHEARIN, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 369 Fed. Appx. 447.

No. 09–9853. JAMERSON *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 09–9855. KING *v.* PACARO. C. A. 11th Cir. Certiorari denied.

No. 09–9859. BURKS *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 2009 Ark. 598, 359 S. W. 3d 402.

No. 09–9860. ALEX *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 09–9865. TOWNSEND *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 09–9874. RHODES *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 09–9876. BENJAMIN *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 09–9887. SALINAS *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 09–9889. DORSEY *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 187 Md. App. 721.

No. 09–9890. DUCRE *v.* LOUISIANA. Ct. App. La., 1st Cir. Certiorari denied.

No. 09–9891. ENGLE *v.* AHMED ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 355 Fed. Appx. 871.

No. 09–9896. STALLINGS *v.* RITTER, GOVERNOR OF COLORADO, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 345 Fed. Appx. 366.

No. 09–9897. WILLIS *v.* TATUM, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 09–9898. TEMPLE *v.* RILEY, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 349 Fed. Appx. 866.

No. 09–9910. PINSON ET UX. *v.* EQUIFAX CREDIT INFORMATION SERVICES, INC., ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 316 Fed. Appx. 744.

No. 09–9911. GOFORTH *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied.

No. 09–9913. LYE HUAT ONG *v.* SOWERS, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 348 Fed. Appx. 875.

No. 09–9917. LEE *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 09–9920. BRINK *v.* KELLY, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY. C. A. 5th Cir. Certiorari denied. Reported below: 359 Fed. Appx. 455.

No. 09–9921. BANKS *v.* CITY OF CHICAGO, ILLINOIS, ET AL. C. A. 7th Cir. Certiorari denied.

No. 09–9923. BURNS *v.* SCRIBNER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 09–9925. THAMES *v.* MILLER. C. A. 9th Cir. Certiorari denied. Reported below: 334 Fed. Appx. 136.

No. 09–9930. COOK *v.* DWYER ET AL. C. A. 8th Cir. Certiorari denied.

No. 09–9931. DURDEN *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 09–9939. LITAKER *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 387 Ill. App. 3d 1201, 981 N. E. 2d 546.

No. 09–9941. LARSON *v.* RUNNELS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 09–9942. JONES *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 09–9947. RICHARDSON *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied. Reported below: 485 Mich. 1044, 776 N. W. 2d 907.

No. 09–9950. BREWSTER *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 587 F. 3d 764.

No. 09–9952. BURNETT *v.* BORRIS, JUDGE, SUPERIOR COURT OF CALIFORNIA, ORANGE COUNTY, ET AL. C. A. 9th Cir. Certiorari denied.

No. 09–9953. BROWN *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 09–9958. THOMAS *v.* NICHOLS. C. A. 11th Cir. Certiorari denied.

No. 09–9993. YOON KYUNG KIM *v.* NORTHWEST AIRLINES, INC. C. A. 2d Cir. Certiorari denied. Reported below: 350 Fed. Appx. 524.

No. 09–10034. ODUCHE-NWAKAIHE *v.* HOLDER, ATTORNEY GENERAL. C. A. 3d Cir. Certiorari denied. Reported below: 363 Fed. Appx. 898.

No. 09–10055. WILLIAMS *v.* NORTH CAROLINA. Gen. Ct. Justice, Super. Ct. Div., Onslow County, N. C. Certiorari denied.

No. 09–10078. GOLDEN *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 26 So. 3d 581.

No. 09–10089. HARD *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 321 Wis. 2d 476, 774 N. W. 2d 475.

No. 09–10094. HOLLY *v.* HOBBS, INTERIM DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 09–10115. PALMER *v.* SHINSEKI, SECRETARY OF VETERANS AFFAIRS. C. A. Fed. Cir. Certiorari denied. Reported below: 360 Fed. Appx. 141.

No. 09–10126. HENDRICKS *v.* BRADT, SUPERINTENDENT, ELMIRA CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 09–10127. GATES, AKA BURKE *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 09–10131. THOMAS *v.* WHITE, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 362 Fed. Appx. 452.

No. 09–10161. HERING *v.* IOWA STATE PATROL ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 331 Fed. Appx. 427.

No. 09–10177. WHITE *v.* WATTS. C. A. 3d Cir. Certiorari denied.

No. 09–10181. SCOTT *v.* SHINSEKI, SECRETARY OF VETERANS AFFAIRS. C. A. Fed. Cir. Certiorari denied. Reported below: 355 Fed. Appx. 426.

No. 09–10188. VELA *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 279 Neb. 94, 777 N. W. 2d 266.

No. 09–10204. NIEVES *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 09–10221. MITCHELL *v.* MURPHY, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 359 Fed. Appx. 22.

No. 09–10257. LYLE *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied.

No. 09–10279. ARMSTRONG *v.* KEMNA, SUPERINTENDENT, CROSSROADS CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied. Reported below: 590 F. 3d 592.

No. 09–10291. SMITH *v.* UNITED STATES ET AL. C. A. 10th Cir. Certiorari denied.

No. 09–10302. NIEVES *v.* WORLD SAVINGS BANK, FSB, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 357 Fed. Appx. 843.

No. 09–10306. WHITE *v.* HOWES, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 586 F. 3d 1025.

No. 09–10315. BRYANT *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 393 Ill. App. 3d 1100, 985 N. E. 2d 723.

No. 09–10350. CHAPMAN *v.* MASSACHUSETTS. App. Ct. Mass. Certiorari denied. Reported below: 75 Mass. App. 1113, 916 N. E. 2d 774.

No. 09–10407. NANCE *v.* MEE, ADMINISTRATOR, EAST JERSEY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 09–10419. WOLFE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 09–10423. DAVILA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 364 Fed. Appx. 488.

No. 09–10424. CLEMENTS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 363 Fed. Appx. 505.

No. 09–10425. DEBERRY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 364 Fed. Appx. 404.

No. 09–10430. MARTINEZ *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 364 Fed. Appx. 305.

No. 09–10431. JONES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 367 Fed. Appx. 482.

No. 09–10433. FERGUSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 360 Fed. Appx. 969.

No. 09–10435. GOWDY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 364 Fed. Appx. 61.

No. 09–10436. FRAZIER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 360 Fed. Appx. 690.

No. 09–10440. HOLDEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 363 Fed. Appx. 476.

No. 09–10442. PODLOG *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 09–10443. MOLINA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 373 Fed. Appx. 211.

No. 09–10446. PHILLIPS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 352 Fed. Appx. 822.

No. 09–10448. PHILLIPS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 370 Fed. Appx. 610.

No. 09–10449. MITCHELL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 09–10455. HICKS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 332 Fed. Appx. 836.

No. 09–10457. MARQUEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 594 F. 3d 855.

No. 09–10459. MOONEY *v.* UNITED STATES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 409 Fed. Appx. 620.

No. 09–10461. WILLIS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 356 Fed. Appx. 858.

No. 09–10462. SMITH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 595 F. 3d 1322.

No. 09–10463. WILHELM *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 358 Fed. Appx. 452.

No. 09–10464. ANDINO-VALENZULEA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 314 Fed. Appx. 700.

No. 09–10472. KELLY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 592 F. 3d 586.

No. 09–10473. COOK *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 594 F. 3d 883.

No. 09–10474. PENA-SANDOVAL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 362 Fed. Appx. 421.

No. 09–10476. LEWIS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 593 F. 3d 765.

No. 09–10478. BLAGROVE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 363 Fed. Appx. 235.

No. 09–10479. TRIPODIS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 362 Fed. Appx. 967.

No. 09–10482. ROBINSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 352 Fed. Appx. 27.

No. 09–10483. RAY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 363 Fed. Appx. 311.

No. 09–10486. GUTIERREZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 363 Fed. Appx. 500.

No. 09–10487. HARRIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 357 Fed. Appx. 893.

No. 09–10489. NOWELL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 09–10490. YOUSEF *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 357 Fed. Appx. 147.

No. 09–10493. JONES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 370 Fed. Appx. 577.

No. 09–10498. MEDINA-VILLEGAS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 585 F. 3d 453.

No. 09–10499. AVELAR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 363 Fed. Appx. 501.

No. 09–10501. AGUILAR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 363 Fed. Appx. 496.

No. 09–10502. MINER *v.* HOLLINGSWORTH, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 09–10507. MANSUR *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 375 Fed. Appx. 458.

No. 09–10508. MARTINEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 365 Fed. Appx. 550.

No. 09–10510. SOLIZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 363 Fed. Appx. 536.

No. 09–10512. WOMACK *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 364 Fed. Appx. 560.

No. 09–10513. TURNER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 09–10515. DEAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 363 Fed. Appx. 179.

No. 09–10518. BARNES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 358 Fed. Appx. 412.

No. 09–10521. CAWTHON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 356 Fed. Appx. 345.

No. 09–10523. CROCKETT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 09–1186. FERGUSON ET AL. *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. Reported below: 580 F. 3d 1183.

No. 09–1196. CAPOGROSSO *v.* NEW YORK STATE COMMISSION ON JUDICIAL CONDUCT ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 352 Fed. Appx. 456.

No. 09–9940. JONES *v.* ARMSTRONG. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 367 Fed. Appx. 256.

No. 09–10434. GARDNER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 602 F. 3d 97.

Rehearing Denied

No. 09–975. PETERSON *v.* PDQ FOOD STORES INC. ET AL., 559 U. S. 1069;

No. 09–8136. HENDERSON *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 559 U. S. 975;

No. 09–8192. HINTON *v.* MCQUILLAN ET AL., 559 U. S. 977;

No. 09–8314. RUFFIN *v.* DIGUGLIELMO, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD, ET AL., 559 U. S. 953;

No. 09–8349. KELLEY *v.* TEXAS WORKFORCE COMMISSION ET AL., 559 U. S. 993;

No. 09–8533. LAFAVORS *v.* FLORIDA DEPARTMENT OF CORRECTIONS, 559 U. S. 1011;

No. 09–8868. MANNIX *v.* PRATHER ET AL., 559 U. S. 1050;

No. 09–9089. ADAMS *v.* MICHIGAN, 559 U. S. 1053;

No. 09–9286. RICHARD *v.* PENNSYLVANIA, 559 U. S. 1077;

No. 09–9354. BANEY *v.* DEPARTMENT OF JUSTICE, 559 U. S. 1054;

No. 09–9372. LINDSEY *v.* DAIMLERCHRYSLER CORP., 559 U. S. 1054; and

No. 09–9454. GONZALES *v.* UNITED STATES, 559 U. S. 1056. Petitions for rehearing denied.

No. 08–10586. THORNE *v.* LARKINS, WARDEN, 558 U. S. 844; and

No. 09–8283. BAUM *v.* RUSHTON, WARDEN, 559 U. S. 979. Motions for leave to file petitions for rehearing denied.

JUNE 7, 2010

Appeal Dismissed

No. 09–797. RODEARMEL *v.* CLINTON, SECRETARY OF STATE, ET AL. Appeal from D. C. D. C. The District Court dismissed for lack of standing, 666 F. Supp. 2d 123, 127–131, and n. 10 (DC 2009), so it did not enter "any interlocutory or final judgment, decree, or order upon the validity of the appointment and continuance in office of the Secretary of State under article I, section 6, clause 2, of the Constitution." Joint Resolution on Compensation and Other Emoluments Attached to the Office of Secretary of State, § 1(b)(3)(A), Pub. L. 110–455, 122 Stat. 5036, note following 5 U. S. C. § 5312. Appeal dismissed for want of jurisdiction. Reported below: 666 F. Supp. 2d 123.

Certiorari Granted—Vacated and Remanded

No. 08–10318. AKERS *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 *Carr* v. *United States*, *ante*, p. 438.

Certiorari Dismissed

No. 09–9991. MCCRAY *v.* BOOKER. Ct. App. Tex., 9th Dist. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 09–10040. BARBOUR *v.* WALLENS RIDGE STATE PRISON. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 371 Fed. Appx. 396.

No. 09–10619. ROGERS *v.* SCHAPIRO, CHAIRMAN, SECURITIES AND EXCHANGE COMMISSION, ET AL. C. A. D. C. Cir. Motion

of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) *(per curiam)*. JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein.

*Question Certified.** (See No. 09–940, *ante*, p. 558.)

Miscellaneous Orders

No. 09A1080. BENTON *v.* CORY. Application for stay, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. 09M99. ROBERTSON *v.* FRANCHOT ET AL.; and

No. 09M100. GRAF *v.* MEE, ADMINISTRATOR, EAST JERSEY STATE PRISON, ET AL. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 09M101. HERNANDEZ *v.* ASTRUE, COMMISSIONER OF SOCIAL SECURITY. Motion to direct the Clerk to file petition for writ of certiorari out of time under this Court's Rule 14.5 denied.

No. 09–9994. GERMAINE *v.* ST. GERMAINE. Dist. Ct. App. Fla., 4th Dist.;

No. 09–9995. GOSS *v.* FLORIDA UNEMPLOYMENT APPEALS COMMISSION ET AL. Sup. Ct. Fla.; and

No. 09–10032. SHAHIN *v.* DARLING ET AL. C. A. 3d Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until June 28, 2010, 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. 09–10677. IN RE WILLIAMS; and

No. 09–10745. IN RE MARCUM. Petitions for writs of habeas corpus denied.

No. 09–10026. IN RE JONES; and

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*[REPORTER'S NOTE: This is a new category for summary dispositions. Cf. Reporter's Note, 398 U. S. 901.]

No. 09–10363. IN RE MAYWEATHER. Petitions for writs of mandamus denied.

No. 09–10041. IN RE BERTHEY. Petition for writ of mandamus and/or prohibition denied.

Certiorari Denied

No. 09–636. SHABAZ *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 579 F. 3d 815.

No. 09–803. DENSON ET AL. *v.* UNITED STATES ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 574 F. 3d 1318.

No. 09–852. SCHOOL DISTRICT OF THE CITY OF PONTIAC ET AL. *v.* DUNCAN, SECRETARY OF EDUCATION. C. A. 6th Cir. Certiorari denied. Reported below: 584 F. 3d 253.

No. 09–948. JONES, DIRECTOR, OKLAHOMA DEPARTMENT OF CORRECTIONS *v.* WILLIAMS. C. A. 10th Cir. Certiorari denied. Reported below: 571 F. 3d 1086.

No. 09–963. LUGOVYJ *v.* HOLDER, ATTORNEY GENERAL. C. A. 6th Cir. Certiorari denied. Reported below: 353 Fed. Appx. 8.

No. 09–1077. SEACOR MARINE LLC *v.* GRAND ISLE SHIPYARD, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 589 F. 3d 778.

No. 09–1198. WILLIAMS *v.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA ET AL.; and WILLIAMS *v.* CLARK COUNTY PUBLIC ADMINISTRATOR ET AL. C. A. 9th Cir. Certiorari denied.

No. 09–1199. BAPTE ET AL. *v.* WEST CARIBBEAN AIRWAYS ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 584 F. 3d 1052.

No. 09–1202. KIM *v.* CITY OF FEDERAL WAY, WASHINGTON. C. A. 9th Cir. Certiorari denied. Reported below: 357 Fed. Appx. 871.

No. 09–1206. CAMPOS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 09–1217. Biliski *v.* Red Clay Consolidated School District Board of Education et al. C. A. 3d Cir. Certiorari denied. Reported below: 574 F. 3d 214.

No. 09–1221. Shugart et al. *v.* Chapman, Secretary of State of Alabama. C. A. 11th Cir. Certiorari denied. Reported below: 366 Fed. Appx. 4.

No. 09–1223. Libertarian Party et al. *v.* Dardenne, Secretary of State of Louisiana. C. A. 5th Cir. Certiorari denied. Reported below: 595 F. 3d 215.

No. 09–1237. Hart *v.* Hodges et al. C. A. 11th Cir. Certiorari denied. Reported below: 587 F. 3d 1288.

No. 09–1243. United States ex rel. Brown *v.* Walt Disney World Co. et al. C. A. 11th Cir. Certiorari denied. Reported below: 361 Fed. Appx. 66.

No. 09–1265. Arnesen *v.* Shinseki, Secretary of Veterans Affairs. C. A. Fed. Cir. Certiorari denied.

No. 09–1269. Hole et al. *v.* Texas A&M University et al. C. A. 5th Cir. Certiorari denied. Reported below: 360 Fed. Appx. 571.

No. 09–1275. Justice *v.* McConnell et al. C. A. 9th Cir. Certiorari denied.

No. 09–1281. Bauder *v.* Kentucky. Sup. Ct. Ky. Certiorari denied. Reported below: 299 S. W. 3d 588.

No. 09–1282. US Technology Corp. *v.* Johnson et al. C. A. 6th Cir. Certiorari denied. Reported below: 361 Fed. Appx. 629.

No. 09–1289. McGee *v.* Bartow, Director, Wisconsin Resource Center. C. A. 7th Cir. Certiorari denied. Reported below: 593 F. 3d 556.

No. 09–1290. Taylor *v.* Judicial Inquiry and Review Commission of Virginia. Sup. Ct. Va. Certiorari denied. Reported below: 278 Va. 699, 685 S. E. 2d 51.

No. 09–1300. Turner *v.* Tennessee. Sup. Ct. Tenn. Certiorari denied. Reported below: 305 S. W. 3d 508.

No. 09–1301. CECENA ET UX. *v.* ALLSTATE INSURANCE CO. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 358 Fed. Appx. 798.

No. 09–1317. DEHLINGER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 368 Fed. Appx. 439.

No. 09–1337. MCNEAL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 364 Fed. Appx. 214.

No. 09–1349. MORENO *v.* UNITED STATES. C. A. Armed Forces. Certiorari denied. Reported below: 69 M. J. 36.

No. 09–1352. PLASKETT *v.* UNITED STATES ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 355 Fed. Appx. 639.

No. 09–1355. LEE *v.* POTTER, POSTMASTER GENERAL. C. A. 9th Cir. Certiorari denied. Reported below: 358 Fed. Appx. 966.

No. 09–7895. ZUNIGA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 579 F. 3d 845.

No. 09–8506. JOHNSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 348 Fed. Appx. 468.

No. 09–8579. JAUREGUI *v.* KUTINA. Ct. App. Cal., 4th App. Dist., Div. 1. Certiorari denied.

No. 09–8988. VAUGHN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 585 F. 3d 1024.

No. 09–9181. SHOEMAKE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 09–9396. MOORE *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 293 Conn. 781, 981 A. 2d 1030.

No. 09–9629. KELLY *v.* MOSER, PATTERSON AND SHERIDAN, LLP, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 348 Fed. Appx. 746.

No. 09–9881. SEMLER *v.* KLANG ET AL. C. A. 8th Cir. Certiorari denied.

No. 09–9884. SMITH *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 227 Ore. App. 289, 205 P. 3d 890.

No. 09–9959. PETIT-HOMME *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 09–9965. HAMMERLORD *v.* CITY OF SAN DIEGO, CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied.

No. 09–9969. KAUFMAN *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 09–9970. SWAMYNATHAN *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 236 Ill. 2d 103, 923 N. E. 2d 276.

No. 09–9973. AMAR *v.* HILLCREST JEWISH CENTER. C. A. 2d Cir. Certiorari denied.

No. 09–9974. ARTIS *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 09–9980. DIXON *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 332 Fed. Appx. 819.

No. 09–9982. CROSS *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 356 Fed. Appx. 724.

No. 09–9996. PETZOLD *v.* JONES, DIRECTOR, OKLAHOMA DEPARTMENT OF CORRECTIONS. C. A. 10th Cir. Certiorari denied. Reported below: 349 Fed. Appx. 295.

No. 09–9999. JOHNSON *v.* TEXAS BOARD OF PARDONS AND PAROLES. C. A. 5th Cir. Certiorari denied. Reported below: 362 Fed. Appx. 416.

No. 09–10000. LARSON *v.* MCDONALD, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 09–10003. WACKERLY *v.* WORKMAN, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 580 F. 3d 1171.

No. 09–10009. GIOVANAZZI, CO-TRUSTEE OF THE AIDA MADELINE LEBBOS TRUST II *v.* SCHUETTE ET AL. C. A. 9th Cir. Certiorari denied.

No. 09–10010. INGLE *v.* DEUTSCHE BANK NATIONAL TRUST CO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 09–10017. ESPINOZA *v.* KERNAN, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 362 Fed. Appx. 704.

No. 09–10018. MITCHELL *v.* AKAL SECURITY INC. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 358 Fed. Appx. 932.

No. 09–10021. PIGG *v.* BASINGER. C. A. 7th Cir. Certiorari denied.

No. 09–10023. MOON *v.* MCINTYRE ET AL. C. A. 6th Cir. Certiorari denied.

No. 09–10024. MORREO *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist., Div. 1. Certiorari denied.

No. 09–10025. YSAIS *v.* NEW MEXICO CHILDREN, YOUTH AND FAMILIES DEPARTMENT ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 353 Fed. Appx. 159.

No. 09–10035. PEARSON *v.* VILLAGE OF GREENUP, ILLINOIS, ET AL. C. A. 7th Cir. Certiorari denied.

No. 09–10036. ZAKRZEWSKI *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 573 F. 3d 1210.

No. 09–10042. ORME *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 25 So. 3d 536.

No. 09–10044. SERRANO *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 15 So. 3d 629.

No. 09–10045. SHAW *v.* UNIVERSITY OF TEXAS MEDICAL BRANCH ET AL. C. A. 5th Cir. Certiorari denied.

No. 09–10046. SALAHUDDIN, AKA SALADIN *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 09–10047. STANKO *v.* PATTON ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 357 Fed. Appx. 738.

No. 09–10051. MULLALY *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 29 So. 3d 295.

No. 09–10052. POLLY *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 09–10065. NELSON *v.* TEXAS. Ct. App. Tex., 7th Dist. Certiorari denied. Reported below: 297 S. W. 3d 424.

No. 09–10069. TOWNSEND *v.* BANG ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 356 Fed. Appx. 908.

No. 09–10091. HAWTHONE *v.* ARKANSAS ET AL. C. A. 8th Cir. Certiorari denied.

No. 09–10101. MASON *v.* INVISION, LLC, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 347 Fed. Appx. 257.

No. 09–10133. TORRES *v.* BENEDETTI, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 09–10172. JAMES *v.* CATE, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 360 Fed. Appx. 939.

No. 09–10321. MORROW *v.* HOREL, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 09–10344. DARBY *v.* SOUTH CAROLINA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 355 Fed. Appx. 751.

No. 09–10345. CASCIO *v.* LAWLER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 09–10377. DOSTER *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 303 S. W. 3d 720.

No. 09–10383. BARRAZA *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 125 Nev. 1018, 281 P. 3d 1153.

No. 09–10388. MURRELL *v.* SHINSEKI, SECRETARY OF VETERANS AFFAIRS. C. A. Fed. Cir. Certiorari denied. Reported below: 334 Fed. Appx. 324.

No. 09–10390. VERBAL *v.* ANDERSON, ADMINISTRATOR, PASQUOTANK CORRECTIONAL INSTITUTION. C. A. 4th Cir. Certiorari denied. Reported below: 361 Fed. Appx. 487.

No. 09–10397. ALEXANDER *v.* COLORADO. Ct. App. Colo. Certiorari denied.

No. 09–10569. HENRY *v.* MENDOZA-POWERS, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 367 Fed. Appx. 741.

No. 09–10589. CROTTE SAINEZ *v.* VENABLES. C. A. 9th Cir. Certiorari denied. Reported below: 588 F. 3d 713.

No. 09–10590. ROZIER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 598 F. 3d 768.

No. 09–10597. RHODE *v.* HALL, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 582 F. 3d 1273.

No. 09–10600. ANDERSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 365 Fed. Appx. 17.

No. 09–10608. MAGANA-COLIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 359 Fed. Appx. 837.

No. 09–10618. RICHARDSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 352 Fed. Appx. 47.

No. 09–10620. REEDER ET VIR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 09–10624. SIGUENZA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 361 Fed. Appx. 483.

No. 09–10627. SOTO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 374 Fed. Appx. 785.

No. 09–10629. HODGE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 594 F. 3d 614.

No. 09–10630. GOODWIN *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 594 F. 3d 1.

No. 09–10631. GOENAGA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 363 Fed. Appx. 885.

No. 09–10632. HEADMAN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 594 F. 3d 1179.

No. 09–10633. POUNDS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 364 Fed. Appx. 362.

No. 09–10634. PETERS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 364 Fed. Appx. 897.

No. 09–10638. WILLIAMS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 363 Fed. Appx. 707.

No. 09–10639. BARBOZA DELGADO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 361 Fed. Appx. 562.

No. 09–10644. ROUNDTREE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 09–10645. WILLIAMS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 363 Fed. Appx. 504.

No. 09–10647. RATLIFF *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 376 Fed. Appx. 830.

No. 09–10651. BURNAM *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 363 Fed. Appx. 970.

No. 09–10652. BROOKS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 594 F. 3d 488.

No. 09–1097. PECK, A MINOR, BY AND THROUGH HIS PARENTS AND NEXT FRIENDS, PECK ET AL. *v.* BALDWINSVILLE CENTRAL SCHOOL DISTRICT ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 351 Fed. Appx. 477.

No. 09–1231. ZHANG *v.* HOLDER, ATTORNEY GENERAL. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 358 Fed. Appx. 216.

No. 09–1356. DHAFIR *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 577 F. 3d 411 and 342 Fed. Appx. 702.

No. 09–9634. WROTTEN *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 14 N. Y. 3d 33, 923 N. E. 2d 1099.

Statement of JUSTICE SOTOMAYOR respecting the denial of the petition for writ of certiorari.

This case presents the question whether petitioner's rights under the Confrontation Clause of the Sixth Amendment, as applied to the States through the Fourteenth Amendment, were violated when the State introduced testimony at his trial via a two-way video that enabled the testifying witness to see and respond to those in the courtroom, and vice versa. The question is an important one, and it is not obviously answered by *Maryland* v. *Craig*, 497 U. S. 836 (1990). We recognized in that case that "a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial," but "only where denial of such confrontation is necessary to further an important public policy." *Id.*, at 850. In so holding, we emphasized that "[t]he requisite finding of necessity must of course be a case-specific one." *Id.*, at 855. Because the use of video testimony in this case arose in a strikingly different context than in *Craig*, it is not clear that the latter is controlling.

The instant petition, however, reaches us in an interlocutory posture. The New York Court of Appeals remanded to the Appellate Division for further review, including of factual questions relevant to the issue of necessity. 14 N. Y. 3d 33, 40, 923 N. E. 2d 1099, 1103 (2009). Granting the petition for certiorari at this time would require us to resolve the threshold question whether the Court of Appeals' decision constitutes a "[f]inal judgmen[t]" under 28 U. S. C. § 1257(a). Moreover, even if we found the judgment final, in reviewing the case at this stage we would not have the benefit of the state courts' full consideration.

In light of the procedural difficulties that arise from the interlocutory posture, I agree with the Court's decision to deny the petition for certiorari. But following the example of some of my colleagues, "I think it appropriate to emphasize that the Court's action does not constitute a ruling on the merits and certainly does not represent an expression of any opinion concerning" the importance of the question presented. *Moreland* v. *Federal Bureau of Prisons*, 547 U. S. 1106, 1107 (2006) (STEVENS, J., statement respecting denial of certiorari).

No. 09–10614. BRENS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 376 Fed. Appx. 38.

No. 09–10646. STONE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 354 Fed. Appx. 547.

Rehearing Denied

No. 08–8379. COOKSEY *v.* MCELROY ET AL., 556 U. S. 1156;
No. 09–985. IN RE PATTERSON, 559 U. S. 1066;
No. 09–8206. MERCER *v.* VIRGINIA, 559 U. S. 1072;
No. 09–8272. RIVERA *v.* UNITED STATES, 559 U. S. 952;
No. 09–8582. TEAGUE *v.* NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, 559 U. S. 1012;
No. 09–8717. SHERIFF *v.* ACCELERATED RECEIVABLES SOLUTIONS ET AL., 559 U. S. 1038;
No. 09–8739. ATHERTON *v.* DISTRICT OF COLUMBIA OFFICE OF THE MAYOR ET AL., 559 U. S. 1039;
No. 09–8771. COLLAZO *v.* TEXAS, 559 U. S. 1039;
No. 09–8773. OWENS *v.* JONES, SUPERINTENDENT, HYDE CORRECTIONAL INSTITUTION, 559 U. S. 1039;
No. 09–8918. BENJAMIN *v.* WALLACE ET AL., 559 U. S. 1051;
No. 09–8947. RICHARDS-JOHNSON *v.* AMERICAN EXPRESS CO., 559 U. S. 1051;
No. 09–9075. BALL *v.* BALL ET AL.; and BALL *v.* BLUNT ET AL., 559 U. S. 1074;
No. 09–9109. HODGE *v.* PARKER, WARDEN, 559 U. S. 1075;
No. 09–9145. SHOVE *v.* WONG, WARDEN, 559 U. S. 1094;
No. 09–9155. SEMLER *v.* LUDEMAN ET AL., 559 U. S. 1053;
No. 09–9230. GRANDOIT *v.* LIBERTY MUTUAL INSURANCE CO., 559 U. S. 1096;
No. 09–9277. IN RE SANDERS, 559 U. S. 1091;
No. 09–9279. RAY *v.* MISSOURI, 559 U. S. 1077;
No. 09–9391. HALL *v.* VIRGINIA, 559 U. S. 1078;
No. 09–9460. IN RE YORK, 559 U. S. 1036;
No. 09–9639. YOUNG *v.* RHODE ISLAND ET AL., 559 U. S. 1099; and
No. 09–9726. SMALL *v.* BODISON, WARDEN, 559 U. S. 1099. Petitions for rehearing denied.

JUNE 8, 2010

Miscellaneous Order

No. 09A1163. MCCOMISH ET AL. *v.* BENNETT, SECRETARY OF STATE OF ARIZONA, ET AL. Application to vacate the stay of the

District Court's injunction and to stay the mandate of the United States Court of Appeals for the Ninth Circuit in case No. 10–15165, presented to JUSTICE KENNEDY, and by him referred to the Court, granted pending the timely filing and disposition of a petition for writ of certiorari. Should the petition for writ of certiorari be denied, this order shall terminate automatically. In the event the petition for writ of certiorari is granted, the order shall terminate upon the sending down of the judgment of this Court.

JUNE 9, 2010

Certiorari Denied

No. 09–11271 (09A1198). FORD *v.* UPTON, WARDEN. Super. Ct. Butts County, Ga. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Certiorari denied.

JUNE 10, 2010

Certiorari Denied

No. 09–11253 (09A1199). PARKER *v.* ALABAMA. Sup. Ct. Ala. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Certiorari denied. Reported below: 610 So. 2d 1181.

JUNE 14, 2010

Certiorari Dismissed

No. 09–10070. MATTHEWS *v.* UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 09–10141. FENLON *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, ET AL. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 350 Fed. Appx. 931.

No. 09–10184. THOMAS *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 09–10217. JOHNSON *v.* TEXAS. Ct. Crim. App. Tex. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 09–10220. BARBOUR *v.* VIRGINIA DEPARTMENT OF CORRECTIONS; BARBOUR *v.* VIRGINIA DEPARTMENT OF CORRECTIONS AT WALLENS RIDGE STATE PRISON; BARBOUR *v.* VIRGINIA DEPARTMENT OF CORRECTIONS EDUCATION; BARBOUR *v.* VIRGINIA DEPARTMENT OF CORRECTIONS AT WALLENS RIDGE STATE PRISON; and BARBOUR *v.* VIRGINIA DEPARTMENT OF CORRECTIONS ET AL. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 09–10284. BARBOUR *v.* DURHAM ET AL. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 09–10659. DRABOVSKIY *v.* YOUNG, WARDEN. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) *(per curiam)*. JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein.

Miscellaneous Orders

No. D–2469. IN RE DISCIPLINE OF BYRD. Ralph T. Byrd, of Laytonsville, Md., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 09M102. NOBLE *v.* UNITED STATES. Motion for leave to proceed *in forma pauperis* without an affidavit of indigency executed by petitioner denied.

No. 09–9281. SHAHIN *v.* DELAWARE ET AL. C. A. 3d Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [559 U. S. 1091] denied.

No. 09–10203. MITRANO *v.* DISTRICT OF COLUMBIA BAR. C. A. D. C. Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until July 6, 2010, 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. 09–10841. IN RE WOLTZ; and

No. 09–10960. IN RE CASILLAS. Petitions for writs of habeas corpus denied.

No. 09–10854. IN RE VAN BUREN. Petition for writ of mandamus denied.

Probable Jurisdiction Postponed

No. 09–1233. SCHWARZENEGGER, GOVERNOR OF CALIFORNIA *v.* PLATA ET AL. Appeal from D. C. E. D. & D. C. N. D. Cal. Further consideration of question of jurisdiction postponed to hearing of case on the merits.

Certiorari Granted

No. 09–520. CSX TRANSPORTATION, INC. *v.* ALABAMA DEPARTMENT OF REVENUE ET AL. C. A. 11th Cir. Certiorari granted limited to the following question: "Whether a State's exemptions of rail carrier competitors, but not rail carriers, from generally applicable sales and use taxes on fuel subject the taxes to challenge under 49 U. S. C. § 11501(b)(4) as 'another tax that discriminates against a rail carrier.'" Reported below: 350 Fed. Appx. 318.

No. 09–1088. CULLEN, ACTING WARDEN *v.* PINHOLSTER. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 590 F. 3d 651.

No. 09–1156. MATRIXX INITIATIVES, INC., ET AL. *v.* SIRACUSANO ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 585 F. 3d 1167.

Certiorari Denied

No. 08–11034. TABLADA *v.* THOMAS, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 533 F. 3d 800.

No. 09–866. PENDERGRASS *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 913 N. E. 2d 703.

No. 09–992. PARLAK *v.* HOLDER, ATTORNEY GENERAL. C. A. 6th Cir. Certiorari denied. Reported below: 578 F. 3d 457.

No. 09–1074. JUSTICE ET AL. *v.* TOWN OF CICERO, ILLINOIS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 577 F. 3d 768.

No. 09–1079. RIVAS-RODRIGUEZ *v.* HOLDER, ATTORNEY GENERAL. C. A. 4th Cir. Certiorari denied. Reported below: 355 Fed. Appx. 740.

No. 09–1098. LEVINE *v.* GREECE CENTRAL SCHOOL DISTRICT ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 353 Fed. Appx. 461.

No. 09–1213. LAMB *v.* NORTH DAKOTA STATE BOARD OF LAW EXAMINERS. Sup. Ct. N. D. Certiorari denied. Reported below: 777 N. W. 2d 343.

No. 09–1219. BAILEY *v.* CALDWELL, PERSONAL REPRESENTATIVE OF THE ESTATE OF BAILEY. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 27 So. 3d 31.

No. 09–1222. SINGH *v.* REED ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 344 Fed. Appx. 314.

No. 09–1225. WILLIAMS *v.* GOVERNMENT OF VIRGIN ISLANDS BOARD OF MEDICAL EXAMINERS ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 360 Fed. Appx. 297.

No. 09–1226. SOWERS *v.* POWHATAN COUNTY, VIRGINIA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 347 Fed. Appx. 898.

No. 09–1228. KIRKLAND *v.* GUARDIAN LIFE INSURANCE COMPANY OF AMERICA. C. A. 11th Cir. Certiorari denied. Reported below: 352 Fed. Appx. 293.

No. 09–1234. CHONTOS *v.* BERGHUIS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 585 F. 3d 1000.

No. 09–1240. DOUGLAS ASPHALT CO. ET AL. *v.* ARCH INSURANCE CO. C. A. 11th Cir. Certiorari denied. Reported below: 361 Fed. Appx. 103.

No. 09–1249. HARRIS *v.* WITTMAN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 590 F. 3d 730.

No. 09–1251. PRADHAN *v.* HOLDER, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied. Reported below: 352 Fed. Appx. 205.

No. 09–1264. MCNEIL *v.* HOLDER, ATTORNEY GENERAL. C. A. 3d Cir. Certiorari denied. Reported below: 344 Fed. Appx. 814.

No. 09–1340. RICHMAN, SPECIAL ADMINISTRATOR OF THE ESTATE OF RICHMAN, DECEASED *v.* BURGESON ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 358 Fed. Appx. 682.

No. 09–1369. CANO *v.* GEITHNER, SECRETARY OF THE TREASURY. C. A. 8th Cir. Certiorari denied. Reported below: 354 Fed. Appx. 283.

No. 09–1382. HAHN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 09–1385. ROSSI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 592 F. 3d 372.

No. 09–8722. SANTORO *v.* WELLS, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 09–8948. JOHNSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 581 F. 3d 320.

No. 09–9032. DOTSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 351 Fed. Appx. 931.

No. 09–9480. ELLMAKER *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 289 Kan. 1132, 221 P. 3d 1105.

No. 09–9635. WILLIAMS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 301 S. W. 3d 675.

No. 09–10067. MILLS *v.* BELLNIER, SUPERINTENDENT, UPSTATE CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 09–10068. MOORE *v.* CALIFORNIA FRANCHISE TAX BOARD. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 09–10071. Ochoa Canales *v.* Thaler, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied.

No. 09–10075. Flaherty *v.* Texas. Ct. Crim. App. Tex. Certiorari denied.

No. 09–10076. Williams *v.* Harrison, Warden. C. A. 9th Cir. Certiorari denied. Reported below: 368 Fed. Appx. 764.

No. 09–10080. Torres *v.* United States Court of Appeals for the Ninth Circuit et al. C. A. 9th Cir. Certiorari denied.

No. 09–10081. George *v.* Smith, Warden. C. A. 7th Cir. Certiorari denied. Reported below: 586 F. 3d 479.

No. 09–10083. Govan *v.* Singleton et al. C. A. 4th Cir. Certiorari denied. Reported below: 347 Fed. Appx. 970.

No. 09–10084. Hindaoui *v.* Thaler, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied.

No. 09–10085. Hearns *v.* Wolfenbarger, Warden. C. A. 6th Cir. Certiorari denied.

No. 09–10086. Fisher *v.* Cain, Warden. C. A. 5th Cir. Certiorari denied.

No. 09–10087. Grimes *v.* McNeil, Secretary, Florida Department of Corrections, et al. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 23 So. 3d 1184.

No. 09–10095. Hall *v.* Thaler, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied.

No. 09–10096. Hurt-Whitmire *v.* Georgia et al. C. A. 11th Cir. Certiorari denied. Reported below: 336 Fed. Appx. 882.

No. 09–10102. Jones *v.* DiGuglielmo, Superintendent, State Correctional Institution at Graterford, et al. C. A. 3d Cir. Certiorari denied.

No. 09–10107. Allen *v.* Stewart Title Guaranty Co. C. A. 5th Cir. Certiorari denied.

No. 09–10112. HILL *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 09–10114. BROWN *v.* UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT. C. A. 9th Cir. Certiorari denied.

No. 09–10117. NYAMBAL *v.* MILLER ET AL. Sup. Ct. Va. Certiorari denied.

No. 09–10118. BEIGHTLER *v.* SUNTRUST BANKS, INC. C. A. 6th Cir. Certiorari denied.

No. 09–10119. BEIGHTLER *v.* OFFICE OF THE ESSEX COUNTY PROSECUTOR ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 342 Fed. Appx. 829.

No. 09–10121. HURNS *v.* ANDERSON, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY. C. A. 5th Cir. Certiorari denied.

No. 09–10123. FUSELIER *v.* MANCUSO ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 354 Fed. Appx. 49.

No. 09–10124. HENDERSON *v.* ALEXANDER & BALDWIN, INC., DBA HAWAIIAN COMMERCIAL & SUGAR CO., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 362 Fed. Appx. 594.

No. 09–10125. FOSTER *v.* MERAZ ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 332 Fed. Appx. 433.

No. 09–10128. HOUSTON *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 09–10132. TOLIVER *v.* TEXAS. Ct. App. Tex., 6th Dist. Certiorari denied. Reported below: 279 S. W. 3d 391.

No. 09–10134. HARRIS *v.* GUTIERREZ ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 343 Fed. Appx. 374.

No. 09–10136. HERNANDEZ *v.* HARTLEY, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 09–10138. HERNANDEZ *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 22 So. 3d 67.

No. 09–10142. HEDGESPETH *v.* HENDRICKS ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 340 Fed. Appx. 767.

No. 09–10143. HUGHES *v.* POTTER, POSTMASTER GENERAL, ET AL. C. A. 8th Cir. Certiorari denied.

No. 09–10149. WILLIS *v.* GRAHAM, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied.

No. 09–10151. WINSTON *v.* GRICE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 353 Fed. Appx. 815.

No. 09–10152. QIAN ZHAO *v.* HOLDER, ATTORNEY GENERAL. C. A. 5th Cir. Certiorari denied. Reported below: 356 Fed. Appx. 749.

No. 09–10154. TOLBERT *v.* STANG ET AL. C. A. 9th Cir. Certiorari denied.

No. 09–10155. WOODRUFF *v.* ILLINOIS DEPARTMENT OF CORRECTIONS ET AL. C. A. 7th Cir. Certiorari denied.

No. 09–10156. WILLIAMS *v.* AYERS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 09–10163. GRAY *v.* KERNAN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 09–10167. PRIETO *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 278 Va. 366, 682 S. E. 2d 910.

No. 09–10171. JACKSON *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 25 So. 3d 518.

No. 09–10173. KELLER *v.* FLORIDA. C. A. 11th Cir. Certiorari denied.

No. 09–10174. KRIST *v.* TEXAS DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES. Ct. App. Tex., 4th Dist. Certiorari denied.

No. 09–10175. MUNIZ *v.* KASPAR ET AL. C. A. 10th Cir. Certiorari denied.

No. 09–10176. DELGADO PEREZ *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 09–10183. WISE *v.* SOUTH CAROLINA DEPARTMENT OF CORRECTIONS. Sup. Ct. S. C. Certiorari denied.

No. 09–10185. TAYLOR *v.* WILLIAMS, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 363 Fed. Appx. 546.

No. 09–10194. BARNES *v.* ROPER, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 09–10195. PERRY *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 09–10201. LEVI *v.* ANHEUSER-BUSCH COS., INC., ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 360 Fed. Appx. 708.

No. 09–10202. PROCTOR *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 125 Nev. 1070, 281 P. 3d 1210.

No. 09–10208. REDMAN *v.* GRAHAM ET AL. C. A. D. C. Cir. Certiorari denied.

No. 09–10210. ELLIS *v.* MARIETTA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 333 Fed. Appx. 751.

No. 09–10222. MUNIZ *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO. C. A. 10th Cir. Certiorari denied.

No. 09–10230. PARKER *v.* ERCOLE, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 09–10232. MCDANIEL *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 393 Ill. App. 3d 1103, 985 N. E. 2d 724.

No. 09–10240. HAKIMI *v.* HOLDER, ATTORNEY GENERAL. C. A. 4th Cir. Certiorari denied. Reported below: 360 Fed. Appx. 497.

No. 09–10247. CARTER *v.* ANDERSON, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 585 F. 3d 1007.

No. 09–10256. KNOWLES *v.* MONTANA ET AL. Sup. Ct. Mont. Certiorari denied. Reported below: 353 Mont. 507, 222 P. 3d 595.

No. 09–10286. DWYER *v.* CITY OF ST. JOSEPH, MISSOURI, ET AL. Sup. Ct. Mo. Certiorari denied.

No. 09–10293. KALU *v.* HOLDER, ATTORNEY GENERAL. C. A. 4th Cir. Certiorari denied. Reported below: 329 Fed. Appx. 462.

No. 09–10314. NELLUMS *v.* NEVEN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 09–10319. MOSLEY *v.* SCRIBNER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 09–10334. ROTEN *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 56 So. 3d 8.

No. 09–10353. CONTANT *v.* HOLDER, ATTORNEY GENERAL, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 352 Fed. Appx. 692.

No. 09–10366. COBURN *v.* LAFLER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 09–10370. CALHOUN *v.* KING COUNTY PROSECUTING ATTORNEY'S OFFICE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 348 Fed. Appx. 299.

No. 09–10380. REBERGER *v.* NEVADA. C. A. 9th Cir. Certiorari denied.

No. 09–10400. ANDERSON *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied.

No. 09–10418. TAYLOR *v.* UNITED STATES. C. A. Armed Forces. Certiorari denied. Reported below: 68 M. J. 236.

No. 09–10447. PECK *v.* NEVEN, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 09–10516. RONWIN *v.* AMEREN, MISSOURI CORP., ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 364 Fed. Appx. 289.

No. 09–10525. GARCIA *v.* SCRIBNER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 09–10526. GASTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 09–10532. CARRILLO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 369 Fed. Appx. 852.

No. 09–10536. MCCANN *v.* TROMBLEY, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 09–10539. JACKSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 363 Fed. Appx. 208.

No. 09–10540. JOHNSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 357 Fed. Appx. 29.

No. 09–10542. LAWSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 368 Fed. Appx. 1.

No. 09–10543. NELSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 363 Fed. Appx. 697.

No. 09–10545. ZIMMERMAN *v.* CASON, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 354 Fed. Appx. 228.

No. 09–10546. WILSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 364 Fed. Appx. 312.

No. 09–10547. TENUTO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 593 F. 3d 695.

No. 09–10548. WHITAKER *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 201 N. C. App. 190, 689 S. E. 2d 395.

No. 09–10554. MERCER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 362 Fed. Appx. 929.

No. 09–10557. BETANCORT-SALAZAR *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 363 Fed. Appx. 412.

No. 09–10561. KINZER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 365 Fed. Appx. 646.

No. 09–10563. COX *v.* SCHWARTZ, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 09–10564. CONTRERAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 367 Fed. Appx. 504.

No. 09–10566. MITCHELL *v.* VASBINDER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 09–10571. PRINCE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 593 F. 3d 1178.

No. 09–10575. VALENZUELA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 09–10577. BOOTH *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 321 Wis. 2d 475, 774 N. W. 2d 475.

No. 09–10578. ARIEGWE *v.* FERRITER, DIRECTOR, MONTANA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied.

No. 09–10579. GIANNONE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 360 Fed. Appx. 473.

No. 09–10581. GILLARD *v.* NORTHWESTERN UNIVERSITY. C. A. 7th Cir. Certiorari denied. Reported below: 366 Fed. Appx. 686.

No. 09–10585. ELLIOTT *v.* DEPARTMENT OF AGRICULTURE. C. A. D. C. Cir. Certiorari denied. Reported below: 596 F. 3d 842.

No. 09–10587. SARTORI *v.* NORTH CAROLINA. Gen. Ct. Justice, Super. Ct. Div., Buncombe County, N. C. Certiorari denied.

No. 09–10591. WILLIS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 362 Fed. Appx. 531.

No. 09–10593. KINARD *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 09–10595. PEREZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 355 Fed. Appx. 286.

No. 09–10602. DOYLE *v.* ARCHULETA ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 370 Fed. Appx. 934.

No. 09–10622. SUAREZ, AKA SOLIS, AKA BARZAGA, AKA VALLADARES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 364 Fed. Appx. 602.

No. 09–10636. TANCHAK ET UX. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 351 Fed. Appx. 729.

No. 09–10642. PITCHFORD *v.* TURBITT, ADMINISTRATIVE JUDGE, MERIT SYSTEMS PROTECTION BOARD. C. A. 8th Cir. Certiorari denied.

No. 09–10661. DE LA CRUZ-DIAZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 364 Fed. Appx. 109.

No. 09–10662. CARDONA-RAMIREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 358 Fed. Appx. 562.

No. 09–10666. QUINONES *v.* OUTLAW, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 366 Fed. Appx. 708.

No. 09–10671. LOPEZ-JACOBO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 357 Fed. Appx. 12.

No. 09–10673. KHAMMANIVONG *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 357 Fed. Appx. 316.

No. 09–10679. TUCKER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 333 Fed. Appx. 747.

No. 09–10680. SANCHEZ-LEYVA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 09–10681. SHENANDOAH *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 595 F. 3d 151.

No. 09–10682. OSAHON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 09–10687. ARROYO-CARBAJAL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 363 Fed. Appx. 308.

No. 09–10688. BARRAZA-MONTES DE OCA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 364 Fed. Appx. 86.

No. 09–10689. VEGA ANGIANO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 602 F. 3d 828.

No. 09–10692. RICE *v.* POTTER, POSTMASTER GENERAL. C. A. 9th Cir. Certiorari denied. Reported below: 347 Fed. Appx. 320.

No. 09–10695. THOMPSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 359 Fed. Appx. 900.

No. 09–10699. NICHOLSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 365 Fed. Appx. 465.

No. 09–10703. SMITH *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 09–10707. MAYES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 364 Fed. Appx. 136.

No. 09–10708. JONES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 09–10714. WILLIAMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 364 Fed. Appx. 41.

No. 09–10716. TOMPKINS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 365 Fed. Appx. 67.

No. 09–10720. ANCHRUM *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 590 F. 3d 795.

No. 09–10721. ANTONUCCI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 09–10722. AS-SADIQ *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 352 Fed. Appx. 796.

No. 09–10725. IRISH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 363 Fed. Appx. 543.

No. 09–10726. HARDISON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 374 Fed. Appx. 427.

No. 09–10728. HAIRSTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 364 Fed. Appx. 11.

No. 09–10729. GERALD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 365 Fed. Appx. 188.

No. 09–10730. FIORELLA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 598 F. 3d 444.

No. 09–10731. FAJARDO-FAJARDO *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 594 F. 3d 1005.

No. 09–10733. NARCE *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 973 A. 2d 733.

No. 09–10735. DELGADO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 353 Fed. Appx. 324.

No. 09–10736. CRUZ *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 595 F. 3d 744.

No. 09–10743. KINSEY *v.* DEPARTMENT OF JUSTICE ET AL. C. A. D. C. Cir. Certiorari denied.

No. 09–10746. VEAL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 348 Fed. Appx. 903.

No. 09–10747. TURNER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 365 Fed. Appx. 918.

No. 09–10748. BURROWES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 09–10749. BARON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 09–10750. SMITH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 358 Fed. Appx. 634.

No. 09–10752. RODRIGUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 365 Fed. Appx. 558.

No. 09–10754. MILLER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 358 Fed. Appx. 750.

No. 09–10756. GONZALEZ-GARZA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 365 Fed. Appx. 588.

No. 09–10757. FLOWERS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 359 Fed. Appx. 742.

No. 09–10759. HARRISON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 350 Fed. Appx. 962.

No. 09–10766. GENTILE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 09–10767. WILLIAMS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 367 Fed. Appx. 578.

No. 09–10768. GARCIA-GRACIAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 329 Fed. Appx. 145.

No. 09–10770. NENNINGER *v.* UNITED STATES FOREST SERVICE ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 353 Fed. Appx. 80.

No. 09–10772. HERDER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 594 F. 3d 352.

No. 09–10773. ROBINSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 357 Fed. Appx. 677.

No. 09–10775. HENOUD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 363 Fed. Appx. 263.

No. 09–10779. SIMMONS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 09–10789. ELLIS *v.* UNITED STATES (Reported below: 365 Fed. Appx. 572); LANDRY *v.* UNITED STATES (366 Fed. Appx. 501); HAYWOOD *v.* UNITED STATES (365 Fed. Appx. 561); POWELL *v.* UNITED STATES (365 Fed. Appx. 597); ROBICHAUX *v.* UNITED STATES (374 Fed. Appx. 478); JONES *v.* UNITED STATES (370 Fed. Appx. 489); RUSSELL *v.* UNITED STATES (369 Fed. Appx. 609); CAO *v.* UNITED STATES (371 Fed. Appx. 477); HILLS *v.* UNITED STATES (371 Fed. Appx. 543); DAVIS *v.* UNITED STATES (371 Fed. Appx. 555); STEVENSON *v.* UNITED STATES (373 Fed. Appx. 524); TAPP *v.* UNITED STATES (375 Fed. Appx. 389); WASHINGTON *v.* UNITED STATES (375 Fed. Appx. 390); HANDY *v.* UNITED STATES (375 Fed. Appx. 398); ALLEN *v.* UNITED STATES (373 Fed. Appx. 523); HUTCHINSON *v.* UNITED STATES (373 Fed. Appx. 536); and DOUGLAS *v.* UNITED STATES (375 Fed. Appx. 387). C. A. 5th Cir. Certiorari denied.

No. 09–10796. LEWIS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 594 F. 3d 1270.

No. 09–10800. GREEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 364 Fed. Appx. 172.

No. 09–10802. SANCHEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 364 Fed. Appx. 393.

No. 09–10803. BYNUM *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 604 F. 3d 161.

No. 09–10804. HERNANDEZ-NAVARRO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 364 Fed. Appx. 173.

No. 09–10815. HYACINTH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 366 Fed. Appx. 132.

No. 09–10816. HICKS *v.* FEDERAL BUREAU OF PRISONS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 358 Fed. Appx. 393.

No. 09–10820. GULLEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 09–10821. HAMILTON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 587 F. 3d 1199.

No. 09–10825. ADLEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 374 Fed. Appx. 891.

No. 09–10842. ROMAN-CARDENAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 366 Fed. Appx. 506.

No. 09–10852. BELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 367 Fed. Appx. 390.

No. 09–10857. DE DIOS MIRANDA MEDRANO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 09–10863. ROMERO-CHAVARRIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 365 Fed. Appx. 587.

No. 09–10864. DARTON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 595 F. 3d 1191.

No. 09–10865. CANO *v.* MIDDLEBROOKS, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 358 Fed. Appx. 107.

No. 09–10875. AGUIRRE-GANCEDA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 592 F. 3d 1043.

No. 09–923. ARAR *v.* ASHCROFT ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 585 F. 3d 559.

No. 09–1027. CITY OF NEW ALBANY, INDIANA *v.* NEW ALBANY DVD, LLC. C. A. 7th Cir. Motions of Indiana Family Institute et al. and International Municipal Lawyers Association for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 581 F. 3d 556.

No. 09–1187. McBrearty et al. *v.* Vanguard Group, Inc., et al. C. A. 2d Cir. Certiorari denied. Justice Alito took no part in the consideration or decision of this petition. Reported below: 353 Fed. Appx. 640.

No. 09–1208. Ryan, Director, Arizona Department of Corrections *v.* Libberton. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 583 F. 3d 1147.

No. 09–9669. Gaines *v.* New York City Transit Authority et al. C. A. 2d Cir. Certiorari denied. Justice Sotomayor took no part in the consideration or decision of this petition. Reported below: 353 Fed. Appx. 509.

No. 09–10528. Gjidija *v.* United States. C. A. 2d Cir. Certiorari denied. Justice Sotomayor took no part in the consideration or decision of this petition. Reported below: 369 Fed. Appx. 282.

No. 09–10693. Worjloh *v.* United States. C. A. 2d Cir. Certiorari denied. Justice Sotomayor took no part in the consideration or decision of this petition. Reported below: 546 F. 3d 104.

No. 09–10799. Johnson *v.* United States. C. A. 2d Cir. Certiorari denied. Justice Sotomayor took no part in the consideration or decision of this petition. Reported below: 365 Fed. Appx. 242.

No. 09–10831. Lluberes *v.* United States. C. A. 2d Cir. Certiorari denied. Justice Sotomayor took no part in the consideration or decision of this petition. Reported below: 372 Fed. Appx. 151.

Rehearing Denied

No. 09–7923. Schwartz *v.* United States, 559 U. S. 1094;

No. 09–9068. Zabriskie *v.* Orlando Police et al., 559 U. S. 1074;

No. 09–9073. Mohammed *v.* Wisconsin Insurance Security Fund et al., 559 U. S. 1074;

No. 09–9080. Judd *v.* New Mexico, 559 U. S. 1075;

No. 09–9167. Semler *v.* Finch, 559 U. S. 1076;

No. 09–9220. Barbour *v.* Schlobohm et al., 559 U. S. 1095;

No. 09–9221. BARBOUR *v.* VIRGINIA DEPARTMENT OF CORRECTIONS ET AL.; BARBOUR *v.* LEGISLATION UPON VIRGINIA DEPARTMENT OF CORRECTIONS; BARBOUR *v.* KEEFFEE COMMISSARIES AT VIRGINIA DEPARTMENT OF CORRECTIONS; BARBOUR *v.* VIRGINIA DEPARTMENT OF CORRECTIONS; BARBOUR *v.* VIRGINIA DEPARTMENT OF CORRECTIONS; BARBOUR *v.* VIRGINIA DEPARTMENT OF CORRECTIONS; BARBOUR *v.* VIRGINIA DEPARTMENT OF CORRECTIONS ET AL.; BARBOUR *v.* VIRGINIA DEPARTMENT OF CORRECTIONS ET AL.; BARBOUR *v.* VIRGINIA DEPARTMENT OF CORRECTIONS; and BARBOUR *v.* REPRESENTATIVE OF THE PERSONS ASSISTANT WARDEN HARVEY, 559 U. S. 1076;

No. 09–9233. GONZALEZ ET UX. *v.* RIDDLE ET AL., 559 U. S. 1096;

No. 09–9255. IN RE HENDERSON, 559 U. S. 1091;

No. 09–9381. BARBOUR *v.* STANFORD ET AL., 559 U. S. 1109;

No. 09–9424. DULAURENCE *v.* LIBERTY MUTUAL INSURANCE CO. ET AL., 559 U. S. 1078;

No. 09–9439. CALLENDER *v.* ROSS STORES, INC., 559 U. S. 1111;

No. 09–9616. AGUILAR *v.* SELMAN BREITZMAN, LLP, ET AL., 559 U. S. 1098;

No. 09–9620. AMR *v.* VIRGINIA STATE UNIVERSITY ET AL., 559 U. S. 1098;

No. 09–9622. MILLER *v.* ANHEUSER BUSCH, INC., 559 U. S. 1099;

No. 09–9717. LAHERA *v.* WALT DISNEY CO. ET AL., 559 U. S. 1084; and

No. 09–9750. IN RE MCCLAIN, 559 U. S. 1066. Petitions for rehearing denied.

JUNE 15, 2010

Certiorari Denied

No. 09–11333 (09A1211). POWELL *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.

JUNE 16, 2010

Dismissals Under Rule 46

No. 09–1009. MARTINEZ SILVA ET UX. *v.* HOLDER, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 329 Fed. Appx. 142.

No. 09–1126. DePree *v.* Saunders et al. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 588 F. 3d 282.

June 17, 2010

Certiorari Denied

No. 09–11378 (09A1222). Gardner *v.* Utah. Sup. Ct. Utah. Application for stay of execution of sentence of death, presented to Justice Sotomayor, and by her referred to the Court, denied. Certiorari denied. Justice Stevens and Justice Breyer would grant the application for stay of execution. See *Johnson* v. *Bredesen*, 558 U. S. 1067, 1067–1068 (2009) (Stevens, J., joined by Breyer, J., respecting denial of certiorari). Reported below: 2010 UT 44, 234 P. 3d 1104, and 2010 UT 46, 234 P. 3d 1115.

No. 09–11439 (09A1229). Gardner *v.* Garner, Chairman, Utah Board of Pardons and Parole, et al. C. A. 10th Cir. Application for stay of execution of sentence of death, presented to Justice Sotomayor, and by her referred to the Court, denied. Certiorari denied.

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