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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 2010

MARCH 22 THROUGH JUNE 6, 2011

CHRISTINE LUCHOK FALLON

REPORTER OF DECISIONS

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Erratum

555 U. S. 500, lines 24 and 27: "Rule 15(b)" should be "Rule 15(d)".

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

JOHN G. ROBERTS, JR., CHIEF JUSTICE.
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CLARENCE THOMAS, ASSOCIATE JUSTICE.
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SUPREME COURT OF THE UNITED STATES

Allotment of Justices

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

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

For the First Circuit, Stephen Breyer, Associate Justice.

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

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

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

For the Fifth Circuit, Antonin Scalia, Associate Justice.

For the Sixth Circuit, Elena Kagan, Associate Justice.

For the Seventh Circuit, Elena Kagan, Associate Justice.

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

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

For the Tenth Circuit, Sonia Sotomayor, Associate Justice.

For the Eleventh Circuit, Clarence Thomas, Associate Justice.

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

September 28, 2010.

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

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 2010

KASTEN *v.* SAINT-GOBAIN PERFORMANCE PLASTICS CORP.

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

No. 09–834. Argued October 13, 2010—Decided March 22, 2011

Petitioner Kasten brought an antiretaliation suit against his former employer, respondent (Saint-Gobain), under the Fair Labor Standards Act of 1938 (Act), which provides minimum wage, maximum hour, and overtime pay rules; and which forbids employers "to discharge . . . any employee because such employee has filed any complaint" alleging a violation of the Act, 29 U. S. C. §215(a)(3). In a related suit the District Court found that Saint-Gobain violated the Act by placing timeclocks in a location that prevented workers from receiving credit for the time they spent donning and doffing work-related protective gear. In this suit Kasten claims that he was discharged because he orally complained to company officials about the timeclocks. The District Court granted Saint-Gobain summary judgment, concluding that the Act's antiretaliation provision did not cover oral complaints. The Seventh Circuit affirmed.

Held: The scope of the statutory term "filed any complaint" includes oral, as well as written, complaints. Pp. 7–17.

(a) The interpretation of the statutory phrase "depends upon reading the whole statutory text, considering the [statute's] purpose and context . . . , and consulting any precedents or authorities that inform the analysis." *Dolan* v. *Postal Service*, 546 U. S. 481, 486. The text, taken

alone, cannot provide a conclusive answer here. Some dictionary definitions of "filed" contemplate a writing while others permit using "file" in conjunction with oral material. In addition to dictionary definitions, state statutes and federal regulations sometimes contemplate oral filings, and contemporaneous judicial usage shows that oral filings were a known phenomenon at the time of the Act's passage. Even if "filed," considered alone, might suggest a narrow interpretation limited to writings, "*any* complaint" suggests a broad interpretation that would include an oral complaint. Thus, the three-word phrase, taken by itself, cannot answer the interpretive question. The Act's other references to "filed" also do not resolve the linguistic question. Some of those provisions involve filed material that is virtually always in writing; others specifically require a writing, and the remainder, like the provision here, leave the oral/written question unresolved. Since "filed any complaint" lends itself linguistically to the broader, "oral" interpretation, the use of broader language in other statutes' antiretaliation provisions does not indicate whether Congress did or did not intend to leave oral grievances unprotected here. Because the text, taken alone, might, or might not, encompass oral complaints, the Court must look further. Pp. 7–11.

(b) Several functional considerations indicate that Congress intended the antiretaliation provision to cover oral, as well as written, complaints. Pp. 11–16.

(1) A narrow interpretation would undermine the Act's basic objective, which is to prohibit "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers," 29 U. S. C. § 202(a). The Act relies for enforcement of its substantive standards on "information and complaints received from employees," *Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361 U. S. 288, 292, and its antiretaliation provision makes the enforcement scheme effective by preventing "fear of economic retaliation" from inducing workers "quietly to accept substandard conditions," *ibid.* Why would Congress want to limit the enforcement scheme's effectiveness by inhibiting use of the Act's complaint procedure by those who would find it difficult to reduce their complaints to writing, particularly the illiterate, less educated, or overworked workers who were most in need of the Act's help at the time of passage? Limiting the provision's scope to written complaints could prevent Government agencies from using hotlines, interviews, and other oral methods to receive complaints. And insofar as the provision covers complaints made to employers, a limiting reading would discourage using informal workplace grievance procedures to secure compliance with the Act. The National Labor Relations Act's antiretaliation provision has been broadly interpreted as protecting workers who simply "participate[d] in a [National Labor Re-

Syllabus

lations] Board investigation." *NLRB* v. *Scrivener*, 405 U. S. 117, 123. The similar enforcement needs of this related statute argue for a broad interpretation of "complaint." The Act's requirement that an employer receive fair notice of an employee's complaint can be met by oral, as well as written, complaints. Pp. 11–14.

(2) Given the delegation of enforcement powers to federal administrative agencies, their views about the meaning of the phrase should be given a degree of weight. The Secretary of Labor has consistently held the view that "filed any complaint" covers both oral and written complaints. The Equal Employment Opportunity Commission has set out a similar view in its Compliance Manual and in multiple briefs. These views are reasonable and consistent with the Act. And the length of time they have been held suggests that they reflect careful consideration, not "*post hoc* rationalizatio[n]." *Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29, 50. Pp. 14–16.

(3) After engaging in traditional statutory interpretation methods, the statute does not remain sufficiently ambiguous to warrant application of the rule of lenity. P. 16.

(c) This Court will not consider Saint-Gobain's alternative claim that the antiretaliation provision applies only to complaints filed with the Government, since that claim was not raised in the certiorari briefs and since its resolution is not a "'predicate to an intelligent resolution'" of the oral/written question at issue, *Caterpillar Inc.* v. *Lewis*, 519 U. S. 61, 75, n. 13. Pp. 16–17.

570 F. 3d 834, vacated and remanded.

BREYER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, GINSBURG, ALITO, and SOTOMAYOR, JJ., joined. SCALIA, J., filed a dissenting opinion, in which THOMAS, J., joined as to all but footnote 6, *post*, p. 17. KAGAN, J., took no part in the consideration or decision of the case.

James H. Kaster argued the cause for petitioner. With him on the briefs were *Adrianna S. Haugen* and *Eric Schnapper*.

Jeffrey B. Wall argued the cause for the United States as *amicus curiae* in support of petitioner. With him on the brief were *Acting Solicitor General Katyal*, *Deputy Solicitor General Kneedler*, *M. Patricia Smith*, *Mary J. Rieser*, and *P. David Lopez*.

Carter G. Phillips argued the cause for respondent. With him on the brief were *Eric D. McArthur*, *Jeffrey A. McIntyre*, *Thomas P. Godar*, and *Barbara J. Zabawa.**

JUSTICE BREYER delivered the opinion of the Court.

The Fair Labor Standards Act of 1938 (Act) sets forth employment rules concerning minimum wages, maximum hours, and overtime pay. 52 Stat. 1060, 29 U. S. C. § 201 *et seq.* The Act contains an antiretaliation provision that forbids employers

> "to discharge or in any other manner discriminate against any employee because such employee has *filed any complaint* or instituted or caused to be instituted any proceeding under or related to [the Act], or has testified or is about to testify in such proceeding, or has served or is about to serve on an industry committee." § 215(a)(3) (emphasis added).

We must decide whether the statutory term "filed any complaint" includes oral as well as written complaints within its scope. We conclude that it does.

I

The petitioner, Kevin Kasten, brought this antiretaliation lawsuit against his former employer, Saint-Gobain Performance Plastics Corporation. Kasten says that Saint-Gobain located its timeclocks between the area where Kasten and

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*Briefs of *amici curiae* urging reversal were filed for the American Federation of Labor and Congress of Industrial Organizations by *Lynn K. Rhinehart*, *James B. Coppess*, and *Matthew J. Ginsburg;* for the Lawyers' Committee for Civil Rights Under Law et al. by *Michael B. de Leeuw*, *Nowles H. Heinrich*, *Sarah Crawford*, *Karen Narasaki*, *Reginald T. Shuford*, and *Dina Lassow;* and for the National Employment Law Project et al. by *Catherine K. Ruckelshaus.*

Rae T. Vann, *Quentin Riegel*, *Karen R. Harned*, and *Elizabeth Milito* filed a brief for the Equal Employment Advisory Council et al. as *amici curiae* urging affirmance.

other workers put on (and take off) their work-related protective gear and the area where they carry out their assigned tasks. That location prevented workers from receiving credit for the time they spent putting on and taking off their work clothes—contrary to the Act's requirements. In a related suit the District Court agreed with Kasten, finding that Saint-Gobain's "practice of not compensating . . . for time spent donning and doffing certain required protective gear and walking to work areas" violated the Act. *Kasten* v. *Saint-Gobain Performance Plastics Corp.*, 556 F. Supp. 2d 941, 954 (WD Wis. 2008). In this suit Kasten claims unlawful retaliation. He says that Saint-Gobain discharged him because he orally complained to Saint-Gobain officials about the timeclocks.

In particular, Kasten says that he repeatedly called the unlawful timeclock location to Saint-Gobain's attention—in accordance with Saint-Gobain's internal grievance-resolution procedure. See Brief for Petitioner 4 (quoting Saint-Gobain's Code of Ethics and Business Conduct as imposing upon every employee "the responsibility to report . . . suspected violations of . . . any applicable law of which he or she becomes aware"); *id.*, at 4–5 (quoting Saint-Gobain's Employee Policy Handbook as instructing employees with "questions, complaints, and problems" to "[c]ontact" their "supervisor[s] immediately" and if necessary "take the issue to the next level of management," then to the "local Human Resources Manager," then to "Human Resources" personnel at the "Regional" or "Headquarters" level).

Kasten adds that he "raised a concern" with his shift supervisor that "it was illegal for the time clocks to be where they were" because of Saint-Gobain's exclusion of "the time you come in and start doing stuff"; he told a human resources employee that "if they were to get challenged on" the location in court, "they would lose"; he told his lead operator that the location was illegal and that he "was thinking about starting a lawsuit about the placement of the time clocks";

and he told the human resources manager and the operations manager that he thought the location was illegal and that the company would "lose" in court. Record in No. 3:07–cv–00686–bbc (WD Wis.), Doc. 87–3, pp. 31–34 (deposition of Kevin Kasten). This activity, Kasten concludes, led the company to discipline him and, in December 2006, to dismiss him.

Saint-Gobain presents a different version of events. It denies that Kasten made any significant complaint about the timeclock location. And it says that it dismissed Kasten simply because Kasten, after being repeatedly warned, failed to record his comings and goings on the timeclock.

For present purposes we accept Kasten's version of these contested events as valid. See *Scott* v. *Harris*, 550 U. S. 372, 380 (2007). That is because the District Court entered summary judgment in Saint-Gobain's favor. 619 F. Supp. 2d 608, 610 (WD Wis. 2008). And it did so, not because it doubted Kasten's ability to prove the facts he alleged, but because it thought the Act did not protect *oral* complaints. *Id.*, at 611–613. On appeal, the Seventh Circuit agreed with the District Court that the Act's antiretaliation provision does not cover oral complaints. 570 F. 3d 834, 838–840 (2009).

Kasten sought certiorari. And in light of conflict among the Circuits as to whether an oral complaint is protected, we granted Kasten's petition. Compare *Hagan* v. *Echostar Satellite, L. L. C.*, 529 F. 3d 617, 625–626 (CA5 2008) (antiretaliation provision covers oral complaints); *Lambert* v. *Ackerley*, 180 F. 3d 997, 1007 (CA9 1999) (en banc) (same), with *Lambert* v. *Genesee Hospital*, 10 F. 3d 46, 55–56 (CA2 1993) (antiretaliation provision does not cover informal complaints to supervisors). See also *Pacheco* v. *Whiting Farms, Inc.*, 365 F. 3d 1199, 1206 (CA10 2004) (antiretaliation provision covers unofficial assertion of rights); *EEOC* v. *White & Son Enterprises*, 881 F. 2d 1006, 1011–1012 (CA11 1989) (same); *Moore* v. *Freeman*, 355 F. 3d 558, 562–563 (CA6 2004) (assuming without discussion that oral complaints are covered);

Brennan v. *Maxey's Yamaha, Inc.*, 513 F. 2d 179, 181 (CA8 1975) (same).

II

The sole question presented is whether "an oral complaint of a violation of the Fair Labor Standards Act" is "protected conduct under the [Act's] anti-retaliation provision." Pet. for Cert. i. The Act protects employees who have "filed any complaint," 29 U. S. C. §215(a)(3), and interpretation of this phrase "depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis," *Dolan* v. *Postal Service*, 546 U. S. 481, 486 (2006). This analysis leads us to conclude that the language of the provision, considered in isolation, may be open to competing interpretations. But considering the provision in conjunction with the purpose and context leads us to conclude that only one interpretation is permissible.

A

We begin with the text of the statute. The word "filed" has different relevant meanings in different contexts. Some dictionary definitions of the word contemplate a writing. See, *e. g.*, Webster's New International Dictionary 945 (2d ed. 1934) (def. 4(a)) (to file is to "deliver *(a paper or instrument)* to the proper officer so that it is received by him to be kept on file, or among the records of his office" (emphasis added)); Webster's Ninth New Collegiate Dictionary 462 (1983) (def. 2(a)) (one definition of "file" is "to place among official records as prescribed by law").

But other dictionaries provide different definitions that permit the use of the word "file" in conjunction with oral material. One can, for example, file an oral statement that enters a matter "into the order of business." 1 Funk & Wagnalls New Standard Dictionary of the English Language 920 (rev. ed. 1938) (def. 2) (to file is to "present in the regular way, as to a judicial or legislative body, so that it shall go

upon the records or into the order of business"). This possibility is significant because it means that dictionary meanings, even if considered alone, do not *necessarily* limit the scope of the statutory phrase to written complaints. Cf. *Crawford* v. *Metropolitan Government of Nashville and Davidson Cty.*, 555 U. S. 271, 277 (2009) (looking for the "limits" of a linguistic phrase rather than what "exemplif[ies]" its application).

In addition to the dictionary definitions, we have found that legislators, administrators, and judges have all sometimes used the word "file" in conjunction with oral statements. Thus state statutes sometimes contemplate oral filings. See, *e. g.*, Alaska Stat. § 47.32.090(a) (2008) ("file a verbal or written complaint"); Cal. Health & Safety Code Ann. § 17055(a) (West 2006) ("file an administrative complaint orally or in writing"); D. C. Code § 7–1231.12(a)(2)(B) (2001) ("filing his or her grievance, orally or in writing"); Ga. Code Ann. §§ 31–8–124(a), (c), 31–8–134(b) (2009) ("to file a grievance," a person may "submit an oral or written complaint"); Ind. Code § 27–8–28–14(a) (2009) ("file a grievance orally or in writing"); Me. Rev. Stat. Ann., Tit. 34–B, § 5604(3)(B) (2009) ("filed through an oral request"); Miss. Code Ann. § 69–47–23(4) (2005) ("file a written or oral complaint"); Mo. Rev. Stat. § 198.088.3(3) (2009) (to have a complaint "filed," a person "shall write or cause to be written his grievance or shall state it orally"); Nev. Rev. Stat. §§ 618.336(2)(a), 618.341(1)(a) (2009) ("oral or written complaint filed"); N. J. Stat. Ann. § 30:4C–12 (West 2008) ("written or oral complaint may be filed"); N. Y. Ins. Law Ann. §§ 3217–a(a)(7), 4324(a)(7) (West 2006) ("file a grievance orally"); N. Y. Pub. Health Law Ann. § 4408(1)(g) (West Supp. 2010) ("file a grievance orally"); Pa. Stat. Ann., Tit. 40, §§ 991.2141(a)–(b) (Purdon 1999) ("file a . . . written or oral complaint"); Tex. Ins. Code Ann. §§ 1305.401(a)–(b) (West 2009) ("oral or written complaint" must be "file[d]"); Wash. Rev. Code §§ 90.64.030(3), (5) (2008)

("complaints have been filed . . . as the result of either an oral or a written complaint").

Regulations promulgated by various federal agencies sometimes permit complaints to be filed orally. See, *e. g.*, 32 CFR § 842.20 (2010) ("[f]iling a claim" may proceed "orally or in writing"); 42 CFR § 422.564(d)(1) (2009) ("file a grievance . . . either orally or in writing"); § 423.564(d)(1) (same); § 438.402(b)(3)(i) ("file a grievance either orally or in writing"); § 494.180(e) ("file an oral or written grievance"); 49 CFR § 1503.629(c) (2009) ("[f]iling of motions . . . must be in writing or orally on the record" (emphasis deleted)); 42 CFR § 438.402(b)(3)(ii) (2009) ("file an appeal either orally or in writing").

And a review of contemporaneous judicial usage, cf. *Utah* v. *Evans*, 536 U. S. 452, 475 (2002), shows that oral filings were a known phenomenon when the Act was passed. See, *e. g.*, *Reed Oil Co.* v. *Cain*, 169 Ark. 309, 312, 275 S. W. 333, 334 (1925) ("appellee filed . . . an oral complaint"); *Tingler* v. *Lahti*, 87 W. Va. 499, 503, 105 S. E. 810, 812 (1921) ("complaint subsequently filed, either oral or written"); *Ex parte Mosgrove*, 47 Okla. Crim. 40, 287 P. 795 (1930) (only "complaint . . . filed against him" was "oral complaint of the town marshal"); *Indian Fred* v. *State*, 36 Ariz. 48, 52–53, 282 P. 930, 932 (1929) ("filed an oral motion to quash"); *Dunn* v. *State*, 60 Okla. Crim. 201, 203, 63 P. 2d 772, 773 (1936) ("filed an oral demurrer"); *Morrison* v. *Lewis*, 58 Ga. App. 677, 199 S. E. 782 (1938) ("filed an oral motion" demurring); *Brock* v. *Cullum Bros.*, 263 S. W. 335 (Tex. Civ. App. 1924) ("filed an oral motion to quash"); *Fike* v. *Allen*, 269 S. W. 179, 180 (Tex. Civ. App. 1925) ("filed oral pleadings").

Filings may more often be made in writing. See, *e. g.*, *Ritter* v. *United States*, 28 F. 2d 265, 267 (CA3 1928) (finding words "file a claim for refund" to require a written request in context of Tax Code). But we are interested in the filing of "*any* complaint." So even if the word "filed," considered alone, might suggest a narrow interpretation limited to writ-

ings, the phrase "*any* complaint" suggests a broad interpretation that would include an oral complaint. See, *e. g.*, *Republic of Iraq* v. *Beaty*, 556 U. S. 848, 856 (2009). The upshot is that the three-word phrase, taken by itself, cannot answer the interpretive question.

We can look further to other appearances of the word "filed" in the Act. See *MCI Telecommunications Corp.* v. *American Telephone & Telegraph Co.*, 512 U. S. 218, 226 (1994) (examining "contextual indications" of the meaning of a term). That word (or a variant) appears in numerous other provisions. But its appearance elsewhere in the Act does not resolve the linguistic question before us. Some of those other provisions (1) involve filed material that, unlike a complaint, is of a kind that is virtually always in writing. See, *e. g.*, 29 U. S. C. § 203(*l*) (employers must "have on file *an unexpired certificate*" (emphasis added)); § 210(a) (Secretary must "file in the court *the record of the industry committee*" (emphasis added)); *ibid.* (industry committee must "file" its findings and recommendations). Others (2) specifically require a writing, see, *e. g.*, § 214(c)(5)(A) (requiring employee's "consent *in writing*" to join collective action to be "filed" (emphasis added)); § 216(b) (same). And the remainder (3) leave the oral/written question unresolved—just as does the provision before us. See, *e. g.*, § 210(b) (prohibiting a stay unless movant "file[s] in court an *undertaking*" (emphasis added)); § 214(c)(5)(A) (employee "may file . . . a *petition*" for review of a special wage rate (emphasis added)).

Looking beyond the Act, we find other statutes that contain antiretaliation provisions. Those statutes, however, use somewhat different language. See, *e. g.*, § 158(a)(4) (protecting an employee who has "filed charges or given testimony"); § 623(d) (protecting those who "*opposed* any [unlawful] practice" (emphasis added)); 42 U. S. C. §§ 2000e–3(a), 12203(a) (same); 29 U. S. C. § 2615(a)(2) (similar). See also, *e. g.*, 15 U. S. C. § 2087(a)(1) (2006 ed., Supp. III) ("*provided* . . . to the employer . . . *information* relating to any viola-

tion" (emphasis added)); § 2651(a) (2006 ed.) (similar); 30 U. S. C. § 815(c)(1) ("filed *or made* a complaint" (emphasis added)); 42 U. S. C. § 5851(a)(1)(A) ("*notified* his employer" (emphasis added)); 49 U. S. C. § 42121(a)(1) ("*provided* . . . *information*" (emphasis added)); § 60129(a)(1) (same). Some of this language is broader than the phrase before us, but, given the fact that the phrase before us lends itself linguistically to the broader, "oral" interpretation, the use of broader language elsewhere *may* mean (1) that Congress wanted to limit the scope of the phrase before us to writings, or (2) that Congress did not believe the different phraseology made a significant difference in this respect. The language alone does not tell us whether Congress, if intending to protect orally expressed grievances elsewhere, did or did not intend to leave those oral grievances unprotected here.

The bottom line is that the text, taken alone, cannot provide a conclusive answer to our interpretive question. The phrase "filed any complaint" might, or might not, encompass oral complaints. We must look further.

B

1

Several functional considerations indicate that Congress intended the antiretaliation provision to cover oral, as well as written, "complaint[s]." First, an interpretation that limited the provision's coverage to written complaints would undermine the Act's basic objectives. The Act seeks to prohibit "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U. S. C. § 202(a). It does so in part by setting forth substantive wage, hour, and overtime standards. It relies for enforcement of these standards, not upon "continuing detailed federal supervision or inspection of payrolls," but upon "information and complaints received from employees seeking to vindicate rights claimed to have been denied." *Mitchell* v. *Robert DeMario*

Jewelry, Inc., 361 U. S. 288, 292 (1960). And its antiretaliation provision makes this enforcement scheme effective by preventing "fear of economic retaliation" from inducing workers "quietly to accept substandard conditions." *Ibid.*

Why would Congress want to limit the enforcement scheme's effectiveness by inhibiting use of the Act's complaint procedure by those who would find it difficult to reduce their complaints to writing, particularly illiterate, less educated, or overworked workers? President Franklin Roosevelt pointed out at the time that these were the workers most in need of the Act's help. See Message to Congress, May 24, 1937, H. R. Doc. No. 255, 75th Cong., 1st Sess., 4 (seeking a bill to help the poorest of "those who toil in factory").

In the years prior to the passage of the Act, illiteracy rates were particularly high among the poor. See E. Gordon & E. Gordon, Literacy in America 273 (2003) (one-quarter of World War I conscripts were illiterate); Dept. of Commerce, Bureau of Census, Sixteenth Census of the United States, 1940, Population: The Labor Force (Sample Statistics): Occupational Characteristics 60 (1943) (20.8% of manufacturing laborers in 1940 had less than five years of schooling). Those rates remained high in certain industries for many years after the Act's passage. In 1948, for example, the National War Labor Board wrote:

> "In many plants where there is a high degree of illiteracy, the writing of grievances by employees works a substantial hardship. In other plants where there is considerable dirt and special clothes must be worn, it is often not practicable to write up grievances during work hours." 1 The Termination Report of the National War Labor Board, p. 122.

To limit the scope of the antiretaliation provision to the filing of written complaints would also take needed flexibility from those charged with the Act's enforcement. It could

prevent Government agencies from using hotlines, interviews, and other oral methods of receiving complaints. And insofar as the antiretaliation provision covers complaints made to employers (a matter we need not decide, see *infra*, at 16–17), it would discourage the use of desirable informal workplace grievance procedures to secure compliance with the Act. Cf. *Burlington Industries, Inc.* v. *Ellerth*, 524 U. S. 742, 764 (1998) (reading Title VII to encourage the development of effective grievance procedures to deter misconduct); D. McPherson, C. Gates, & K. Rogers, Resolving Grievances: A Practical Approach 38–40 (1983) (describing the significant benefits of unwritten complaints).

Given the need for effective enforcement of the National Labor Relations Act (NLRA), this Court has broadly interpreted the language of the NLRA's antiretaliation provision—"filed charges or given testimony," 29 U. S. C. § 158(a)(4)—as protecting workers who *neither* filed charges *nor* were "called *formally* to testify" but simply "participate[d] in a [National Labor Relations] Board investigation." *NLRB* v. *Scrivener*, 405 U. S. 117, 123 (1972) (emphasis added). The similar enforcement needs of this related statute argue for an interpretation of the word "complaint" that would provide "broad rather than narrow protection to the employee," *id.*, at 122 (and would do so here without pressing statutory language to its limit). See also *Tennessee Coal, Iron & R. Co.* v. *Muscoda Local No. 123*, 321 U. S. 590, 597 (1944) (the Act's "remedial and humanitarian . . . purpose" cautions against "narrow, grudging" interpretations of its language).

Saint-Gobain replies that worker protection is not the only relevant statutory objective. The Act also seeks to establish an enforcement system that is fair to employers. To do so, the employer must have fair notice that an employee is making a complaint that could subject the employer to a later claim of retaliation. If oral complaints suffice, Saint-Gobain adds, employers too often will be left in a state of uncer-

tainty about whether an employee (particularly an employee who seems unusually angry at the moment) is in fact making a complaint about an Act violation or just letting off steam.

We agree with Saint-Gobain that the statute requires fair notice. Although the dictionary definitions, statutes, regulations, and judicial opinions we considered, see *supra*, at 7–10, do not distinguish between writings and oral statements, they do suggest that a "filing" is a serious occasion, rather than a triviality. As such, the phrase "filed any complaint" contemplates some degree of formality, certainly to the point where the recipient has been given fair notice that a grievance has been lodged and does, or should, reasonably understand the matter as part of its business concerns.

Moreover, the statute prohibits employers from discriminating against an employee "*because* such employee has filed any complaint." §215(a)(3) (emphasis added). And it is difficult to see how an employer who does not (or should not) know an employee has made a complaint could discriminate *because* of that complaint. But we also believe that a fair notice requirement does not necessarily mean that notice must be in writing.

At oral argument, the Government said that a complaint is "filed" when "a reasonable, objective person would have understood the employee" to have "put the employer on notice that [the] employee is asserting statutory rights under the [Act]." Tr. of Oral Arg. 23, 26. We agree. To fall within the scope of the antiretaliation provision, a complaint must be sufficiently clear and detailed for a reasonable employer to understand it, in light of both content and context, as an assertion of rights protected by the statute and a call for their protection. This standard can be met, however, by oral complaints, as well as by written ones.

2

Second, given Congress' delegation of enforcement powers to federal administrative agencies, we also give a degree of

weight to their views about the meaning of this enforcement language. See 29 U. S. C. § 216(c) (vesting enforcement power in Secretary of Labor); Reorganization Plan No. 1 of 1978, 5 U. S. C. App. § 1, p. 664 (transferring to Equal Employment Opportunity Commission (EEOC) enforcement of this antiretaliation provision as part of its Equal Pay Act enforcement responsibilities); *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140 (1944) (giving weight to a persuasive articulation of views within an agency's area of expertise).

The Secretary of Labor has consistently held the view that the words "filed any complaint" cover oral, as well as written, complaints. The Department of Labor articulated that view in an enforcement action filed many years ago, *Goldberg* v. *Zenger*, 43 CCH LC ¶ 31,155, pp. 40,985, 40,986 (D Utah 1961). It has subsequently reaffirmed that view in briefs. See, *e. g.*, Brief for Secretary of Labor as *Amicus Curiae* Supporting Petition for Rehearing With Suggestion for Rehearing *En Banc* in *Lambert* v. *Ackerley*, No. 96–36017 etc. (CA9), pp. 6–7. And more recently it has acted in accordance with that view by creating a hotline to receive oral complaints, see Dept. of Labor, Compliance Assistance by Law—The Fair Labor Standards Act (FLSA), http://www.dol.gov/compliance/laws/comp-flsa.htm (as visited Mar. 18, 2011, and available in Clerk of Court's case file) (directing participants who wish to "file a complaint" to contact a local office "or call the Department's Toll-Free Wage and Hour Help Line at 1–866–4–US–WAGE").

The EEOC has set forth a similar view in its Compliance Manual, Vol. 2, § 8–II(B)(1), p. 8–3, and n. 12 (1998), and in multiple briefs, see, *e. g.*, Brief for EEOC as *Amicus Curiae* in Support of Petition for Rehearing With Suggestion for Rehearing *En Banc* in *Lambert* v. *Ackerley*, No. 96–36017 etc. (CA9), pp. 8–13; Brief for Appellee in *EEOC* v. *White & Son Enterprises, Inc.*, No. 88–7658 (CA11), pp. 29–30.

These agency views are reasonable. They are consistent with the Act. The length of time the agencies have held

them suggests that they reflect careful consideration, not "*post hoc* rationalizatio[n]." *Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29, 50 (1983). And they consequently add force to our conclusion. *Skidmore*, *supra*, at 140; cf. *United States* v. *Mead Corp.*, 533 U. S. 218, 229, 234–235 (2001) (Court sometimes finds judicial deference intended even in absence of rulemaking authority); *Babbitt* v. *Sweet Home Chapter, Communities for Great Ore.*, 515 U. S. 687, 703–704, and n. 18 (1995) (agency views, where the law counsels deference, can clarify otherwise ambiguous statutory provisions).

3

Finally, we note that Saint-Gobain invokes the "rule of lenity" in support of its "written complaint" interpretation. That rule applies primarily to the interpretation of criminal statutes. It leads us to favor a more lenient interpretation of a criminal statute "when, after consulting traditional canons of statutory construction, we are left with an ambiguous statute." *United States* v. *Shabani*, 513 U. S. 10, 17 (1994). We agree with Saint-Gobain that those who violate the antiretaliation provision before us are subject to criminal sanction, 29 U. S. C. § 216(a). And we have said that the rule of lenity can apply when a statute with criminal sanctions is applied in a noncriminal context. See *Leocal* v. *Ashcroft*, 543 U. S. 1, 11, n. 8 (2004). But after engaging in traditional methods of statutory interpretation, we cannot find that the statute remains sufficiently ambiguous to warrant application of the rule of lenity here.

C

Alternatively, Saint-Gobain claims that it should prevail because Kasten complained to a private employer, not to the Government; and, in Saint-Gobain's view, the antiretaliation provision applies only to complaints filed with the Government. Saint-Gobain advanced this claim in the lower courts,

which held to the contrary. 570 F. 3d, at 837–838; 619 F. Supp. 2d, at 613. But Saint-Gobain said nothing about it in response to Kasten's petition for certiorari. Indeed, it did not mention the claim in this Court until it filed its brief on the merits.

We do not normally consider a separate legal question not raised in the certiorari briefs. See this Court's Rule 15.2; *Caterpillar Inc.* v. *Lewis*, 519 U. S. 61, 75, n. 13 (1996). We see no reason to make an exception here. Resolution of the Government/private employer question is not a "'"predicate to an intelligent resolution"'" of the oral/written question that we granted certiorari to decide. See *ibid.* (quoting *Ohio* v. *Robinette*, 519 U. S. 33, 38 (1996)). That is to say, we can decide the oral/written question separately—on its own. And we have done so. Thus, we state no view on the merits of Saint-Gobain's alternative claim. Cf. *post*, at 18–21 (SCALIA, J., dissenting).

* * *

We conclude that the Seventh Circuit erred in determining that oral complaints cannot fall within the scope of the phrase "filed any complaint" in the Act's antiretaliation provision. We leave it to the lower courts to decide whether Kasten will be able to satisfy the Act's notice requirement. We vacate the Circuit's judgment and remand the case for further proceedings consistent with this opinion.

It is so ordered.

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

JUSTICE SCALIA, with whom JUSTICE THOMAS joins as to all but footnote 6, dissenting.

The Seventh Circuit found for the employer because it held that the Fair Labor Standards Act of 1938 (FLSA), 29 U. S. C. § 215(a)(3), covers only written complaints to the em-

ployer. I would affirm the judgment on the ground that § 215(a)(3) does not cover complaints to the employer at all.

I

The FLSA's retaliation provision states that it shall be unlawful

> "to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee." *Ibid.*

The phrase central to the outcome here is "filed any complaint." In the courts below, Kasten asserted a claim for retaliation based solely on allegations that he "filed" oral "complaints" with his employer; Saint-Gobain argued that the retaliation provision protects only complaints that are (1) in writing, and (2) made to judicial or administrative bodies. I agree with at least the second part of Saint-Gobain's contention. The plain meaning of the critical phrase and the context in which it appears make clear that the retaliation provision contemplates an official grievance filed with a court or an agency, not oral complaints—or even formal, written complaints—from an employee to an employer.

A

In isolation, the word "complaint" could cover Kasten's objection: It often has an expansive meaning, connoting any "[e]xpression of grief, regret, pain . . . or resentment." Webster's New International Dictionary 546 (2d ed. 1934) (hereinafter Webster's). But at the time the FLSA was passed (and still today) the word when used in a legal context has borne a specialized meaning: "[a] formal allegation or charge against a party, made or presented to the appropriate court

or officer." *Ibid.* See also Cambridge Dictionary of American English 172 (2000) ("a formal statement to a government authority that you have a legal cause to complain about the way you have been treated"); 3 Oxford English Dictionary 608 (2d ed. 1989) ("[a] statement of injury or grievance laid before a court or judicial authority . . . for purposes of prosecution or of redress").

There are several reasons to think that the word bears its specialized meaning here. First, every other use of the word "complaint" in the FLSA refers to an official filing with a governmental body. Sections 216(b) and (c) both state that the right to bring particular types of actions "shall terminate upon the filing of a complaint" by the Secretary of Labor, and §216(c) clarifies that the statute of limitations begins running in actions to recover unpaid wages "on the date when the complaint is filed." These provisions unquestionably use "complaint" in the narrow legal sense. Identical words used in different parts of a statute are presumed to have the same meaning absent contrary indication, *IBP, Inc.* v. *Alvarez*, 546 U. S. 21, 34 (2005); *Sullivan* v. *Stroop*, 496 U. S. 478, 484 (1990). It is one thing to expand the meaning of "complaint" in §215(a)(3) to include complaints filed with an agency instead of a court; it is quite something else to wrench it from the legal context entirely, to include an employee's objection to an employer.

Second, the word "complaint" appears as part of the phrase "filed any complaint" and thus draws meaning from the verb with which it is connected. The choice of the word "filed" rather than a broader alternative like "made," if it does not connote (as the Seventh Circuit believed, and as I need not consider) something in writing, at least suggests a degree of formality consistent with legal action and inconsistent (at least in the less regulated work environment of 1938) with employee-to-employer complaints. It is noteworthy that every definition of the verb "filed" that the Court's opinion provides, whether it supports the inclusion of oral

content or not, envisions a formal, prescribed process of delivery or submission. *Ante*, at 7–8 (comparing, for example, Webster's 945 (to file is to "deliver (a paper or instrument) to the proper officer") with 1 Funk & Wagnalls New Standard Dictionary of the English Language 920 (rev. ed. 1938) (to file is to "present in the regular way, as to a judicial or legislative body")).

Moreover, "[t]he law uses familiar legal expressions in their familiar legal sense," *Henry* v. *United States*, 251 U. S. 393, 395 (1920). It is, I suppose, possible to speak of "filing a complaint" with an employer, but that is assuredly not common usage. Thus, when the antiretaliation provision of the Mine Health and Safety Act used that phrase in a context that includes both complaints to an agency and complaints to the employer, it did not use "filed" alone, but supplemented that with "or made"—and to boot specified "including a complaint notifying the [mine] operator . . . of an alleged danger or safety or health violation . . . ." 30 U. S. C. § 815(c)(1).[1]

Third, the phrase "filed any complaint" appears alongside three other protected activities: "institut[ing] or caus[ing] to be instituted any proceeding under or related to this chapter," "testif[ying] in any such proceeding," and "serv[ing] on an industry committee."[2] 29 U. S. C. § 215(a)(3). Since each of these three activities involves an interaction with governmental authority, we can fairly attribute this characteristic to the phrase "filed any complaint" as well. "That

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[1] Kasten and this Court's opinion, *ante*, at 9–10, argue that the use of the modifier "any" in the phrase "filed *any* complaint" suggests that Congress meant to define the word "complaint" expansively. Not so. The modifier "any" does not cause a word that is in context narrow to become broad. The phrase "to cash a check at any bank" does not refer to a river bank, or even a blood bank.

[2] Section 5 of the original FLSA, which has since been repealed, charged industry committees with recommending minimum wages for certain industries to the Department of Labor. 52 Stat. 1062. In order to perform this function, industry committees were empowered, among other things, to "hear . . . witnesses" and "receive . . . evidence." § 8(b), *id.*, at 1064.

several items in a list share an attribute counsels in favor of interpreting the other items as possessing that attribute as well." *Beecham* v. *United States*, 511 U. S. 368, 371 (1994).

And finally, the 1938 version of the FLSA, while creating private rights of action for other employer violations, see § 16(b), 52 Stat. 1069, did not create a private right of action for retaliation. That was added in 1977, see § 10, 91 Stat. 1252. Until then, only the Administrator of the Wage and Hour Division of the Department of Labor could enforce the retaliation provision. See § 11(a), 52 Stat. 1066. It would seem more strange to require the employee to go to the Administrator to establish, and punish retaliation for, his intracompany complaint, than to require the Administrator-protected complaint to be filed with the Administrator in the first place.[3]

B

1

The meaning of the phrase "filed any complaint" is clear in light of its context, and there is accordingly no need to rely on abstractions of congressional purpose. Nevertheless, Kasten argues that protecting intracompany complaints best accords with the purpose of the FLSA—"to assure fair compensation to covered employees"—because such purposes are "advanced when internal complaints lead to voluntary compliance." Reply Brief for Petitioner 18. But no legislation pursues its ends at all costs. *Rodriguez* v. *United States*, 480 U. S. 522, 525–526 (1987) *(per curiam)*. Congress may not have protected intracompany complaints for the same reason it did not provide a private cause of action for retaliation against complaints: because it was unwilling

[3] Kasten argues that excluding intracompany complaints would make the phrases "filed any complaint" and "instituted or caused to be instituted any proceeding" redundant. That is not so. An employee may file a complaint with the Administrator that does not result in a proceeding, or has not yet done so when the employer takes its retaliatory action.

to expose employers to the litigation, or to the inability to dismiss unsatisfactory workers, which that additional step would entail. Limitation of the retaliation provision to agency complaints may have been an attempt "to achieve the benefits of regulation right up to the point where the costs of further benefits exceed the value of those benefits." Easterbrook, Statutes' Domains, 50 U. Chi. L. Rev. 533, 541 (1983).

2

In deciding whether an oral complaint may be "filed," the Court's opinion examines modern state and federal statutes, which presumably cover complaints filed with an employer. The only relevance of these provisions to whether the FLSA covers such complaints is that none of them achieves that result by use of the term "filed any complaint," and all of them use language that unmistakably includes complaints to employers. See, *e. g.,* 42 U. S. C. §2000e–3(a) (prohibiting retaliation against employees who "oppos[e] any [unlawful] practice"). Any suggestion that because more recent statutes cover intracompany complaints, a provision adopted in the 1938 Act should be deemed to do so is unacceptable. While the jurisprudence of this Court has sometimes sanctioned a "living Constitution," it has never approved a living United States Code. What Congress enacted in 1938 must be applied according to its terms, and not according to what a modern Congress (or this Court) would deem desirable.[4]

3

Kasten argues that this Court should defer to the Department of Labor and Equal Employment Opportunity Commis-

[4] Moreover, if the substance of the retaliation provision of any other Act could shed light upon what Congress sought to achieve in the FLSA, it would be the relatively contemporaneous provision of the National Labor Relations Act, §8(4), 49 Stat. 453, codified at 29 U. S. C. §158(a)(4), which did not cover retaliation for employee-employer complaints. See *NLRB* v. *Scrivener,* 405 U. S. 117 (1972).

sion's (EEOC) interpretations of 29 U. S. C. § 215(a)(3). He claims that those agencies have construed § 215(a)(3) to protect intracompany complaints "[f]or almost half a century," in litigating positions and enforcement actions. Reply Brief for Petitioner 22. He also argues that although the Department of Labor lacks the authority to issue regulations implementing § 215(a)(3), it has such authority for several similarly worded provisions and has interpreted those statutes to include intracompany complaints. *Id.*, at 20.

Even were § 215(a)(3) ambiguous, deference would still be unwarranted. If we are to apply our new jurisprudence that deference is appropriate only when Congress has given the agency authority to make rules carrying the force of law, see *Gonzales* v. *Oregon*, 546 U. S. 243, 255–256 (2006), deference is improper here. The EEOC has no such authority. Although the Secretary of Labor and his subordinates have authority to issue regulations under various provisions of the FLSA, see, *e. g.*, § 203(*l*); § 206(a)(2), they have no general authority to issue regulations interpreting the Act, and no specific authority to issue regulations interpreting § 215(a)(3).

Presumably for this reason, the Court's opinion seems to suggest that only so-called *Skidmore* deference is appropriate, see *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140 (1944).[5]

[5] Or perhaps not. The actual quantum of deference measured out by the Court's opinion is unclear—seemingly intentionally so. The Court says that it is giving "a degree of weight" to the Secretary and EEOC's views "given Congress' delegation of enforcement powers to federal administrative agencies." *Ante*, at 14–15. But it never explicitly states the level of deference applied, and includes a mysterious citation of *United States* v. *Mead Corp.*, 533 U. S. 218 (2001), along with a parenthetical saying that "sometimes . . . judicial deference [is] intended even in [the] absence of rulemaking authority." *Ante*, at 16. I say this is mysterious because *Mead* clearly held that rulemaking authority was necessary for full *Chevron* deference, see *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984). I have chosen to interpret

This doctrine states that agencies' views are "'entitled to respect'" to the extent they have "the 'power to persuade.'" *Christensen* v. *Harris County*, 529 U. S. 576, 587 (2000) (quoting *Skidmore*, *supra*, at 140).[6] For the reasons stated above, the agencies' views here lack the "power to persuade."

II

The Court's opinion claims that whether § 215(a)(3) covers intracompany complaints is not fairly included in the question presented because the argument, although raised below, was not made in Saint-Gobain's response to Kasten's petition for certiorari. Citing this Court's Rule 15.2 and *Caterpillar Inc.* v. *Lewis*, 519 U. S. 61, 75, n. 13 (1996), the opinion says that this Court does "not normally consider a separate legal question not raised in the certiorari briefs." *Ante*, at 17.

It regularly does so, however, under the circumstances that obtain here. (Curiously enough, *Caterpillar*, the case cited by the Court, was one instance.) Rule 15.2 is permissive rather than mandatory: "Any objection to consideration of a question presented based on what occurred in the proceedings below . . . *may* be deemed waived unless called to the Court's attention in the brief in opposition." (Emphasis added.) Accordingly, the Court has often permitted parties to defend a judgment on grounds not raised in the brief in opposition when doing so is "predicate to an intelligent resolution of the question presented, and therefore fairly in-

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the Court as referring to *Skidmore* deference, rather than *Chevron* deference or something in between, in order to minimize the Court's ongoing obfuscation of this once-clear area of administrative law. See *Mead*, *supra*, at 245 (SCALIA, J., dissenting).

[6] In my view this doctrine (if it can be called that) is incoherent, both linguistically and practically. To defer is to subordinate one's own judgment to another's. If one has been persuaded by another, so that one's judgment accords with the other's, there is no room for deferral—only for agreement. Speaking of "*Skidmore* deference" to a persuasive agency position does nothing but confuse.

cluded therein." *Ohio* v. *Robinette*, 519 U. S. 33, 38 (1996) (internal quotation marks omitted); see also *Vance* v. *Terrazas*, 444 U. S. 252, 258–259, n. 5 (1980).

Kasten's petition for certiorari phrases the question presented as follows: "Is an oral complaint of a violation of the Fair Labor Standards Act protected conduct under the anti-retaliation provision, 29 U. S. C. §215(a)(3)?" Pet. for Cert. i. Surely the word "complaint" in this question must be assigned an implied addressee. It presumably does not include a complaint to Judge Judy. And the only plausible addressee, given the facts of this case, is the employer. Saint-Gobain's rewording of the question presented in its brief in opposition is even more specific: "Has an employee alleging solely that he orally asserted objections *to his employer* . . . 'filed any complaint' within the meaning of [§215(a)(3)]." Brief in Opposition *i* (emphasis added). Moreover, under this Court's Rule 14.1(a), the question presented is "deemed to comprise every subsidiary question fairly included therein." Whether intracompany complaints are protected is at least subsidiary to Kasten's formulation (and explicitly included in Saint-Gobain's). The question was also decided by the courts below and was briefed before this Court. It is not clear what benefit additional briefing would provide.

Moreover, whether §215(a)(3) covers intracompany complaints is "predicate to an intelligent resolution of the question presented" in this case. The Court's own opinion demonstrates the point. While claiming that it remains an open question whether intracompany complaints are covered, the opinion adopts a test for "filed any complaint" that assumes a "yes" answer—and that makes no sense otherwise. An employee, the Court says, is deemed to have "filed [a] complaint" only when "'a reasonable, objective person would have understood the employee' to have 'put the employer on notice that [the] employee is asserting statutory rights under the [Act].'" *Ante*, at 14 (quoting Tr. of Oral Arg. 23, 26).

This utterly atextual standard is obviously designed to counter the argument of Saint-Gobain, that if oral complaints are allowed, "employers too often will be left in a state of uncertainty about whether an employee . . . is in fact making a complaint . . . or just letting off steam." *Ante,* at 13–14. Of course, if intracompany complaints were excluded, this concern would be nonexistent: Filing a complaint with a judicial or administrative body is quite obviously an unambiguous assertion of one's rights. There would be no need for lower courts to question whether a complaint is "sufficiently clear and detailed," *ante,* at 14, carries the requisite "degree of formality," *ibid.*, or provides "fair notice," *ibid.*, whatever those terms may require.

The test the Court adopts amply disproves its contention that "we can decide the oral/written question separately," *ante,* at 17. And it makes little sense to consider that question *at all* in the present case if neither oral nor written complaints to employers are protected, cf. *United States* v. *Grubbs,* 547 U. S. 90, 94, n. 1 (2006). This Court should not issue an advisory opinion as to what would have been the scope of a retaliation provision covering complaints to employers if Congress had enacted such a provision.

Syllabus

MATRIXX INITIATIVES, INC., ET AL. *v.* SIRACUSANO ET AL.

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

No. 09–1156. Argued January 10, 2011—Decided March 22, 2011

Respondents filed this securities fraud class action, alleging that petitioners (hereinafter Matrixx) violated § 10(b) of the Securities Exchange Act of 1934 and Securities and Exchange Commission Rule 10b–5 by failing to disclose reports of a possible link between Matrixx's leading product, Zicam Cold Remedy, and loss of smell (anosmia), rendering statements made by Matrixx misleading. Matrixx moved to dismiss the complaint, arguing that respondents had not pleaded the element of a material misstatement or omission and the element of scienter. The District Court granted the motion, but the Ninth Circuit reversed. It held that the District Court erred in requiring an allegation of statistical significance to establish materiality, concluding instead that the complaint adequately alleged information linking Zicam and anosmia that would have been significant to a reasonable investor. It also held that Matrixx's withholding of information about reports of adverse effects and about pending lawsuits by Zicam users gave rise to a strong inference of scienter.

Held: Respondents have stated a claim under § 10(b) and Rule 10b–5. Pp. 37–50.

(a) To prevail on their claim, respondents must prove, as relevant here, a material misrepresentation or omission by Matrixx and scienter. See *Stoneridge Investment Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U. S. 148, 157. Matrixx contends that they failed to plead these required elements because they did not allege that the reports Matrixx received reflected statistically significant evidence that Zicam caused anosmia. Pp. 37–38.

(b) Respondents have adequately pleaded materiality. Pp. 38–47.

(1) Under *Basic Inc.* v. *Levinson*, 485 U. S. 224, § 10(b)'s materiality requirement is satisfied when there is " 'a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the "total mix" of information made available.' " *Id.*, at 231–232. The Court declined to adopt a bright-line rule for determining materiality in *Basic*, observing that "[a]ny approach that designates a single fact or occurrence as always determinative of an inherently fact-specific finding such as materiality,

must necessarily be overinclusive or underinclusive." *Id.*, at 236. Here, Matrixx's bright-line rule—that adverse event reports regarding a pharmaceutical company's products are not material absent a sufficient number of such reports to establish a statistically significant risk that the product is causing the events—would "artificially exclud[e]" information that "would otherwise be considered significant to [a reasonable investor's] trading decision." *Ibid.* Matrixx's premise that statistical significance is the only reliable indication of causation is flawed. Both medical experts and the Food and Drug Administration rely on evidence other than statistically significant data to establish an inference of causation. It thus stands to reason that reasonable investors would act on such evidence. Because adverse reports can take many forms, assessing their materiality is a fact-specific inquiry, requiring consideration of their source, content, and context. The question is whether a *reasonable* investor would have viewed the nondisclosed information "'as having significantly altered the "total mix" of information made available.'" *Id.*, at 232. Something more than the mere existence of adverse event reports is needed to satisfy that standard, but that something more is not limited to statistical significance and can come from the source, content, and context of the reports. Pp. 38–45.

(2) Applying *Basic*'s "total mix" standard here, respondents adequately pleaded materiality. The complaint's allegations suffice to "raise a reasonable expectation that discovery will reveal evidence" satisfying the materiality requirement, *Bell Atlantic Corp.* v. *Twombly*, 550 U. S. 544, 556, and to "allo[w] the court to draw the reasonable inference that the defendant is liable," *Ashcroft* v. *Iqbal*, 556 U. S. 662, 678. Assuming the complaint's allegations to be true, Matrixx received reports from medical experts and researchers that plausibly indicated a reliable causal link between Zicam and anosmia. Consumers likely would have viewed Zicam's risk as substantially outweighing its benefit. Viewing the complaint's allegations as a whole, the complaint alleges facts suggesting a significant risk to the commercial viability of Matrixx's leading product. It is substantially likely that a reasonable investor would have viewed this information "'as having significantly altered the "total mix" of information made available.'" *Basic*, 485 U. S., at 232. Assuming the complaint's allegations to be true, Matrixx told the market that revenues were going to rise 50 and then 80 percent when it had information indicating a significant risk to its leading revenue-generating product. It also publicly dismissed reports linking Zicam and anosmia and stated that zinc gluconate's safety was well established, when it had evidence of a biological link between Zicam's key ingredient and anosmia and had conducted no studies to disprove that link. Pp. 45–47.

Syllabus

(c) Respondents have also adequately pleaded scienter, "'a mental state embracing intent to deceive, manipulate, or defraud,'" *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U. S. 308, 319. This Court assumes, without deciding, that the scienter requirement may be satisfied by a showing of deliberate recklessness. Under the Private Securities Litigation Reform Act of 1995, a complaint adequately pleads scienter "only if a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged." *Id.*, at 324. Matrixx's proposed bright-line rule requiring an allegation of statistical significance to establish a strong inference of scienter is once again flawed. The complaint's allegations, "taken collectively," give rise to a "cogent and compelling" inference that Matrixx elected not to disclose adverse event reports not because it believed they were meaningless but because it understood their likely effect on the market. *Id.*, at 323, 324. "[A] reasonable person" would deem the inference that Matrixx acted with deliberate recklessness "at least as compelling as any [plausible] opposing inference." *Id.*, at 324. Pp. 48–50.

585 F. 3d 1167, affirmed.

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

Jonathan D. Hacker argued the cause for petitioners. With him on the briefs were *Matthew Shors*, *Irving L. Gornstein*, *Michael G. Yoder*, and *Amy J. Longo*.

David C. Frederick argued the cause for respondents. With him on the brief were *Scott H. Angstreich*, *Gregory G. Rapawy*, *Eric Alan Isaacson*, and *Joseph D. Daley*.

Pratik A. Shah argued the cause for the United States as *Amicus Curiae* in support of respondents. With him on the brief were *Acting Solicitor General Katyal*, *Deputy Solicitor General Stewart*, *David M. Becker*, *Mark D. Cahn*, *Jacob H. Stillman*, *Michael A. Conley*, *Luis de la Torre*, *Jeffrey A. Berger*, and *Ralph S. Tyler*.*

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*Briefs of *amici curiae* urging reversal were filed for the Advanced Medical Technology Association by *Steven G. Bradbury, Steven A. Engel, James M. Beck*, and *David A. Kotler;* for BayBio by *Deanne E. Maynard, Brian R. Matsui*, and *Marc A. Hearron;* for the Consumer Healthcare Products Association et al. by *Robert A. Long, Jr.*, and *Richard F. Kingham;* for DRI—The Voice of the Defense Bar by *James C. Martin* and

JUSTICE SOTOMAYOR delivered the opinion of the Court.

This case presents the question whether a plaintiff can state a claim for securities fraud under § 10(b) of the Securities Exchange Act of 1934, 48 Stat. 891, as amended, 15 U. S. C. § 78j(b), and Securities and Exchange Commission (SEC) Rule 10b–5, 17 CFR § 240.10b–5 (2010), based on a pharmaceutical company's failure to disclose reports of adverse events associated with a product if the reports do not disclose a statistically significant number of adverse events. Respondents, plaintiffs in a securities fraud class action, allege that petitioners, Matrixx Initiatives, Inc., and three of its executives (collectively Matrixx), failed to disclose reports of a possible link between Matrixx's leading product, a cold remedy, and loss of smell, rendering statements made by Matrixx misleading. Matrixx contends that respondents' complaint does not adequately allege that Matrixx made a material representation or omission or that it acted with scienter because the complaint does not allege that Matrixx knew of a statistically significant number of adverse events requiring disclosure. We conclude that the materiality of adverse event reports cannot be reduced to a bright-line rule. Although in many cases reasonable investors would not con-

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Colin E. Wrabley; for the Natural Products Association by *Scott Bass* and *Jonathan F. Cohn;* for the Pharmaceutical Research and Manufacturers of America et al. by *David W. Ogden* and *Mark C. Fleming;* for the Product Liability Advisory Council, Inc., by *Anne E. Cohen;* for the Securities Industry and Financial Markets Association et al. by *Lyle Roberts*, *Jonathan E. Richman*, *Kevin M. Carroll*, *Robin S. Conrad*, and *Amar D. Sarwal;* and for the Washington Legal Foundation by *Daniel J. Popeo* and *Richard A. Samp.*

Briefs of *amici curiae* urging affirmance were filed for AARP et al. by *Jay E. Sushelsky* and *Michael R. Schuster;* for Robert E. Litan et al. by *Merrill G. Davidoff* and *Lawrence J. Lederer;* for Tonia M. Young-Fadok et al. by *Jonathan S. Massey*, *Jay W. Eisenhofer*, *Geoffrey C. Jarvis*, *David Kessler*, *Darren J. Check*, and *Benjamin J. Sweet;* for Professors at Law and Business Schools by *J. Robert Brown, Jr.*, *Lisa L. Casey*, and *Robert O. Bentley;* and for Statistics Experts by *Edward Labaton.*

sider reports of adverse events to be material information, respondents have alleged facts plausibly suggesting that reasonable investors would have viewed these particular reports as material. Respondents have also alleged facts "giving rise to a strong inference" that Matrixx "acted with the required state of mind." 15 U. S. C. § 78u–4(b)(2)(A) (2006 ed., Supp. IV). We therefore hold, in agreement with the Court of Appeals for the Ninth Circuit, that respondents have stated a claim under § 10(b) and Rule 10b–5.

I

A

Through a wholly owned subsidiary, Matrixx develops, manufactures, and markets over-the-counter pharmaceutical products. Its core brand of products is called Zicam. All of the products sold under the name Zicam are used to treat the common cold and associated symptoms. At the time of the events in question, one of Matrixx's products was Zicam Cold Remedy, which came in several forms including nasal spray and gel. The active ingredient in Zicam Cold Remedy was zinc gluconate. Respondents allege that Zicam Cold Remedy accounted for approximately 70 percent of Matrixx's sales.

Respondents initiated this securities fraud class action against Matrixx on behalf of individuals who purchased Matrixx securities between October 22, 2003, and February 6, 2004.[1] The action principally arises out of statements that Matrixx made during the class period relating to revenues and product safety. Respondents claim that Matrixx's statements were misleading in light of reports that Matrixx had received, but did not disclose, about consumers who had lost their sense of smell (a condition called anosmia) after using Zicam Cold Remedy. Respondents' consolidated amended

[1] According to the complaint, Matrixx securities were traded on the NASDAQ National Market. App. 99a.

complaint alleges the following facts, which the courts below properly assumed to be true. See *Ashcroft* v. *Iqbal*, 556 U. S. 662, 678 (2009).

In 1999, Dr. Alan Hirsch, neurological director of the Smell & Taste Treatment and Research Foundation, Ltd., called Matrixx's customer service line after discovering a possible link between Zicam nasal gel and a loss of smell "in a cluster of his patients." App. 67a–68a. Dr. Hirsch told a Matrixx employee that "previous studies had demonstrated that intranasal application of zinc could be problematic." *Id.*, at 68a. He also told the employee about at least one of his patients who did not have a cold and who developed anosmia after using Zicam.

In September 2002, Timothy Clarot, Matrixx's vice president for research and development, called Miriam Linschoten, Ph.D., at the University of Colorado Health Sciences Center after receiving a complaint from a person Linschoten was treating who had lost her sense of smell after using Zicam. Clarot informed Linschoten that Matrixx had received similar complaints from other customers. Linschoten drew Clarot's attention to "previous studies linking zinc sulfate to loss of smell." *Ibid.* Clarot gave her the impression that he had not heard of the studies. She asked Clarot whether Matrixx had done any studies of its own; he responded that it had not but that it had hired a consultant to review the product. Soon thereafter, Linschoten sent Clarot abstracts of the studies she had mentioned. Research from the 1930's and 1980's had confirmed "[z]inc's toxicity." *Id.*, at 69a. Clarot called Linschoten to ask whether she would be willing to participate in animal studies that Matrixx was planning, but she declined because her focus was human research.

By September 2003, one of Linschoten's colleagues at the University of Colorado, Dr. Bruce Jafek, had observed 10 patients suffering from anosmia after Zicam use. Linschoten and Jafek planned to present their findings at a meeting

of the American Rhinologic Society in a poster presentation entitled "Zicam® Induced Anosmia." *Ibid.* (internal quotation marks omitted). The American Rhinologic Society posted their abstract in advance of the meeting. The presentation described in detail a 55-year-old man with previously normal taste and smell who experienced severe burning in his nose, followed immediately by a loss of smell, after using Zicam. It also reported 10 other Zicam users with similar symptoms.

Matrixx learned of the doctors' planned presentation. Clarot sent a letter to Dr. Jafek warning him that he did not have permission to use Matrixx's name or the names of its products. Dr. Jafek deleted the references to Zicam in the poster before presenting it to the American Rhinologic Society.

The following month, two plaintiffs commenced a product liability lawsuit against Matrixx alleging that Zicam had damaged their sense of smell. By the end of the class period on February 6, 2004, nine plaintiffs had filed four lawsuits.

Respondents allege that Matrixx made a series of public statements that were misleading in light of the foregoing information. In October 2003, after it had learned of Dr. Jafek's study and after Dr. Jafek had presented his findings to the American Rhinologic Society, Matrixx stated that Zicam was "'poised for growth in the upcoming cough and cold season'" and that the company had "'very strong momentum.'"[2] *Id.*, at 72a–74a. Matrixx further expressed its expectation that revenues would "'be up in excess of 50% and that earnings, per share for the full year [would] be in the 25 to 30 cent range.'" *Id.*, at 74a. In January 2004, Matrixx raised

[2] At oral argument, counsel for the United States, which submitted an *amicus curiae* brief in support of respondents, suggested that some of these statements might qualify as nonactionable "puffery." Tr. of Oral Arg. 51–52. This question is not before us, as Matrixx has not advanced such an argument.

its revenue guidance, predicting an increase in revenues of 80 percent and earnings per share in the 33- to 38-cent range.

In its Form 10–Q filed with the SEC in November 2003, Zicam warned of the potential "'material adverse effect'" that could result from product liability claims, "'whether or not proven to be valid.'" *Id.*, at 75a–76a. It stated that product liability actions could materially affect Matrixx's "'product branding and goodwill,'" leading to reduced customer acceptance.[3] *Id.*, at 76a. It did not disclose, however, that two plaintiffs had already sued Matrixx for allegedly causing them to lose their sense of smell.

On January 30, 2004, Dow Jones Newswires reported that the Food and Drug Administration (FDA) was "'looking into complaints that an over-the-counter common-cold medicine manufactured by a unit of Matrixx Initiatives, Inc. (MTXX) may be causing some users to lose their sense of smell'" in light of at least three product liability lawsuits. *Id.*, at 79a–80a. Matrixx's stock fell from $13.55 to $11.97 per share after the report. In response, on February 2, Matrixx issued a press release that stated:

> "All Zicam products are manufactured and marketed according to FDA guidelines for homeopathic medicine. Our primary concern is the health and safety of our customers and the distribution of factual information about our products. Matrixx believes statements alleging that intranasal Zicam products cause anosmia (loss of smell) are completely unfounded and misleading.
>
> "In no clinical trial of intranasal zinc gluconate gel products has there been a single report of lost or diminished olfactory function (sense of smell). Rather, the safety and efficacy of zinc gluconate for the treatment of symptoms related to the common cold have been well

[3] Respondents also allege that Matrixx falsely reported its financial results in the Form 10–Q by failing to reserve for or disclose potential liability, in violation of generally accepted accounting principles. The Court of Appeals did not rely on these allegations.

established in two double-blind, placebo-controlled, randomized clinical trials. In fact, in neither study were there any reports of anosmia related to the use of this compound. The overall incidence of adverse events associated with zinc gluconate was extremely low, with no statistically significant difference between the adverse event rates for the treated and placebo subsets.

"A multitude of environmental and biologic influences are known to affect the sense of smell. Chief among them is the common cold. As a result, the population most likely to use cold remedy products is already at increased risk of developing anosmia. Other common causes of olfactory dysfunction include age, nasal and sinus infections, head trauma, anatomical obstructions, and environmental irritants." *Id.*, at 77a–78a (internal quotation marks omitted).

The day after Matrixx issued this press release, its stock price bounced back to $13.40 per share.

On February 6, 2004, the end of the class period, Good Morning America, a nationally broadcast morning news program, highlighted Dr. Jafek's findings. (The complaint does not allege that Matrixx learned of the news story before its broadcast.) The program reported that Dr. Jafek had discovered more than a dozen patients suffering from anosmia after using Zicam. It also noted that four lawsuits had been filed against Matrixx. The price of Matrixx stock plummeted to $9.94 per share that same day. Zicam again issued a press release largely repeating its February 2 statement.

On February 19, 2004, Matrixx filed a Form 8–K with the SEC stating that it had "'convened a two-day meeting of physicians and scientists to review current information on smell disorders'" in response to Dr. Jafek's presentation. *Id.*, at 82a. According to the Form 8–K: "'In the opinion of the panel, there is insufficient scientific evidence at this time to determine if zinc gluconate, when used as recommended, affects a person's ability to smell.'" *Ibid.* A few weeks

later, a reporter quoted Matrixx as stating that it would begin conducting "'animal and human studies to further characterize these post-marketing complaints.'" *Id.*, at 84a.

On the basis of these allegations, respondents claimed that Matrixx violated § 10(b) of the Securities Exchange Act and SEC Rule 10b–5 by making untrue statements of fact and failing to disclose material facts necessary to make the statements not misleading in an effort to maintain artificially high prices for Matrixx securities.

B

Matrixx moved to dismiss respondents' complaint, arguing that they had failed to plead the elements of a material misstatement or omission and scienter. The District Court granted the motion to dismiss. Relying on *In re Carter-Wallace, Inc. Securities Litigation*, 220 F. 3d 36 (CA2 2000), it held that respondents had not alleged a "statistically significant correlation between the use of Zicam and anosmia so as to make failure to public[ly] disclose complaints and the University of Colorado study a material omission." App. to Pet. for Cert. 50a. The District Court similarly agreed that respondents had not stated with particularity facts giving rise to a strong inference of scienter. See 15 U. S. C. § 78u–4(b)(2)(A). It noted that the complaint failed to allege that Matrixx disbelieved its statements about Zicam's safety or that any of the defendants profited or attempted to profit from Matrixx's public statements. App. to Pet. for Cert. 52a.

The Court of Appeals reversed. 585 F. 3d 1167 (CA9 2009). Noting that "'[t]he determination [of materiality] requires delicate assessments of the inferences a "reasonable shareholder" would draw from a given set of facts and the significance of those inferences to him,'" *id.*, at 1178 (quoting *Basic Inc.* v. *Levinson*, 485 U. S. 224, 236 (1988); some internal quotation marks omitted; alterations in original), the Court of Appeals held that the District Court had erred in

requiring an allegation of statistical significance to establish materiality. It concluded, to the contrary, that the complaint adequately alleged "information regarding the possible link between Zicam and anosmia" that would have been significant to a reasonable investor. 585 F. 3d, at 1179, 1180. Turning to scienter, the Court of Appeals concluded that "[w]ithholding reports of adverse effects of and lawsuits concerning the product responsible for the company's remarkable sales increase is 'an extreme departure from the standards of ordinary care,'" giving rise to a strong inference of scienter. *Id.*, at 1183.

We granted certiorari, 560 U. S. 964 (2010), and we now affirm.

II

Section 10(b) of the Securities Exchange Act makes it unlawful for any person to "use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors." 15 U. S. C. § 78j(b). SEC Rule 10b–5 implements this provision by making it unlawful to, among other things, "make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading." 17 CFR § 240.10b–5(b). We have implied a private cause of action from the text and purpose of § 10(b). See *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U. S. 308, 318 (2007).

To prevail on their claim that Matrixx made material misrepresentations or omissions in violation of § 10(b) and Rule 10b–5, respondents must prove "(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss

causation." *Stoneridge Investment Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U. S. 148, 157 (2008). Matrixx contends that respondents have failed to plead both the element of a material misrepresentation or omission and the element of scienter because they have not alleged that the reports received by Matrixx reflected statistically significant evidence that Zicam caused anosmia. We disagree.

A

We first consider Matrixx's argument that "adverse event reports that do not reveal a statistically significant increased risk of adverse events from product use are not material information." Brief for Petitioners 17 (capitalization omitted).

1

To prevail on a § 10(b) claim, a plaintiff must show that the defendant made a statement that was "*misleading* as to a *material* fact."[4] *Basic*, 485 U. S., at 238. In *Basic*, we held that this materiality requirement is satisfied when there is "'a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the "total mix" of information made available.'" *Id.*, at 231–232 (quoting *TSC Industries, Inc.* v. *Northway, Inc.*, 426 U. S. 438, 449 (1976)). We were "careful not to set too low a standard of materiality," for fear that management would "'bury the shareholders in an avalanche of trivial information.'" 485 U. S., at 231 (quoting *TSC Industries*, 426 U. S., at 448–449).

Basic involved a claim that the defendant had made misleading statements denying that it was engaged in merger negotiations when it was, in fact, conducting preliminary ne-

[4] Under the Private Securities Litigation Reform Act of 1995 (PSLRA), when a plaintiff's claim is based on alleged misrepresentations or omissions of a material fact, "the complaint shall specify each statement alleged to have been misleading, [and] the reason or reasons why the statement is misleading." 15 U. S. C. § 78u–4(b)(1).

gotiations. See 485 U. S., at 227–229. The defendant urged a bright-line rule that preliminary merger negotiations are material only once the parties to the negotiations reach an agreement in principle. *Id.*, at 232–233. We observed that "[a]ny approach that designates a single fact or occurrence as always determinative of an inherently fact-specific finding such as materiality, must necessarily be overinclusive or underinclusive." *Id.*, at 236. We thus rejected the defendant's proposed rule, explaining that it would "artificially exclud[e] from the definition of materiality information concerning merger discussions, which would otherwise be considered significant to the trading decision of a reasonable investor." *Ibid.*

Like the defendant in *Basic*, Matrixx urges us to adopt a bright-line rule that reports of adverse events[5] associated with a pharmaceutical company's products cannot be material absent a sufficient number of such reports to establish a statistically significant risk that the product is in fact causing the events.[6] Absent statistical significance, Matrixx argues,

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[5] The FDA defines an "[a]dverse drug experience" as "[a]ny adverse event associated with the use of a drug in humans, whether or not considered drug related." 21 CFR § 314.80(a) (2010). Federal law imposes certain obligations on pharmaceutical manufacturers to report adverse events to the FDA. During the class period, manufacturers of over-the-counter drugs such as Zicam Cold Remedy had no obligation to report adverse events to the FDA. In 2006, Congress enacted legislation to require manufacturers of over-the-counter drugs to report any "serious adverse event" to the FDA within 15 business days. See 21 U. S. C. §§ 379aa(b), (c).

[6] "A study that is statistically significant has results that are unlikely to be the result of random error . . . ." Federal Judicial Center, Reference Manual on Scientific Evidence 354 (2d ed. 2000). To test for significance, a researcher develops a "null hypothesis"—*e. g.*, the assertion that there is no relationship between Zicam use and anosmia. See *id.*, at 122. The researcher then calculates the probability of obtaining the observed data (or more extreme data) if the null hypothesis is true (called the *p*-value). *Ibid.* Small *p*-values are evidence that the null hypothesis is incorrect. See *ibid.* Finally, the researcher compares the *p*-value to a preselected

adverse event reports provide only "anecdotal" evidence that "the user of a drug experienced an adverse event at some point during or following the use of that drug." Brief for Petitioners 17. Accordingly, it contends, reasonable investors would not consider such reports relevant unless they are statistically significant because only then do they "reflect a scientifically reliable basis for inferring a potential causal link between product use and the adverse event." *Id.*, at 32.

As in *Basic*, Matrixx's categorical rule would "artificially exclud[e]" information that "would otherwise be considered significant to the trading decision of a reasonable investor." 485 U. S., at 236. Matrixx's argument rests on the premise that statistical significance is the only reliable indication of causation. This premise is flawed: As the SEC points out, "medical researchers . . . consider multiple factors in assessing causation." Brief for United States as *Amicus Curiae* 12. Statistically significant data are not always available. For example, when an adverse event is subtle or rare, "an inability to obtain a data set of appropriate quality or quantity may preclude a finding of statistical significance." *Id.*, at 15; see also Brief for Medical Researchers as *Amici Curiae* 11. Moreover, ethical considerations may prohibit researchers from conducting randomized clinical trials to confirm a suspected causal link for the purpose of obtaining statistically significant data. See *id.*, at 10–11.

A lack of statistically significant data does not mean that medical experts have no reliable basis for inferring a causal link between a drug and adverse events. As Matrixx itself concedes, medical experts rely on other evidence to establish an inference of causation. See Brief for Petitioners 44–45, n. 22.[7] We note that courts frequently permit expert testi-

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value called the significance level. *Id.*, at 123. If the *p*-value is below the preselected value, the difference is deemed "significant." *Id.*, at 124.

[7] Matrixx and its *amici* list as relevant factors the strength of the association between the drug and the adverse effects; a temporal relationship between exposure and the adverse event; consistency across studies; bio-

mony on causation based on evidence other than statistical significance. See, *e. g.*, *Best* v. *Lowe's Home Centers, Inc.*, 563 F. 3d 171, 178 (CA6 2009); *Westberry* v. *Gislaved Gummi AB*, 178 F. 3d 257, 263–264 (CA4 1999) (citing cases); *Wells* v. *Ortho Pharmaceutical Corp.*, 788 F. 2d 741, 744–745 (CA11 1986). We need not consider whether the expert testimony was properly admitted in those cases, and we do not attempt to define here what constitutes reliable evidence of causation. It suffices to note that, as these courts have recognized, "medical professionals and researchers do not limit the data they consider to the results of randomized clinical trials or to statistically significant evidence." Brief for Medical Researchers as *Amici Curiae* 31.

The FDA similarly does not limit the evidence it considers for purposes of assessing causation and taking regulatory action to statistically significant data. In assessing the safety risk posed by a product, the FDA considers factors such as "strength of the association," "temporal relationship of product use and the event," "consistency of findings across available data sources," "evidence of a dose-response for the effect," "biologic plausibility," "seriousness of the event relative to the disease being treated," "potential to mitigate the risk in the population," "feasibility of further study using observational or controlled clinical study designs," and "degree of benefit the product provides, including availability of other therapies."[8] FDA, Guidance for Industry: Good Pharmacovigilance Practices and Pharmacoepidemiologic Assessment 18 (2005) (capitalization omitted), http://

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logical plausibility; consideration of alternative explanations; specificity (*i. e.*, whether the specific chemical is associated with the specific disease); the dose-response relationship; and the clinical and pathological characteristics of the event. Brief for Petitioners 44–45, n. 22; Brief for Consumer Healthcare Products Association et al. as *Amici Curiae* 12–13. These factors are similar to the factors the FDA considers in taking action against pharmaceutical products. See *infra* this page.

[8] See also n. 7, *supra*.

www.fda.gov/downloads/RegulatingInformation/Guidances/UCM126834.pdf (all Internet materials as visited Mar. 17, 2011, and available in Clerk of Court's case file); see also Brief for United States as *Amicus Curiae* 19–20 (same); FDA, The Clinical Impact of Adverse Event Reporting 6 (1996) (similar), http://www.fda.gov/downloads/safety/MedWatch/UCM168505.pdf. It "does not apply any single metric for determining when additional inquiry or action is necessary, and it certainly does not insist upon 'statistical significance.'" Brief for United States as *Amicus Curiae* 19.

Not only does the FDA rely on a wide range of evidence of causation, it sometimes acts on the basis of evidence that suggests, but does not prove, causation. For example, the FDA requires manufacturers of over-the-counter drugs to revise their labeling "to include a warning as soon as there is reasonable evidence of an association of a serious hazard with a drug; a causal relationship need not have been proved." 21 CFR §201.80(e). More generally, the FDA may make regulatory decisions against drugs based on postmarketing evidence that gives rise to only a suspicion of causation. See FDA, The Clinical Impact of Adverse Event Reporting, *supra*, at 7 ("[A]chieving certain proof of causality through postmarketing surveillance is unusual. Attaining a prominent degree of suspicion is much more likely, and may be considered a sufficient basis for regulatory decisions" (footnote omitted)).[9]

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[9] See also GAO, M. Crosse et al., Drug Safety: Improvement Needed in FDA's Postmarket Decision-making and Oversight Process 7 (GAO–06–402, 2006) ("If FDA has information that a drug on the market may pose a significant health risk to consumers, it weighs the effect of the adverse events against the benefit of the drug to determine what actions, if any, are warranted. This decision-making process is complex and encompasses many factors, such as the medical importance and utility of the drug, the drug's extent of usage, the severity of the disease being treated, the drug's efficacy in treating this disease, and the availability of other drugs to treat the same disorder"), http://www.gao.gov/new.items/

This case proves the point. In 2009, the FDA issued a warning letter to Matrixx stating that "[a] significant and growing body of evidence substantiates that the Zicam Cold Remedy intranasal products may pose a serious risk to consumers who use them." App. 270a. The letter cited as evidence 130 reports of anosmia the FDA had received, the fact that the FDA had received few reports of anosmia associated with other intranasal cold remedies, and "evidence in the published scientific literature that various salts of zinc can damage olfactory function in animals and humans." *Ibid.* It did not cite statistically significant data.

Given that medical professionals and regulators act on the basis of evidence of causation that is not statistically significant, it stands to reason that in certain cases reasonable investors would as well. As Matrixx acknowledges, adverse event reports "appear in many forms, including direct complaints by users to manufacturers, reports by doctors about reported or observed patient reactions, more detailed case reports published by doctors in medical journals, or larger scale published clinical studies." Brief for Petitioners 17. As a result, assessing the materiality of adverse event reports is a "fact-specific" inquiry, *Basic*, 485 U. S., at 236, that requires consideration of the source, content, and context of the reports. This is not to say that statistical significance (or the lack thereof) is irrelevant—only that it is not dispositive of every case.

Application of *Basic*'s "total mix" standard does not mean that pharmaceutical manufacturers must disclose all reports of adverse events. Adverse event reports are daily events in the pharmaceutical industry; in 2009, the FDA entered nearly 500,000 such reports into its reporting system, see FDA, Reports Received and Reports Entered in AERS

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d06402.pdf; Federal Judicial Center, *supra* n. 6, at 33 ("[R]isk assessors may pay heed to any evidence that points to a need for caution, rather than assess the likelihood that a causal relationship in a specific case is more likely than not").

by Year (as of Mar. 31, 2010), http://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/Surveillance/AdverseDrugEffects/ucm070434.htm. The fact that a user of a drug has suffered an adverse event, standing alone, does not mean that the drug caused that event. See FDA, Annual Adverse Drug Experience Report: 1996, p. 2 (1997), http://druganddevicelaw.net/Annual%20Adverse%20Drug%20Experience%20Report%201996.pdf. The question remains whether a *reasonable* investor would have viewed the nondisclosed information "'as having *significantly* altered the "total mix" of information made available.'" *Basic*, 485 U. S., at 232 (quoting *TSC Industries*, 426 U. S., at 449; emphasis added). For the reasons just stated, the mere existence of reports of adverse events—which says nothing in and of itself about whether the drug is causing the adverse events—will not satisfy this standard. Something more is needed, but that something more is not limited to statistical significance and can come from "the source, content, and context of the reports," *supra*, at 43. This contextual inquiry may reveal in some cases that reasonable investors would have viewed reports of adverse events as material even though the reports did not provide statistically significant evidence of a causal link.[10]

Moreover, it bears emphasis that § 10(b) and Rule 10b–5(b) do not create an affirmative duty to disclose any and all material information. Disclosure is required under these provisions only when necessary "to make . . . statements made, in the light of the circumstances under which they were made, not misleading." 17 CFR § 240.10b–5(b); see also

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[10] We note that our conclusion accords with views of the SEC, as expressed in an *amicus curiae* brief filed in this case. See Brief for United States 11–12; see also *TSC Industries, Inc.* v. *Northway, Inc.*, 426 U. S. 438, 449, n. 10 (1976) ("[T]he SEC's view of the proper balance between the need to insure adequate disclosure and the need to avoid the adverse consequences of setting too low a threshold for civil liability is entitled to consideration").

Basic, 485 U. S., at 239, n. 17 ("Silence, absent a duty to disclose, is not misleading under Rule 10b–5"). Even with respect to information that a reasonable investor might consider material, companies can control what they have to disclose under these provisions by controlling what they say to the market.

2

Applying *Basic*'s "total mix" standard in this case, we conclude that respondents have adequately pleaded materiality. This is not a case about a handful of anecdotal reports, as Matrixx suggests. Assuming the complaint's allegations to be true, as we must, Matrixx received information that plausibly indicated a reliable causal link between Zicam and anosmia. That information included reports from three medical professionals and researchers about more than 10 patients who had lost their sense of smell after using Zicam. Clarot told Linschoten that Matrixx had received additional reports of anosmia. (In addition, during the class period, nine plaintiffs commenced four product liability lawsuits against Matrixx alleging a causal link between Zicam use and anosmia.)[11] Further, Matrixx knew that Linschoten and Dr. Jafek had presented their findings about a causal link between Zicam and anosmia to a national medical conference devoted to treatment of diseases of the nose.[12] Their presentation described a patient who experienced severe burning

[11] It is unclear whether these plaintiffs were the same individuals whose symptoms were reported by the medical professionals.

[12] Matrixx contends that Dr. Jafek and Linschoten's study was not reliable because they did not sufficiently rule out the common cold as a cause for their patients' anosmia. We note that the complaint alleges that, in one instance, a consumer who did not have a cold lost his sense of smell after using Zicam. More importantly, to survive a motion to dismiss, respondents need only allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp.* v. *Twombly*, 550 U. S. 544, 570 (2007). For all the reasons we state in the opinion, respondents' allegations plausibly suggest that Dr. Jafek and Linschoten's conclusions were based on reliable evidence of a causal link between Zicam and anosmia.

in his nose, followed immediately by a loss of smell, after using Zicam—suggesting a temporal relationship between Zicam use and anosmia.

Critically, both Dr. Hirsch and Linschoten had also drawn Matrixx's attention to previous studies that had demonstrated a biological causal link between intranasal application of zinc and anosmia.[13] Before his conversation with Linschoten, Clarot, Matrixx's vice president of research and development, was seemingly unaware of these studies, and the complaint suggests that, as of the class period, Matrixx had not conducted any research of its own relating to anosmia. See, *e. g.,* App. 84a (referencing a press report, issued after the end of the class period, noting that Matrixx said it would begin conducting "'animal and human studies to further characterize these post-marketing complaints'"). Accordingly, it can reasonably be inferred from the complaint that Matrixx had no basis for rejecting Dr. Jafek's findings out of hand.

We believe that these allegations suffice to "raise a reasonable expectation that discovery will reveal evidence" satisfying the materiality requirement, *Bell Atlantic Corp.* v. *Twombly,* 550 U. S. 544, 556 (2007), and to "allo[w] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged," *Iqbal,* 556 U. S., at 678. The information provided to Matrixx by medical experts revealed a plausible causal relationship between Zicam Cold

[13] Matrixx contends that these studies are not reliable evidence of causation because the studies used zinc sulfate, whereas the active ingredient in Matrixx is zinc gluconate. Respondents' complaint, however, alleges that the studies confirmed the toxicity of "zinc." App. 68a. Matrixx further contends that studies relating to fish cannot reliably prove causation with respect to humans. The complaint references several studies, however, only one of which involved fish. In any event, the existence of the studies suggests a plausible biological link between zinc and anosmia, which, in combination with the other allegations, is sufficient to survive a motion to dismiss.

Remedy and anosmia. Consumers likely would have viewed the risk associated with Zicam (possible loss of smell) as substantially outweighing the benefit of using the product (alleviating cold symptoms), particularly in light of the existence of many alternative products on the market. Importantly, Zicam Cold Remedy allegedly accounted for 70 percent of Matrixx's sales. Viewing the allegations of the complaint as a whole, the complaint alleges facts suggesting a significant risk to the commercial viability of Matrixx's leading product.

It is substantially likely that a reasonable investor would have viewed this information "'as having significantly altered the "total mix" of information made available.'" *Basic*, 485 U. S., at 232 (quoting *TSC Industries*, 426 U. S., at 449). Matrixx told the market that revenues were going to rise 50 and then 80 percent. Assuming the complaint's allegations to be true, however, Matrixx had information indicating a significant risk to its leading revenue-generating product. Matrixx also stated that reports indicating that Zicam caused anosmia were "'completely unfounded and misleading'" and that "'the safety and efficacy of zinc gluconate for the treatment of symptoms related to the common cold have been well established.'" App. 77a–78a. Importantly, however, Matrixx had evidence of a biological link between Zicam's key ingredient and anosmia, and it had not conducted any studies of its own to disprove that link. In fact, as Matrixx later revealed, the scientific evidence at that time was "'insufficient . . . to determine if zinc gluconate, when used as recommended, affects a person's ability to smell.'" *Id.*, at 82a.

Assuming the facts to be true, these were material facts "necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading." 17 CFR §240.10b–5(b). We therefore affirm the Court of Appeals' holding that respondents adequately pleaded the element of a material misrepresentation or omission.

B

Matrixx also argues that respondents failed to allege facts plausibly suggesting that it acted with the required level of scienter. "To establish liability under § 10(b) and Rule 10b–5, a private plaintiff must prove that the defendant acted with scienter, 'a mental state embracing intent to deceive, manipulate, or defraud.' " *Tellabs*, 551 U. S., at 319 (quoting *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185, 193–194, and n. 12 (1976)). We have not decided whether recklessness suffices to fulfill the scienter requirement. See *Tellabs*, 551 U. S., at 319, n. 3. Because Matrixx does not challenge the Court of Appeals' holding that the scienter requirement may be satisfied by a showing of "deliberate recklessness," see 585 F. 3d, at 1180 (internal quotation marks omitted), we assume, without deciding, that the standard applied by the Court of Appeals is sufficient to establish scienter.[14]

Under the PSLRA, a plaintiff must "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U. S. C. § 78u–4(b)(2)(A) (2006 ed., Supp. IV). This standard requires courts to take into account "plausible opposing inferences." *Tellabs*, 551 U. S., at 323. A complaint adequately pleads scienter under the PSLRA "only if a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged." *Id.*, at 324. In making this determination, the court must review "all the allegations holistically." *Id.*, at 326. The absence of a motive allegation, though relevant, is not dispositive. *Id.*, at 325.

Matrixx argues, in summary fashion, that because respondents do not allege that it knew of statistically significant evidence of causation, there is no basis to consider the

[14] Under the PSLRA, if the alleged misstatement or omission is a "forward-looking statement," the required level of scienter is "actual knowledge." 15 U. S. C. § 78u–5(c)(1)(B). Matrixx has not argued that the statements or omissions here are "forward-looking statement[s]."

inference that it acted recklessly or knowingly to be at least as compelling as the alternative inferences. "Rather," it argues, "the most obvious inference is that petitioners did not disclose the [reports] simply because petitioners believed they were far too few . . . to indicate anything meaningful about adverse reactions to use of Zicam." Brief for Petitioners 49. Matrixx's proposed bright-line rule requiring an allegation of statistical significance to establish a strong inference of scienter is just as flawed as its approach to materiality.

The inference that Matrixx acted recklessly (or intentionally, for that matter) is at least as compelling as, if not more compelling than, the inference that it simply thought the reports did not indicate anything meaningful about adverse reactions. According to the complaint, Matrixx was sufficiently concerned about the information it received that it informed Linschoten that it had hired a consultant to review the product, asked Linschoten to participate in animal studies, and convened a panel of physicians and scientists in response to Dr. Jafek's presentation. It successfully prevented Dr. Jafek from using Zicam's name in his presentation on the ground that he needed Matrixx's permission to do so. Most significantly, Matrixx issued a press release that suggested that studies had confirmed that Zicam does not cause anosmia when, in fact, it had not conducted any studies relating to anosmia and the scientific evidence at that time, according to the panel of scientists, was insufficient to determine whether Zicam did or did not cause anosmia.[15]

[15] One of Matrixx's *amici* argues that "the most cogent inference regarding Matrixx's state of mind is that it delayed releasing information regarding anosmia complaints in order to provide itself an opportunity to carefully review all evidence regarding any link between Zicam and anosmia." Brief for Washington Legal Foundation 26. We do not doubt that this may be the most cogent inference in some cases. Here, however, the misleading nature of Matrixx's press release is sufficient to render the inference of scienter at least as compelling as the inference suggested by *amicus*.

These allegations, "taken collectively," give rise to a "cogent and compelling" inference that Matrixx elected not to disclose the reports of adverse events not because it believed they were meaningless but because it understood their likely effect on the market. *Tellabs*, 551 U. S., at 323, 324. "[A] reasonable person" would deem the inference that Matrixx acted with deliberate recklessness (or even intent) "at least as compelling as any opposing inference one could draw from the facts alleged." *Id.*, at 324. We conclude, in agreement with the Court of Appeals, that respondents have adequately pleaded scienter. Whether respondents can ultimately prove their allegations and establish scienter is an altogether different question.

* * *

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

Affirmed.

Syllabus

CONNICK, DISTRICT ATTORNEY, ET AL. *v.* THOMPSON

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

No. 09–571. Argued October 6, 2010—Decided March 29, 2011

Petitioner the Orleans Parish District Attorney's Office concedes that, in prosecuting respondent Thompson for attempted armed robbery, prosecutors violated *Brady* v. *Maryland*, 373 U. S. 83, by failing to disclose a crime lab report. Because of his robbery conviction, Thompson elected not to testify at his later murder trial and was convicted. A month before his scheduled execution, the lab report was discovered. A reviewing court vacated both convictions, and Thompson was found not guilty in a retrial on the murder charge. He then filed suit against the district attorney's office under 42 U. S. C. § 1983, alleging, *inter alia*, that the *Brady* violation was caused by the office's deliberate indifference to an obvious need to train prosecutors to avoid such constitutional violations. The District Court held that, to prove deliberate indifference, Thompson did not need to show a pattern of similar *Brady* violations when he could demonstrate that the need for training was obvious. The jury found the district attorney's office liable for failure to train and awarded Thompson damages. The Fifth Circuit affirmed by an equally divided court.

Held: A district attorney's office may not be held liable under § 1983 for failure to train its prosecutors based on a single *Brady* violation. Pp. 59–72.

(a) Plaintiffs seeking to impose § 1983 liability on local governments must prove that their injury was caused by "action pursuant to official municipal policy," which includes the decisions of a government's lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law. *Monell* v. *New York City Dept. of Social Servs.*, 436 U. S. 658, 691. A local government's decision not to train certain employees about their legal duty to avoid violating citizens' rights may rise to the level of an official government policy for § 1983 purposes, but the failure to train must amount to "deliberate indifference to the rights of persons with whom the [untrained employees] come into contact." *Canton* v. *Harris*, 489 U. S. 378, 388. Deliberate indifference in this context requires proof that city policymakers disregarded the "known or obvious consequence" that a particular omission in their training program would cause city employees to

violate citizens' constitutional rights. *Board of Comm'rs of Bryan Cty.* v. *Brown*, 520 U. S. 397, 410. Pp. 59–62.

(b) A pattern of similar constitutional violations by untrained employees is "ordinarily necessary" to demonstrate deliberate indifference. *Bryan Cty.*, *supra*, at 409. Without notice that a course of training is deficient, decisionmakers can hardly be said to have deliberately chosen a training program that will cause violations of constitutional rights. Thompson does not contend that he proved a pattern of similar *Brady* violations, and four reversals by Louisiana courts for dissimilar *Brady* violations in the 10 years before the robbery trial could not have put the district attorney's office on notice of the need for specific training. Pp. 62–63.

(c) Thompson mistakenly relies on the "single-incident" liability hypothesized in *Canton*, contending that the *Brady* violation in his case was the "obvious" consequence of failing to provide specific *Brady* training and that this "obviousness" showing can substitute for the pattern of violations ordinarily necessary to establish municipal culpability. In *Canton*, the Court theorized that if a city armed its police force and deployed them into the public to capture fleeing felons without training the officers in the constitutional limitation on the use of deadly force, the failure to train could reflect the city's deliberate indifference to the highly predictable consequence, namely, violations of constitutional rights. Failure to train prosecutors in their *Brady* obligations does not fall within the narrow range of *Canton*'s hypothesized single-incident liability. The obvious need for specific legal training present in *Canton*'s scenario—police academy applicants are unlikely to be familiar with constitutional constraints on deadly force and, absent training, cannot obtain that knowledge—is absent here. Attorneys are trained in the law and equipped with the tools to interpret and apply legal principles, understand constitutional limits, and exercise legal judgment. They receive training before entering the profession, must usually satisfy continuing-education requirements, often train on the job with more experienced attorneys, and must satisfy licensing standards and ongoing ethical obligations. Prosecutors not only are equipped but are ethically bound to know what *Brady* entails and to perform legal research when they are uncertain. Thus, recurring constitutional violations are not the "obvious consequence" of failing to provide prosecutors with formal in-house training. The nuance of the allegedly necessary training also distinguishes the case from the example in *Canton*. Here, the prosecutors were familiar with the general *Brady* rule. Thus, Thompson cannot rely on the lack of an ability to cope with constitutional situations that underlies the *Canton* hypothetical, but must assert that prosecutors were not trained about particular *Brady* evidence or the specific scenario related to the violation in his case. That sort of nuance simply

cannot support an inference of deliberate indifference here. Contrary to the holding below, it does not follow that, because *Brady* has gray areas and some *Brady* decisions are difficult, prosecutors will so obviously make wrong decisions that failing to train them amounts, as it must, to "a decision by the city itself to violate the Constitution." *Canton*, *supra*, at 395 (O'Connor, J., concurring in part and dissenting in part). Pp. 63–71.

578 F. 3d 293, reversed.

THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, and ALITO, JJ., joined. SCALIA, J., filed a concurring opinion, in which ALITO, J., joined, *post*, p. 72. GINSBURG, J., filed a dissenting opinion, in which BREYER, SOTOMAYOR, and KAGAN, JJ., joined, *post*, p. 79.

Stuart Kyle Duncan, Appellate Chief, Louisiana Attorney General's Office, argued the cause for petitioners. With him on the briefs were *James D. "Buddy" Caldwell*, Attorney General, *Ross W. Bergethon* and *Robert Abendroth*, Assistant Attorneys General, *Graymond F. Martin*, and *Donna R. Andrieu*.

J. Gordon Cooney, Jr., argued the cause for respondent. With him on the brief were *Michael L. Banks*, *R. Ted Cruz*, and *Allyson N. Ho*.*

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*Briefs of *amici curiae* urging reversal were filed for the National District Attorneys Association et al. by *Edward C. Dawson* and *Richard B. Farrer;* for the National League of Cities et al. by *Richard Ruda*, *Stephen B. Kinnaird*, *Alexander M. R. Lyon*, and *Stephanos Bibas;* and for the Orleans Parish Assistant District Attorneys by *Valentin M. Solino*.

Briefs of *amici curiae* urging affirmance were filed for the Center on the Administration of Criminal Law, New York University School of Law, et al. by *Martin J. Siegel*, *Anthony S. Barkow*, and *David B. Edwards;* for Former Federal Civil Rights Officials et al. by *Paul D. Clement*, *Jeffrey S. Bucholtz*, *Adam Conrad*, *Kelly Shackelford*, *Hiram S. Sasser III*, and *Pamela S. Karlan;* for the Innocence Network by *Peter D. Isakoff*, *Keith A. Findley*, *Peter J. Neufeld*, and *Barry Scheck;* and for the National Association of Criminal Defense Lawyers by *Joel B. Rudin* and *Joshua L. Dratel*.

Briefs of *amici curiae* were filed for the Alliance Defense Fund et al. by *Glen Lavy*, *Thomas Marcelle*, and *Ilya Shapiro;* for the American Civil Liberties Union et al. by *Lisa S. Blatt*, *John A. Freedman*, *Joshua P. Wilson*, *Steven R. Shapiro*, and *Mary Bauer;* and for the District Attor-

JUSTICE THOMAS delivered the opinion of the Court.

The Orleans Parish District Attorney's Office now concedes that, in prosecuting respondent John Thompson for attempted armed robbery, prosecutors failed to disclose evidence that should have been turned over to the defense under *Brady* v. *Maryland*, 373 U. S. 83 (1963). Thompson was convicted. Because of that conviction Thompson elected not to testify in his own defense in his later trial for murder, and he was again convicted. Thompson spent 18 years in prison, including 14 years on death row. One month before Thompson's scheduled execution, his investigator discovered the undisclosed evidence from his armed robbery trial. The reviewing court determined that the evidence was exculpatory, and both of Thompson's convictions were vacated.

After his release from prison, Thompson sued petitioner Harry Connick, in his official capacity as the Orleans Parish district attorney, for damages under Rev. Stat. § 1979, 42 U. S. C. § 1983. Thompson alleged that Connick had failed to train his prosecutors adequately about their duty to produce exculpatory evidence and that the lack of training had caused the nondisclosure in Thompson's robbery case. The jury awarded Thompson $14 million, and the Court of Appeals for the Fifth Circuit affirmed by an evenly divided en banc court. We granted certiorari to decide whether a district attorney's office may be held liable under § 1983 for failure to train based on a single *Brady* violation. We hold that it cannot.

I

A

In early 1985, John Thompson was charged with the murder of Raymond T. Liuzza, Jr., in New Orleans. Publicity following the murder charge led the victims of an unrelated

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neys Association of the State of New York by *Anthony J. Servino* and *Steven A. Bender*.

armed robbery to identify Thompson as their attacker. The district attorney charged Thompson with attempted armed robbery.

As part of the robbery investigation, a crime scene technician took from one of the victims' pants a swatch of fabric stained with the robber's blood. Approximately one week before Thompson's armed robbery trial, the swatch was sent to the crime laboratory. Two days before the trial, Assistant District Attorney Bruce Whittaker received the crime lab's report, which stated that the perpetrator had blood type B. There is no evidence that the prosecutors ever had Thompson's blood tested or that they knew what his blood type was. Whittaker claimed he placed the report on Assistant District Attorney James Williams' desk, but Williams denied seeing it. The report was never disclosed to Thompson's counsel.

Williams tried the armed robbery case with Assistant District Attorney Gerry Deegan. On the first day of trial, Deegan checked all of the physical evidence in the case out of the police property room, including the bloodstained swatch. Deegan then checked all of the evidence but the swatch into the courthouse property room. The prosecutors did not mention the swatch or the crime lab report at trial, and the jury convicted Thompson of attempted armed robbery.

A few weeks later, Williams and Special Prosecutor Eric Dubelier tried Thompson for the Liuzza murder. Because of the armed robbery conviction, Thompson chose not to testify in his own defense. He was convicted and sentenced to death. *State* v. *Thompson*, 516 So. 2d 349 (La. 1987). In the 14 years following Thompson's murder conviction, state and federal courts reviewed and denied his challenges to the conviction and sentence. See *State ex rel. Thompson* v. *Cain*, 95–2463 (La. 4/25/96), 672 So. 2d 906; *Thompson* v. *Cain*, 161 F. 3d 802 (CA5 1998). The State scheduled Thompson's execution for May 20, 1999.

In late April 1999, Thompson's private investigator discovered the crime lab report from the armed robbery investigation in the files of the New Orleans Police Crime Laboratory. Thompson was tested and found to have blood type O, proving that the blood on the swatch was not his. Thompson's attorneys presented this evidence to the district attorney's office, which, in turn, moved to stay the execution and vacate Thompson's armed robbery conviction.[1] The Louisiana Court of Appeal then reversed Thompson's murder conviction, concluding that the armed robbery conviction unconstitutionally deprived Thompson of his right to testify in his own defense at the murder trial. *State* v. *Thompson*, 2002–0361 (La. App. 7/17/02), 825 So. 2d 552. In 2003, the district attorney's office retried Thompson for Liuzza's murder.[2] The jury found him not guilty.

B

Thompson then brought this action against the district attorney's office, Connick, Williams, and others, alleging that their conduct caused him to be wrongfully convicted, incarcerated for 18 years, and nearly executed. The only claim that proceeded to trial was Thompson's claim under § 1983 that the district attorney's office had violated *Brady* by fail-

[1] After Thompson discovered the crime lab report, former Assistant District Attorney Michael Riehlmann revealed that Deegan had confessed to him in 1994 that he had "intentionally suppressed blood evidence in the armed robbery trial of John Thompson that in some way exculpated the defendant." Record EX583; see also *id.*, at 2677. Deegan apparently had been recently diagnosed with terminal cancer when he made his confession. Following a disciplinary complaint by the district attorney's office, the Supreme Court of Louisiana reprimanded Riehlmann for failing to disclose Deegan's admission earlier. *In re Riehlmann*, 2004–0680 (La. 1/19/05), 891 So. 2d 1239.

[2] Thompson testified in his own defense at the second trial and presented evidence suggesting that another man committed the murder. That man, the government's key witness at the first murder trial, had died in the interval between the first and second trials.

ing to disclose the crime lab report in his armed robbery trial. See *Brady*, 373 U. S. 83. Thompson alleged liability under two theories: (1) The *Brady* violation was caused by an unconstitutional policy of the district attorney's office; and (2) the violation was caused by Connick's deliberate indifference to an obvious need to train the prosecutors in his office in order to avoid such constitutional violations.

Before trial, Connick conceded that the failure to produce the crime lab report constituted a *Brady* violation.[3] See Record EX608, EX880. Accordingly, the District Court instructed the jury that the "only issue" was whether the nondisclosure was caused by either a policy, practice, or custom of the district attorney's office or a deliberately indifferent failure to train the office's prosecutors. *Id.*, at 1615.

Although no prosecutor remembered any specific training session regarding *Brady* prior to 1985, it was undisputed at trial that the prosecutors were familiar with the general *Brady* requirement that the State disclose to the defense evidence in its possession that is favorable to the accused. Prosecutors testified that office policy was to turn crime lab reports and other scientific evidence over to the defense. They also testified that, after the discovery of the undisclosed crime lab report in 1999, prosecutors disagreed about whether it had to be disclosed under *Brady* absent knowledge of Thompson's blood type.

The jury rejected Thompson's claim that an unconstitutional office policy caused the *Brady* violation, but found the district attorney's office liable for failing to train the prosecutors. The jury awarded Thompson $14 million in damages, and the District Court added more than $1 million in attorney's fees and costs.

After the verdict, Connick renewed his objection—which he had raised on summary judgment—that he could not have

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[3] Because Connick conceded that the failure to disclose the crime lab report violated *Brady*, that question is not presented here, and we do not address it.

been deliberately indifferent to an obvious need for more or different *Brady* training because there was no evidence that he was aware of a pattern of similar *Brady* violations. The District Court rejected this argument for the reasons that it had given in the summary judgment order. In that order, the court had concluded that a pattern of violations is not necessary to prove deliberate indifference when the need for training is "so obvious." No. Civ. A. 03–2045 (ED La., Nov. 15, 2005), App. to Pet. for Cert. 141a, 2005 WL 3541035, *13. Relying on *Canton* v. *Harris*, 489 U. S. 378 (1989), the court had held that Thompson could demonstrate deliberate indifference by proving that "the DA's office knew to a moral certainty that assistan[t] [district attorneys] would acquire *Brady* material, that without training it is not always obvious what *Brady* requires, and that withholding *Brady* material will virtually always lead to a substantial violation of constitutional rights."[4] App. to Pet. for Cert. 141a, 2005 WL 3541035, *13.

A panel of the Court of Appeals for the Fifth Circuit affirmed. The panel acknowledged that Thompson did not present evidence of a pattern of similar *Brady* violations, 553 F. 3d 836, 851 (2008), but held that Thompson did not need to prove a pattern, *id.*, at 854. According to the panel, Thompson demonstrated that Connick was on notice of an obvious need for *Brady* training by presenting evidence "that attorneys, often fresh out of law school, would undoubtedly be required to confront *Brady* issues while at the DA's Office, that erroneous decisions regarding *Brady* evidence would result in serious constitutional violations, that resolution of *Brady* issues was often unclear, and that training in *Brady* would have been helpful." 553 F. 3d, at 854.

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[4] The District Court rejected Connick's proposed deliberate indifference jury instruction—which would have required Thompson to prove a pattern of similar violations—for the same reasons as the summary judgment motion. Tr. 1013; Record 993; see also Tr. of Oral Arg. 26.

The Court of Appeals sitting en banc vacated the panel opinion, granted rehearing, and divided evenly, thereby affirming the District Court. 578 F. 3d 293 (CA5 2009) *(per curiam)*. In four opinions, the divided en banc court disputed whether Thompson could establish municipal liability for failure to train the prosecutors based on the single *Brady* violation without proving a prior pattern of similar violations, and, if so, what evidence would make that showing. We granted certiorari. 559 U. S. 1004 (2010).

II

The *Brady* violation conceded in this case occurred when one or more of the four prosecutors involved with Thompson's armed robbery prosecution failed to disclose the crime lab report to Thompson's counsel. Under Thompson's failure-to-train theory, he bore the burden of proving both (1) that Connick, the policymaker for the district attorney's office, was deliberately indifferent to the need to train the prosecutors about their *Brady* disclosure obligation with respect to evidence of this type and (2) that the lack of training actually caused the *Brady* violation in this case. Connick argues that he was entitled to judgment as a matter of law because Thompson did not prove that he was on actual or constructive notice of, and therefore deliberately indifferent to, a need for more or different *Brady* training. We agree.[5]

[5] Because we conclude that Thompson failed to prove deliberate indifference, we need not reach causation. Thus, we do not address whether the alleged training deficiency, or some other cause, was the "'moving force,'" *Canton* v. *Harris*, 489 U. S. 378, 389 (1989) (quoting *Monell* v. *New York City Dept. of Social Servs.*, 436 U. S. 658, 694 (1978), and *Polk County* v. *Dodson*, 454 U. S. 312, 326 (1981)), that "actually caused" the failure to disclose the crime lab report, *Canton*, *supra*, at 391.

The same cannot be said for the dissent, however. Affirming the verdict in favor of Thompson would require finding both that he proved deliberate indifference and that he proved causation. Perhaps unsurprisingly, the dissent has not conducted the second step of the analysis, which would require showing that the failure to provide particular training (which the

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Title 42 U. S. C. § 1983 provides in relevant part:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ."

A municipality or other local government may be liable under this section if the governmental body itself "subjects" a person to a deprivation of rights or "causes" a person "to be subjected" to such deprivation. See *Monell* v. *New York City Dept. of Social Servs.*, 436 U. S. 658, 692 (1978). But, under § 1983, local governments are responsible only for "their *own* illegal acts." *Pembaur* v. *Cincinnati*, 475 U. S. 469, 479 (1986) (citing *Monell*, 436 U. S., at 665–683). They are not vicariously liable under § 1983 for their employees' actions. See *id.*, at 691; *Canton*, 489 U. S., at 392; *Board of Comm'rs of Bryan Cty.* v. *Brown*, 520 U. S. 397, 403 (1997) (collecting cases).

Plaintiffs who seek to impose liability on local governments under § 1983 must prove that "action pursuant to official municipal policy" caused their injury. *Monell*, 436 U. S.,

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dissent never clearly identifies) "actually caused" the flagrant—and quite possibly intentional—misconduct that occurred in this case. See *post*, at 98 (opinion of GINSBURG, J.) (assuming that, "[h]ad *Brady*'s importance been brought home to prosecutors," the violation at issue "surely" would not have occurred). The dissent believes that evidence that the prosecutors allegedly "misapprehen[ded]" *Brady* proves causation. *Post*, at 104, n. 20. Of course, if evidence of a need for training, by itself, were sufficient to prove that the lack of training "actually caused" the violation at issue, no causation requirement would be necessary because every plaintiff who satisfied the deliberate indifference requirement would necessarily satisfy the causation requirement.

at 691; see *id.*, at 694. Official municipal policy includes the decisions of a government's lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law. See *ibid.*; *Pembaur*, *supra*, at 480–481; *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144, 167–168 (1970). These are "action[s] for which the municipality is actually responsible." *Pembaur*, *supra*, at 479–480.

In limited circumstances, a local government's decision not to train certain employees about their legal duty to avoid violating citizens' rights may rise to the level of an official government policy for purposes of § 1983. A municipality's culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train. See *Oklahoma City* v. *Tuttle*, 471 U. S. 808, 822–823 (1985) (plurality opinion) ("[A] 'policy' of 'inadequate training' " is "far more nebulous, and a good deal further removed from the constitutional violation, than was the policy in *Monell*"). To satisfy the statute, a municipality's failure to train its employees in a relevant respect must amount to "deliberate indifference to the rights of persons with whom the [untrained employees] come into contact." *Canton*, 489 U. S., at 388. Only then "can such a shortcoming be properly thought of as a city 'policy or custom' that is actionable under § 1983." *Id.*, at 389.

" '[D]eliberate indifference' is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." *Bryan Cty.*, 520 U. S., at 410. Thus, when city policymakers are on actual or constructive notice that a particular omission in their training program causes city employees to violate citizens' constitutional rights, the city may be deemed deliberately indifferent if the policymakers choose to retain that program. *Id.*, at 407. The city's " 'policy of inaction' " in light of notice that its program will cause constitutional violations "is the functional equivalent of a decision by the city itself to violate

the Constitution." *Canton*, 489 U. S., at 395 (O'Connor, J., concurring in part and dissenting in part). A less stringent standard of fault for a failure-to-train claim "would result in *de facto respondeat superior* liability on municipalities . . . ." *Id.*, at 392; see also *Pembaur*, *supra*, at 483 (opinion of Brennan, J.) ("[M]unicipal liability under § 1983 attaches where—and only where—a deliberate choice to follow a course of action is made from among various alternatives by [the relevant] officials . . . ").

B

A pattern of similar constitutional violations by untrained employees is "ordinarily necessary" to demonstrate deliberate indifference for purposes of failure to train. *Bryan Cty.*, 520 U. S., at 409. Policymakers' "continued adherence to an approach that they know or should know has failed to prevent tortious conduct by employees may establish the conscious disregard for the consequences of their action—the 'deliberate indifference'—necessary to trigger municipal liability." *Id.*, at 407. Without notice that a course of training is deficient in a particular respect, decisionmakers can hardly be said to have deliberately chosen a training program that will cause violations of constitutional rights.

Although Thompson does not contend that he proved a pattern of similar *Brady* violations, 553 F. 3d, at 851, vacated, 578 F. 3d 293 (en banc), he points out that, during the 10 years preceding his armed robbery trial, Louisiana courts had overturned four convictions because of *Brady* violations by prosecutors in Connick's office.[6] Those four reversals could not have put Connick on notice that the office's *Brady* training was inadequate with respect to the sort of *Brady* violation at issue here. None of those cases involved failure to disclose blood evidence, a crime lab report, or physical or

[6] Thompson had every incentive at trial to attempt to establish a pattern of similar violations, given that the jury instruction allowed the jury to find deliberate indifference based on, among other things, prosecutors' "history of mishandling" similar situations. Record 1619.

scientific evidence of any kind. Because those incidents are not similar to the violation at issue here, they could not have put Connick on notice that specific training was necessary to avoid this constitutional violation.[7]

C

1

Instead of relying on a pattern of similar *Brady* violations, Thompson relies on the "single-incident" liability that this Court hypothesized in *Canton*. He contends that the *Brady* violation in his case was the "obvious" consequence of failing to provide specific *Brady* training, and that this showing of "obviousness" can substitute for the pattern of violations ordinarily necessary to establish municipal culpability.

In *Canton*, the Court left open the possibility that, "in a narrow range of circumstances," a pattern of similar violations might not be necessary to show deliberate indifference. *Bryan Cty.*, *supra*, at 409. The Court posed the hypothetical example of a city that arms its police force with firearms and deploys the armed officers into the public to capture fleeing felons without training the officers in the constitutional limitation on the use of deadly force. *Canton*, *supra*, at 390, n. 10. Given the known frequency with which police attempt to arrest fleeing felons and the "predictability that an officer lacking specific tools to handle that situation will violate citizens' rights," the Court theorized that a city's decision not to train the officers about constitutional limits on

[7] Thompson also asserts that this case is not about a "single incident" because up to four prosecutors may have been responsible for the nondisclosure of the crime lab report and, according to his allegations, withheld additional evidence in his armed robbery and murder trials. But contemporaneous or subsequent conduct cannot establish a pattern of violations that would provide "notice to the cit[y] and the opportunity to conform to constitutional dictates . . . ." *Canton*, 489 U. S., at 395 (O'Connor, J., concurring in part and dissenting in part). Moreover, no court has ever found any of the other *Brady* violations that Thompson alleges occurred in his armed robbery and murder trials.

the use of deadly force could reflect the city's deliberate indifference to the "highly predictable consequence," namely, violations of constitutional rights. *Bryan Cty.*, *supra*, at 409. The Court sought not to foreclose the possibility, however rare, that the unconstitutional consequences of failing to train could be so patently obvious that a city could be liable under § 1983 without proof of a pre-existing pattern of violations.

Failure to train prosecutors in their *Brady* obligations does not fall within the narrow range of *Canton*'s hypothesized single-incident liability. The obvious need for specific legal training that was present in the *Canton* scenario is absent here. Armed police must sometimes make split-second decisions with life-or-death consequences. There is no reason to assume that police academy applicants are familiar with the constitutional constraints on the use of deadly force. And, in the absence of training, there is no way for novice officers to obtain the legal knowledge they require. Under those circumstances there is an obvious need for some form of training. In stark contrast, legal "[t]raining is what differentiates attorneys from average public employees." 578 F. 3d, at 304–305 (opinion of Clement, J.).

Attorneys are trained in the law and equipped with the tools to interpret and apply legal principles, understand constitutional limits, and exercise legal judgment. Before they may enter the profession and receive a law license, all attorneys must graduate from law school or pass a substantive examination; attorneys in the vast majority of jurisdictions must do both. See, *e. g.*, La. State Bar Assn. (LSBA), Articles of Incorporation, La. Rev. Stat. Ann. § 37, ch. 4, App., Art. 14, § 7 (1988 West Supp.) (as amended through 1985). These threshold requirements are designed to ensure that all new attorneys have learned how to find, understand, and apply legal rules. Cf. *United States* v. *Cronic*, 466 U. S. 648, 658, 664 (1984) (noting that the presumption "that the lawyer is competent to provide the guiding hand that the defendant

needs" applies even to young and inexperienced lawyers in their first jury trial and even when the case is complex).

Nor does professional training end at graduation. Most jurisdictions require attorneys to satisfy continuing-education requirements. See, *e. g.*, LSBA, Articles of Incorporation, Art. 16, Rule 1.1(b) (effective 1987); La. Sup. Ct. Rule XXX (effective 1988). Even those few jurisdictions that do not impose mandatory continuing-education requirements mandate that attorneys represent their clients competently and encourage attorneys to engage in continuing study and education. See, *e. g.*, Mass. Rule Prof. Conduct 1.1 and comment 6 (West 2006). Before Louisiana adopted continuing-education requirements, it imposed similar general competency requirements on its state bar. LSBA, Articles of Incorporation, Art. 16, EC 1–1, 1–2, DR 6–101 (West 1974) (effective 1971).

Attorneys who practice with other attorneys, such as in district attorney's offices, also train on the job as they learn from more experienced attorneys. For instance, here in the Orleans Parish District Attorney's Office, junior prosecutors were trained by senior prosecutors who supervised them as they worked together to prepare cases for trial, and trial chiefs oversaw the preparation of the cases. Senior attorneys also circulated court decisions and instructional memoranda to keep the prosecutors abreast of relevant legal developments.

In addition, attorneys in all jurisdictions must satisfy character and fitness standards to receive a law license and are personally subject to an ethical regime designed to reinforce the profession's standards. See, *e. g.*, LSBA, Articles of Incorporation, Art. 14, § 7 (1985); see generally *id.*, Art. 16 (1971) (Code of Professional Responsibility). Trial lawyers have a "duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Strickland* v. *Washington*, 466 U. S. 668, 688 (1984). Prosecutors have a special "duty to seek justice, not merely to

convict." LSBA, Articles of Incorporation, Art. 16, EC 7–13 (1971); ABA Standards for Criminal Justice 3–1.1(c) (2d ed. 1980). Among prosecutors' unique ethical obligations is the duty to produce *Brady* evidence to the defense. See, *e. g.*, LSBA, Articles of Incorporation, Art. 16, EC 7–13 (1971); ABA Model Rule of Prof. Conduct 3.8(d) (1984).[8] An attorney who violates his or her ethical obligations is subject to professional discipline, including sanctions, suspension, and disbarment. See, *e. g.*, LSBA, Articles of Incorporation, Art. 15, §§ 5, 6 (1971); *id.*, Art. 16, DR 1–102; ABA Model Rule of Prof. Conduct 8.4 (1984).

In light of this regime of legal training and professional responsibility, recurring constitutional violations are not the "obvious consequence" of failing to provide prosecutors with formal in-house training about how to obey the law. *Bryan Cty.*, 520 U. S., at 409. Prosecutors are not only equipped

[8] The Louisiana State Bar Code of Professional Responsibility included a broad understanding of the prosecutor's duty to disclose in 1985:

"With respect to evidence and witnesses, the prosecutor has responsibilities different from those of a lawyer in private practice: the prosecutor should make timely disclosure to the defense of available evidence, known to him, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. Further, a prosecutor should not intentionally avoid pursuit of evidence merely because he believes it will damage the prosecution's case or aid the accused." LSBA, Articles of Incorporation, Art. 16, EC 7–13 (1971); see also ABA Model Rule of Prof. Conduct 3.8(d) (1984) ("The prosecutor in a criminal case shall . . . make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense . . . ").

In addition to these ethical rules, the Louisiana Code of Criminal Procedure, with which Louisiana prosecutors are no doubt familiar, in 1985 required prosecutors, upon order of the court, to permit inspection of evidence "favorable to the defendant . . . which [is] material and relevant to the issue of guilt or punishment," La. Code Crim. Proc. Ann., Art. 718 (West 1981) (added 1977), as well as "any results or reports" of "scientific tests or experiments, made in connection with or material to the particular case," if those reports are exculpatory or intended for use at trial, *id.*, Art. 719.

but are also ethically bound to know what *Brady* entails and to perform legal research when they are uncertain. A district attorney is entitled to rely on prosecutors' professional training and ethical obligations in the absence of specific reason, such as a pattern of violations, to believe that those tools are insufficient to prevent future constitutional violations in "the usual and recurring situations with which [the prosecutors] must deal."[9] *Canton*, 489 U. S., at 391. A licensed attorney making legal judgments, in his capacity as a prosecutor, about *Brady* material simply does not present the same "highly predictable" constitutional danger as *Canton*'s untrained officer.

A second significant difference between this case and the example in *Canton* is the nuance of the allegedly necessary training. The *Canton* hypothetical assumes that the armed police officers have no knowledge at all of the constitutional limits on the use of deadly force. But it is undisputed here that the prosecutors in Connick's office were familiar with the general *Brady* rule. Thompson's complaint therefore cannot rely on the utter lack of an ability to cope with constitutional situations that underlies the *Canton* hypothetical, but rather must assert that prosecutors were not trained about particular *Brady* evidence or the specific scenario related to the violation in his case. That sort of nuance simply cannot support an inference of deliberate indifference here. As the Court said in *Canton*, "[i]n virtually every instance where a person has had his or her constitutional rights violated by a city employee, a § 1983 plaintiff will be able to point to something the city 'could have done' to prevent the unfortunate incident." 489 U. S., at 392 (citing *Tuttle*, 471 U. S., at 823 (plurality opinion)).

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[9] Contrary to the dissent's assertion, see *post*, at 108, n. 26 (citing *post*, at 96–98), a prosecutor's youth is not a "specific reason" not to rely on professional training and ethical obligations. See *supra*, at 64–65 (citing *United States* v. *Cronic*, 466 U. S. 648, 658, 664 (1984)).

Thompson suggests that the absence of any *formal* training sessions about *Brady* is equivalent to the complete absence of legal training that the Court imagined in *Canton*. But failure-to-train liability is concerned with the substance of the training, not the particular instructional format. The statute does not provide plaintiffs or courts *carte blanche* to micromanage local governments throughout the United States.

We do not assume that prosecutors will always make correct *Brady* decisions or that guidance regarding specific *Brady* questions would not assist prosecutors. But showing merely that additional training would have been helpful in making difficult decisions does not establish municipal liability. "[P]rov[ing] that an injury or accident could have been avoided if an [employee] had had better or more training, sufficient to equip him to avoid the particular injury-causing conduct" will not suffice. *Canton*, *supra*, at 391. The possibility of single-incident liability that the Court left open in *Canton* is not this case.[10]

2

The dissent rejects our holding that *Canton*'s hypothesized single-incident liability does not, as a legal matter, encompass failure to train prosecutors in their *Brady* obligation. It would instead apply the *Canton* hypothetical to this case, and thus devotes almost all of its opinion to explaining

[10] Thompson also argues that he proved deliberate indifference by "direct evidence of policymaker fault" and so, presumably, did not need to rely on circumstantial evidence at all. Brief for Respondent 37. In support, Thompson contends that Connick created a "culture of indifference" in the district attorney's office, *id.*, at 38, as evidenced by Connick's own allegedly inadequate understanding of *Brady*, the office's unwritten *Brady* policy that was later incorporated into a 1987 handbook, and an officewide "restrictive discovery policy," Brief for Respondent 39–40. This argument is essentially an assertion that Connick's office had an unconstitutional policy or custom. The jury rejected this claim, and Thompson does not challenge that finding.

why the evidence supports liability under that theory.[11] But the dissent's attempt to address our holding—by pointing out that not all prosecutors will necessarily have enrolled in criminal procedure class—misses the point. See *post*, at 106–107. The reason why the *Canton* hypothetical is inapplicable

[11] The dissent spends considerable time finding new *Brady* violations in Thompson's trials. See *post*, at 81–90. How these violations are relevant even to the dissent's own legal analysis is "a mystery." *Post*, at 81, n. 2. The dissent does not list these violations among the "[a]bundant evidence" that it believes supports the jury's finding that *Brady* training was obviously necessary. *Post*, at 93. Nor does the dissent quarrel with our conclusion that contemporaneous or subsequent conduct cannot establish a pattern of violations. The only point appears to be to highlight what the dissent sees as sympathetic, even if legally irrelevant, facts.

In any event, the dissent's findings are highly suspect. In finding two of the "new" violations, the dissent belatedly tries to reverse the Court of Appeals' 1998 decision that those *Brady* claims were "without merit." Compare *Thompson* v. *Cain*, 161 F. 3d 802, 806–808 (CA5) (rejecting *Brady* claims regarding the Perkins-Liuzza audiotapes and the Perkins police report), with *post*, at 85–86 (concluding that these were *Brady* violations). There is no basis to the dissent's suggestion that materially new facts have called the Court of Appeals' 1998 decision into question. Cf. *State* v. *Thompson*, 2002–0361, p. 6 (La. App. 7/17/02), 825 So. 2d 552, 555 (noting Thompson's admission that some of his current *Brady* claims "ha[ve] been rejected by both the Louisiana Supreme Court and the federal courts"). Regarding the bloodstained swatch, which the dissent asserts prosecutors "blocked" the defense from inspecting by sending it to the crime lab for testing, *post*, at 84, Thompson's counsel conceded at oral argument that trial counsel had access to the evidence locker where the swatch was recorded as evidence. See Tr. of Oral Arg. 37, 42; Record EX42, EX43 (evidence card identifying "One (1) Piece of Victims *[sic]* Right Pants Leg, W/Blood" among the evidence in the evidence locker and indicating that some evidence had been checked out); Tr. 401 (testimony from Thompson's counsel that he "[w]ent down to the evidence room and checked all of the evidence"); *id.*, at 103, 369–370, 586, 602 (testimony that evidence card was "available to the public," would have been available to Thompson's counsel, and would have been seen by Thompson's counsel because it was stapled to the evidence bag in "the normal process"). Moreover, the dissent cannot seriously believe that the jury could have found *Brady* violations—indisputably, questions of law. See *post*, at 89, n. 10, 92, n. 11.

is that attorneys, unlike police officers, are equipped with the tools to find, interpret, and apply legal principles.

By the end of its opinion, however, the dissent finally reveals that its real disagreement is not with our holding today, but with this Court's precedent. The dissent does not see "any reason," *post*, at 108, for the Court's conclusion in *Bryan County* that a pattern of violations is "ordinarily necessary" to demonstrate deliberate indifference for purposes of failure to train, 520 U. S., at 409. Cf. *id.*, at 406–408 (explaining why a pattern of violations is ordinarily necessary). But cf. *post*, at 108 (describing our reliance on *Bryan County* as "imply[ing]" a new "limitation" on § 1983). As our precedent makes clear, proving that a municipality itself actually caused a constitutional violation by failing to train the offending employee presents "difficult problems of proof," and we must adhere to a "stringent standard of fault," lest municipal liability under § 1983 collapse into *respondeat superior*.[12] *Bryan Cty.*, *supra*, at 406, 410; see *Canton*, 489 U. S., at 391–392.

3

The District Court and the Court of Appeals panel erroneously believed that Thompson had proved deliberate indifference by showing the "obviousness" of a need for additional training. They based this conclusion on Connick's awareness that (1) prosecutors would confront *Brady* issues while

[12] Although the dissent acknowledges that "deliberate indifference liability and *respondeat superior* liability are not one and the same," the opinion suggests that it believes otherwise. *Post*, at 109, n. 28; see, *e. g.*, *post*, at 109 (asserting that "the buck stops with [the district attorney]"); *post*, at 100 (suggesting municipal liability attaches when "the prosecutors" themselves are "deliberately indifferent to what the law requires"). We stand by the longstanding rule—reaffirmed by a unanimous Court earlier this Term—that to prove a violation of § 1983, a plaintiff must prove that "the municipality's own wrongful conduct" caused his injury, not that the municipality is ultimately responsible for the torts of its employees. *Los Angeles County* v. *Humphries*, 562 U. S. 29, 38 (2010); see *id.*, at 35, 36 (citing *Monell*, 436 U. S., at 691).

at the district attorney's office; (2) inexperienced prosecutors were expected to understand *Brady*'s requirements; (3) *Brady* has gray areas that make for difficult choices; and (4) erroneous decisions regarding *Brady* evidence would result in constitutional violations. 553 F. 3d, at 854; App. to Pet. for Cert. 141a, 2005 WL 3541035, *13. This is insufficient.

It does not follow that, because *Brady* has gray areas and some *Brady* decisions are difficult, prosecutors will so obviously make wrong decisions that failing to train them amounts to "a decision by the city itself to violate the Constitution." *Canton*, *supra*, at 395 (O'Connor, J., concurring in part and dissenting in part). To prove deliberate indifference, Thompson needed to show that Connick was on notice that, absent additional specified training, it was "highly predictable" that the prosecutors in his office would be confounded by those gray areas and make incorrect *Brady* decisions as a result. In fact, Thompson had to show that it was *so* predictable that failing to train the prosecutors amounted to *conscious disregard* for defendants' *Brady* rights. See *Bryan Cty.*, *supra*, at 409; *Canton*, *supra*, at 389. He did not do so.

III

The role of a prosecutor is to see that justice is done. *Berger* v. *United States*, 295 U. S. 78, 88 (1935). "It is as much [a prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Ibid.* By their own admission, the prosecutors who tried Thompson's armed robbery case failed to carry out that responsibility. But the only issue before us is whether Connick, as the policymaker for the district attorney's office, was deliberately indifferent to the need to train the attorneys under his authority.

We conclude that this case does not fall within the narrow range of "single-incident" liability hypothesized in *Canton* as

a possible exception to the pattern of violations necessary to prove deliberate indifference in § 1983 actions alleging failure to train. The District Court should have granted Connick judgment as a matter of law on the failure-to-train claim because Thompson did not prove a pattern of similar violations that would "establish that the 'policy of inaction' [was] the functional equivalent of a decision by the city itself to violate the Constitution." *Canton*, *supra*, at 395 (opinion of O'Connor, J.).

The judgment of the United States Court of Appeals for the Fifth Circuit is reversed.

It is so ordered.

JUSTICE SCALIA, with whom JUSTICE ALITO joins, concurring.

I join the Court's opinion in full. I write separately only to address several aspects of the dissent.

1. The dissent's lengthy excavation of the trial record is a puzzling exertion. The question presented for our review is whether a municipality is liable for a single *Brady* violation by one of its prosecutors, even though no pattern or practice of prior violations put the municipality on notice of a need for specific training that would have prevented it. See *Brady* v. *Maryland*, 373 U. S. 83 (1963). That question is a legal one: whether a *Brady* violation presents one of those rare circumstances we hypothesized in *Canton*'s footnote 10, in which the need for training in constitutional requirements is so obvious *ex ante* that the municipality's failure to provide that training amounts to deliberate indifference to constitutional violations. See *Canton* v. *Harris*, 489 U. S. 378, 390, n. 10 (1989).

The dissent defers consideration of this question until the twenty-third page of its opinion. It first devotes considerable space to allegations that Connick's prosecutors misunderstood *Brady* when asked about it at trial, see *post*, at 93–95 (opinion of GINSBURG, J.), and to supposed gaps in the

Brady guidance provided by Connick's office to prosecutors, including deficiencies (unrelated to the specific *Brady* violation at issue in this case) in a policy manual published by Connick's office three years after Thompson's trial, see *post*, at 96–98. None of that is relevant. Thompson's failure-to-train theory at trial was not based on a pervasive culture of indifference to *Brady*, but rather on the inevitability of mistakes over enough iterations of criminal trials. The District Court instructed the jury it could find Connick deliberately indifferent if:

> "First: The District Attorney was certain that prosecutors would confront the situation where they would have to decide which evidence was required by the constitution to be provided to an accused[;]
>
> "Second: The situation involved a difficult choice, or one that prosecutors had a history of mishandling, such that additional training, supervision, or monitoring was clearly needed[; and]
>
> "Third: The wrong choice by a prosecutor in that situation will frequently cause a deprivation of an accused's constitutional rights." App. 828.

That theory of deliberate indifference would repeal the law of *Monell*[1] in favor of the Law of Large Numbers. *Brady* mistakes are inevitable. So are all species of error routinely confronted by prosecutors: authorizing a bad warrant; losing a *Batson*[2] claim; crossing the line in closing argument; or eliciting hearsay that violates the Confrontation Clause. Nevertheless, we do not have "*de facto respondeat superior* liability," *Canton*, 489 U. S., at 392, for each such violation under the rubric of failure to train simply because the municipality does not have a professional educational program cov-

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[1] *Monell* v. *New York City Dept. of Social Servs.*, 436 U. S. 658 (1978).

[2] *Batson* v. *Kentucky*, 476 U. S. 79 (1986).

ering the specific violation in sufficient depth.[3] Were Thompson's theory the law, there would have been no need for *Canton*'s footnote to confine its hypothetical to the extreme circumstance of arming police officers with guns without telling them about the constitutional limitations upon shooting fleeing felons; the District Court's instructions cover every recurring situation in which citizens' rights can be violated.

That result cannot be squared with our admonition that failure-to-train liability is available only in "limited circumstances," *id.*, at 387, and that a pattern of constitutional violations is "ordinarily necessary to establish municipal culpability and causation," *Board of Comm'rs of Bryan Cty.* v. *Brown*, 520 U. S. 397, 409 (1997). These restrictions are indispensable because without them, "failure to train" would become a talismanic incantation producing municipal liability "[i]n virtually every instance where a person has had his or her constitutional rights violated by a city employee"—which is what *Monell* rejects. *Canton*, 489 U. S., at 392. Worse, it would "engage the federal courts in an endless exercise of second-guessing municipal employee-training programs," thereby diminishing the autonomy of state and local governments. *Ibid.*

2. Perhaps for that reason, the dissent does not seriously contend that Thompson's theory of recovery was proper. Rather, it accuses Connick of acquiescing in that theory at trial. See *post*, at 102. The accusation is false. Connick's

[3] I do not share the dissent's confidence that this result will be avoided by the instruction's requirement that "'more likely than not the *Brady* material would have been produced if the prosecutors involved in his underlying criminal cases had been properly trained, supervised or monitored regarding the production of *Brady* evidence.'" *Post*, at 101–102, n. 17 (quoting Tr. 1100). How comforting that assurance is depends entirely on what proper training consists of. If it is not limited to training in aspects of *Brady* that have been repeatedly violated, but includes—as the dissent would have it include here—training that would avoid any one-time violation, the assurance is no assurance at all.

central claim was and is that failure-to-train liability for a *Brady* violation cannot be premised on a single incident, but requires a pattern or practice of previous violations. He pressed that argument at the summary judgment stage but was rebuffed. At trial, when Connick offered a jury instruction to the same effect, the trial judge effectively told him to stop bringing up the subject:

> "[Connick's counsel]: Also, as part of that definition in that same location, Your Honor, we would like to include language that says that deliberate indifference to training requires a pattern of similar violations and proof of deliberate indifference requires more than a single isolated act.
>
> "[Thompson's counsel]: That's not the law, Your Honor.
>
> "THE COURT: No, I'm not giving that. That was in your motion for summary judgment that I denied." Tr. 1013.

Nothing more is required to preserve a claim of error. See Fed. Rule Civ. Proc. 51(d)(1)(B).[4]

3. But in any event, to recover from a municipality under 42 U. S. C. § 1983, a plaintiff must satisfy a "rigorous" standard of causation, *Bryan Cty.*, 520 U. S., at 405; he must "demonstrate a direct causal link between the municipal action and the deprivation of federal rights," *id.*, at 404. Thomp-

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[4] The dissent's contention that "[t]he instruction Connick proposed resembled the charge given by the District Court," *post*, at 102, n. 18, disregards his requested instruction concerning the necessity of a pattern of prior violations. It is meaningless to say that after "the court rejected [Connick's] categorical position," as it did, he did not "assail the District Court's formulation of the deliberate indifference instruction," *post*, at 103, n. 18. The prior-pattern requirement was *part* of Connick's requested formulation of deliberate indifference: "To *prove deliberate indifference*, a plaintiff must demonstrate 'at least a pattern of similar violations arising from training that is so clearly inadequate as to be obviously likely to result in a constitutional violation.'" Record, Doc. 94, p. 18 (emphasis added).

son cannot meet that standard. The withholding of evidence in his case was almost certainly caused not by a failure to give prosecutors specific training, but by miscreant prosecutor Gerry Deegan's willful suppression of evidence he believed to be exculpatory, in an effort to railroad Thompson. According to Deegan's colleague Michael Riehlmann, in 1994 Deegan confessed to him—in the same conversation in which Deegan revealed he had only a few months to live—that he had "suppressed blood evidence in the armed robbery trial of John Thompson that in some way exculpated the defendant." App. 367; see also *id.*, at 362 ("[Deegan] told me . . . that he had failed to inform the defense of exculpatory information"). I have no reason to disbelieve that account, particularly since Riehlmann's testimony hardly paints a flattering picture of himself: Riehlmann kept silent about Deegan's misconduct for another five years, as a result of which he incurred professional sanctions. See *In re Riehlmann*, 2004–0680 (La. 1/19/05), 891 So. 2d 1239. And if Riehlmann's story is true, then the "moving force," *Bryan Cty.*, *supra*, at 404 (internal quotation marks omitted), behind the suppression of evidence was Deegan, not a failure of continuing legal education.

4. The dissent suspends disbelief about this, insisting that with proper *Brady* training, "surely at least one" of the prosecutors in Thompson's trial would have turned over the lab report and blood swatch. *Post*, at 98. But training must consist of more than mere broad encomiums of *Brady:* We have made clear that "the identified deficiency in a city's training program [must be] closely related to the ultimate injury." *Canton*, *supra*, at 391. So even indulging the dissent's assumption that Thompson's prosecutors failed to disclose the lab report *in good faith*—in a way that could be prevented by training—what sort of training would have prevented the good-faith nondisclosure of a blood report not known to be exculpatory?

Perhaps a better question to ask is what *legally accurate* training would have prevented it. The dissent's suggestion is to instruct prosecutors to ignore the portion of *Brady* limiting prosecutors' disclosure obligations to evidence that is "favorable to an accused," 373 U. S., at 87. Instead, the dissent proposes that "Connick could have communicated to Orleans Parish prosecutors, in no uncertain terms, that, '[i]f you have physical evidence that, if tested, can establish the innocence of the person who is charged, you have to turn it over.'" *Post,* at 97, n. 13 (quoting Tr. of Oral Arg. 34). Though labeled a training suggestion, the dissent's proposal is better described as a *sub silentio* expansion of the substantive law of *Brady.* If any of our cases establishes such an obligation, I have never read it, and the dissent does not cite it.[5]

Since Thompson's trial, however, we have decided a case that appears to say just the opposite of the training the dissent would require: In *Arizona* v. *Youngblood*, 488 U. S. 51, 58 (1988), we held that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." We acknowledged that "*Brady* . . . makes the good or bad faith of the State irrelevant when the State fails to disclose to the defendant material exculpatory evidence," but concluded that "the Due Process Clause requires a dif-

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[5] What the dissent *does* cite in support of its theory comes from an unexpected source: Connick's testimony about what qualifies as *Brady* material. See *post,* at 98, n. 13. ("Or Connick could have told prosecutors what he told the jury when he was asked whether a prosecutor must disclose a crime lab report to the defense, even if the prosecutor does not know the defendant's blood type: 'Under the law it qualifies as *Brady* material'" (quoting Tr. 872)). Given the effort the dissent has expended persuading us that Connick's understanding of *Brady* is profoundly misguided, its newfound trust in his expertise on the subject is, to the say the least, surprising.

ferent result when we deal with the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." *Id.*, at 57. Perhaps one day we will recognize a distinction between good-faith failures to preserve from destruction evidence whose inculpatory or exculpatory character is unknown, and good-faith failures to turn such evidence over to the defense. But until we do so, a failure to train prosecutors to observe that distinction cannot constitute deliberate indifference.

5. By now the reader has doubtless guessed the best-kept secret of this case: There was probably no *Brady* violation at all—except for Deegan's (which, since it was a bad-faith, knowing violation, could not possibly be attributed to lack of training).[6] The dissent surely knows this, which is why it leans heavily on the fact that Connick conceded that *Brady* was violated. I can honor that concession in my analysis of the case because even if it extends beyond Deegan's deliberate actions, it remains irrelevant to Connick's training obligations. For any *Brady* violation apart from Deegan's was surely on the very frontier of our *Brady* jurisprudence; Connick could not possibly have been on notice decades ago that he was required to instruct his prosecutors to respect a right to untested evidence that we had not *(and still have not)* recognized. As a consequence, even if I accepted the dissent's conclusion that failure-to-train liability could be premised on a single *Brady* error, I could not agree that the lack of an accurate training regimen caused the violation Connick has conceded.

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[6] The dissent's only response to this is that the jury must have found otherwise, since it was instructed that "'[f]or liability to attach because of a failure to train, the fault must be in the training program itself, not in any particular prosecutor.'" *Post*, at 105, n. 20 (quoting Tr. 1098). But this instruction did not require the jury to find that Deegan did not commit a bad-faith, knowing violation; it merely prevented the jury from finding that, if he did so, Connick was liable for a failure to train. I not only agree with that; it is part of my point.

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

In *Brady* v. *Maryland*, 373 U. S. 83, 87 (1963), this Court held that due process requires the prosecution to turn over evidence favorable to the accused and material to his guilt or punishment. That obligation, the parties have stipulated, was dishonored in this case; consequently, John Thompson spent 18 years in prison, 14 of them isolated on death row, before the truth came to light: He was innocent of the charge of attempted armed robbery, and his subsequent trial on a murder charge, by prosecutorial design, was fundamentally unfair.

The Court holds that the Orleans Parish District Attorney's Office (District Attorney's Office or Office) cannot be held liable, in a civil rights action under 42 U. S. C. §1983, for the grave injustice Thompson suffered. That is so, the Court tells us, because Thompson has shown only an aberrant *Brady* violation, not a routine practice of giving short shrift to *Brady*'s requirements. The evidence presented to the jury that awarded compensation to Thompson, however, points distinctly away from the Court's assessment. As the trial record in the §1983 action reveals, the conceded, long-concealed prosecutorial transgressions were neither isolated nor atypical.

From the top down, the evidence showed, members of the District Attorney's Office, including the District Attorney himself, misperceived *Brady*'s compass and therefore inadequately attended to their disclosure obligations. Throughout the pretrial and trial proceedings against Thompson, the team of four engaged in prosecuting him for armed robbery and murder hid from the defense and the court exculpatory information Thompson requested and had a constitutional right to receive. The prosecutors did so despite multiple opportunities, spanning nearly two decades, to set the record straight. Based on the prosecutors' conduct relating to Thompson's trials, a fact trier could reasonably conclude that

inattention to *Brady* was standard operating procedure at the District Attorney's Office.

What happened here, the Court's opinion obscures, was no momentary oversight, no single incident of a lone officer's misconduct. Instead, the evidence demonstrated that misperception and disregard of *Brady*'s disclosure requirements were pervasive in Orleans Parish. That evidence, I would hold, established persistent, deliberately indifferent conduct for which the District Attorney's Office bears responsibility under § 1983.

I dissent from the Court's judgment mindful that *Brady* violations, as this case illustrates, are not easily detected. But for a chance discovery made by a defense team investigator weeks before Thompson's scheduled execution, the evidence that led to his exoneration might have remained under wraps. The prosecutorial concealment Thompson encountered, however, is bound to be repeated unless municipal agencies bear responsibility—made tangible by § 1983 liability—for adequately conveying what *Brady* requires and for monitoring staff compliance. Failure to train, this Court has said, can give rise to municipal liability under § 1983 "where the failure . . . amounts to deliberate indifference to the rights of persons with whom the [untrained employees] come into contact." *Canton* v. *Harris*, 489 U. S. 378, 388 (1989). That standard is well met in this case.

I

I turn first to a contextual account of the *Brady* violations that infected Thompson's trials.

A

In the early morning hours of December 6, 1984, an assailant shot and killed Raymond T. Liuzza, Jr., son of a prominent New Orleans business executive, on the street fronting the victim's home. Only one witness saw the assailant. As recorded in two contemporaneous police reports, that

eyewitness initially described the assailant as African-American, six feet tall, with "close cut hair." Record EX2–EX3, EX9.[1] Thompson is five feet eight inches tall and, at the time of the murder, styled his hair in a large "Afro." *Id.*, at EX13. The police reports of the witness' immediate identification were not disclosed to Thompson or to the court.

While engaged in the murder investigation, the Orleans Parish prosecutors linked Thompson to another violent crime committed three weeks later. On December 28, an assailant attempted to rob three siblings at gunpoint. During the struggle, the perpetrator's blood stained the oldest child's pant leg. That blood, preserved on a swatch of fabric cut from the pant leg by a crime scene analyst, was eventually tested. The test conclusively established that the perpetrator's blood was type B. *Id.*, at EX151. Thompson's blood is type O. His prosecutors failed to disclose the existence of the swatch or the test results.

B

One month after the Liuzza murder, Richard Perkins, a man who knew Thompson, approached the Liuzza family. Perkins did so after the family's announcement of a $15,000 reward for information leading to the murderer's conviction. Police officers surreptitiously recorded the Perkins-Liuzza conversations.[2] As documented on tape, Perkins told the family, "I don't mind helping [you] catch [the perpetrator], . . . but I would like [you] to help me and, you know, I'll help

[1] Exhibits entered into evidence in Thompson's § 1983 trial are herein cited by reference to the page number in the exhibit binder compiled by the District Court and included in the record on appeal.

[2] The majority endorses the Fifth Circuit's conclusion that, when Thompson was tried for murder, no *Brady* violation occurred with respect to these audio tapes "[b]ecause defense counsel had knowledge of such evidence and could easily have requested access from the prosecution." *Thompson* v. *Cain*, 161 F. 3d 802, 806–807 (1998); *ante*, at 69, n. 11. The basis for that asserted "knowledge" is a mystery. The recordings secretly made did not come to light until long after Thompson's trials.

[you]." *Id.*, at EX479, EX481. Once the family assured Perkins, "we're on your side, we want to try and help you," *id.*, at EX481, Perkins intimated that Thompson and another man, Kevin Freeman, had been involved in Liuzza's murder. Perkins thereafter told the police what he had learned from Freeman about the murder, and that information was recorded in a police report. Based on Perkins' account, Thompson and Freeman were arrested on murder charges.

Freeman was six feet tall and went by the name "Kojak" because he kept his hair so closely trimmed that his scalp was visible. Unlike Thompson, Freeman fit the eyewitness' initial description of the Liuzza assailant's height and hair style. As the Court notes, *ante*, at 56, n. 2, Freeman became the key witness for the prosecution at Thompson's trial for the murder of Liuzza.

After Thompson's arrest for the Liuzza murder, the father of the armed robbery victims saw a newspaper photo of Thompson with a large Afro hairstyle and showed it to his children. He reported to the District Attorney's Office that the children had identified Thompson as their attacker, and the children then picked that same photo out of a "photographic lineup." Record EX120, EX642–EX643. Indicting Thompson on the basis of these questionable identifications, the District Attorney's Office did not pause to test the pant leg swatch dyed by the perpetrator's blood. This lapse ignored or overlooked a prosecutor's notation that the Office "may wish to do [a] blood test." *Id.*, at EX122.

The murder trial was scheduled to begin in mid-March 1985. Armed with the later indictment against Thompson for robbery, however, the prosecutors made a strategic choice: They switched the order of the two trials, proceeding first on the robbery indictment. *Id.*, at EX128–EX129. Their aim was twofold. A robbery conviction gained first would serve to inhibit Thompson from testifying in his own defense at the murder trial, for the prior conviction could be

used to impeach his credibility. In addition, an armed robbery conviction could be invoked at the penalty phase of the murder trial in support of the prosecution's plea for the death penalty. *Id.*, at 682.

Recognizing the need for an effective prosecution team, petitioner Harry F. Connick, District Attorney for the Parish of Orleans, appointed his third-in-command, Eric Dubelier, as special prosecutor in both cases. Dubelier enlisted Jim Williams to try the armed robbery case and to assist him in the murder case. Gerry Deegan assisted Williams in the armed robbery case. Bruce Whittaker, the fourth prosecutor involved in the cases, had approved Thompson's armed robbery indictment.[3]

C

During pretrial proceedings in the armed robbery case, Thompson filed a motion requesting access to all materials and information "favorable to the defendant" and "material and relevant to the issue of guilt or punishment," as well as "any results or reports" of "scientific tests or experiments." *Id.*, at EX144, EX145. Prosecutorial responses to this motion fell far short of *Brady* compliance.[4]

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[3] At the time of their assignment, Dubelier had served in the District Attorney's Office for three and a half years, Williams, for four and a half years, Deegan, a recent law school graduate, for less than one year, and Whittaker, for three years.

[4] Connick did not dispute that failure to disclose the swatch and the crime lab report violated *Brady*. See Tr. 46, 1095. But cf. *ante*, at 57, 59 (limiting Connick's concession, as Connick himself did not, to failure to disclose the crime lab report).

In JUSTICE SCALIA's contrary view, "[t]here was probably no *Brady* violation at all," or, if there was any violation of Thompson's rights, it "was surely on the very frontier of our *Brady* jurisprudence," such that "Connick could not possibly have been on notice" of the need to train. *Ante*, at 78. Connick's counsel, however, saw the matter differently. "[A]ny reasonable prosecutor would have recognized blood evidence as *Brady* material," he said, indeed "the proper response" was "obvious to all." Record 1663, 1665.

First, prosecutors blocked defense counsel's inspection of the pant leg swatch stained by the robber's blood. Although Dubelier's April 3 response stated, "Inspection to be permitted," *id.*, at EX149, the swatch was signed out from the property room at 10:05 a.m. the next day, and was not returned until noon on April 10, the day before trial, *id.*, at EX43, EX670. Thompson's attorney inspected the evidence made available to him and found no blood evidence. No one told defense counsel about the swatch and its recent removal from the property room. *Id.*, at EX701–EX702; Tr. 400–402. But cf. *ante*, at 69, n. 11 (Thompson's attorney had "access to the evidence locker where the swatch was recorded as evidence.").[5]

Second, Dubelier or Whittaker ordered the crime laboratory to rush a pretrial test of the swatch. Tr. 952–954. Whittaker received the lab report, addressed to his attention, two days before trial commenced. Immediately thereafter, he placed the lab report on Williams' desk. Record EX151, EX589. Although the lab report conclusively identified the perpetrator's blood type, *id.*, at EX151, the District Attorney's Office never revealed the report to the defense.[6]

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[5] The majority assails as "highly suspect" the suggestion that prosecutors violated *Brady* by failing to disclose the bloodstained swatch. See *ante*, at 69, n. 11. But the parties stipulated in Thompson's § 1983 action, and the jury was so informed, that, "[p]rior to the armed robbery trial, Mr. Thompson and his attorneys were not advised of the existence of the blood evidence, that the evidence had been tested, [or] that a blood type was determined definitively from the swatch . . . ." Tr. 46. Consistent with this stipulation, Thompson's trial counsel testified that he spoke to "[t]he clerk who maintain[ed] the evidence" and learned that "[t]hey didn't have any blood evidence." *Id.*, at 401. And the District Court instructed the jury, with no objection from Connick, "that the nonproduced blood evidence . . . violated [Thompson's] constitutional rights as a matter of law." *Id.*, at 1095.

[6] JUSTICE SCALIA questions petitioners' concession that *Brady* was violated when the prosecution failed to inform Thompson of the blood evidence. He considers the evidence outside *Brady* because the prosecution did not endeavor to test Thompson's blood, and therefore avoided knowing

Third, Deegan checked the swatch out of the property room on the morning of the first day of trial, but the prosecution did not produce the swatch at trial. *Id.*, at EX43. Deegan did not return the swatch to the property room after trial, and the swatch has never been found. Tr. of Oral Arg. 37.

"[B]ased solely on the descriptions" provided by the three victims, Record 683, the jury convicted Thompson of attempted armed robbery. The court sentenced him to 49.5 years without possibility of parole—the maximum available sentence.

D

Prosecutors continued to disregard *Brady* during the murder trial, held in May 1985, at which the prosecution's order-of-trial strategy achieved its aim.[7] By prosecuting Thompson for armed robbery first—and withholding blood evidence that might have exonerated Thompson of that charge—the District Attorney's Office disabled Thompson from testifying in his own defense at the murder trial.[8] As earlier observed, see *supra*, at 82–83, impeaching use of the prior conviction would have severely undermined Thompson's credibility. And because Thompson was effectively stopped from testifying in his own defense, the testimony of the witnesses against him gained force. The prosecution's failure to reveal

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that the evidence was in fact exculpatory. *Ante*, at 77–78. Such a "don't ask, don't tell" view of a prosecutor's *Brady* obligations garners no support from precedent. See also *supra*, at 83, n. 4; *infra*, at 98, n. 13.

[7] During jury deliberations in the armed robbery case, Williams, the only Orleans Parish trial attorney common to the two prosecutions, told Thompson of his objective in no uncertain terms: "I'm going to fry you. You will die in the electric chair." Tr. 252–253.

[8] The Louisiana Court of Appeal concluded, and Connick does not dispute, that Thompson "would have testified in the absence of the attempted armed robbery conviction." *State* v. *Thompson*, 2002–0361, p. 7 (7/17/02), 825 So. 2d 552, 556. But cf. *ante*, at 54, 55 (Thompson "elected" not to testify).

evidence that could have impeached those witnesses helped to seal Thompson's fate.

First, the prosecution undermined Thompson's efforts to impeach Perkins. Perkins testified that he volunteered information to the police with no knowledge of reward money. Record EX366, EX372–EX373. Because prosecutors had not produced the audiotapes of Perkins' conversations with the Liuzza family (or a police summary of the tapes), Thompson's attorneys could do little to cast doubt on Perkins' credibility. In closing argument, the prosecution emphasized that Thompson presented no "direct evidence" that reward money had motivated any of the witnesses. *Id.*, at EX3171–EX3172.

Second, the prosecution impeded Thompson's impeachment of key witness Kevin Freeman. It did so by failing to disclose a police report containing Perkins' account of what he had learned from Freeman about the murder. See *supra*, at 82. Freeman's trial testimony was materially inconsistent with that report. Tr. 382–384, 612–614; Record EX270–EX274. Lacking any knowledge of the police report, Thompson could not point to the inconsistencies.

Third, and most vital, the eyewitness' initial description of the assailant's hair, see *supra*, at 81, was of prime relevance, for it suggested that Freeman, not Thompson, murdered Liuzza, see *supra*, at 82. The materiality of the eyewitness' contemporaneous description of the murderer should have been altogether apparent to the prosecution. Failure to produce the police reports setting out what the eyewitness first said not only undermined efforts to impeach that witness and the police officer who initially interviewed him. The omission left defense counsel without knowledge that the prosecutors were restyling the killer's "close cut hair" into an "Afro."

Prosecutors finessed the discrepancy between the eyewitness' initial description and Thompson's appearance. They asked leading questions prompting the eyewitness to agree

on the stand that the perpetrator's hair was "afro type," yet "straight back." Record EX322–EX323. Corroboratively, the police officer—after refreshing his recollection by reviewing material at the prosecution's table—gave artful testimony. He characterized the witness' initial description of the perpetrator's hair as "black and short, *afro style*." *Id.*, at EX265 (emphasis added). As prosecutors well knew, nothing in the withheld police reports, which described the murderer's hair simply as "close cut," portrayed a perpetrator with an Afro or Afro-style hair.

The jury found Thompson guilty of first-degree murder. Having prevented Thompson from testifying that Freeman was the killer, the prosecution delivered its ultimate argument. Because Thompson was already serving a near-life sentence for attempted armed robbery, the prosecution urged, the only way to punish him for murder was to execute him. The strategy worked as planned; Thompson was sentenced to death.

E

Thompson discovered the prosecutors' misconduct through a serendipitous series of events. In 1994, nine years after Thompson's convictions, Deegan, the assistant prosecutor in the armed robbery trial, learned he was terminally ill. Soon thereafter, Deegan confessed to his friend Michael Riehlmann that he had suppressed blood evidence in the armed robbery case. *Id.*, at EX709. Deegan did not heed Riehlmann's counsel to reveal what he had done. For five years, Riehlmann, himself a former Orleans Parish prosecutor, kept Deegan's confession to himself. *Id.*, at EX712–EX713.

On April 16, 1999, the State of Louisiana scheduled Thompson's execution. *Id.*, at EX1366–EX1367. In an eleventh-hour effort to save his life, Thompson's attorneys hired a private investigator. Deep in the crime lab archives, the investigator unearthed a microfiche copy of the lab report identifying the robber's blood type. The copy showed that the report had been addressed to Whittaker. See

supra, at 84. Thompson's attorneys contacted Whittaker, who informed Riehlmann that the lab report had been found. Riehlmann thereupon told Whittaker that Deegan "had failed to turn over stuff that might have been exculpatory." Tr. 718. Riehlmann prepared an affidavit describing Deegan's disclosure "that he had intentionally suppressed blood evidence in the armed robbery trial of John Thompson." Record EX583.

Thompson's lawyers presented to the trial court the crime lab report showing that the robber's blood type was B, and a report identifying Thompson's blood type as O. This evidence proved Thompson innocent of the robbery. The court immediately stayed Thompson's execution, *id.*, at EX590, and commenced proceedings to assess the newly discovered evidence.

Connick sought an abbreviated hearing. A full hearing was unnecessary, he urged, because the Office had confessed error and had moved to dismiss the armed robbery charges. See, *e. g.*, *id.*, at EX617. The court insisted on a public hearing. Given "the history of this case," the court said, it "was not willing to accept the representations that [Connick] and [his] office made [in their motion to dismiss]," *id.*, at EX882. After a full day's hearing, the court vacated Thompson's attempted armed robbery conviction and dismissed the charges. Before doing so, the court admonished:

> "[A]ll day long there have been a number of young Assistant D. A.'s . . . sitting in this courtroom watching this, and I hope they take home . . . and take to heart the message that this kind of conduct cannot go on in this Parish if this Criminal Justice System is going to work." *Id.*, at EX883.

The District Attorney's Office then initiated grand jury proceedings against the prosecutors who had withheld the lab report. Connick terminated the grand jury after just one day. He maintained that the lab report would not be

Brady material if prosecutors did not know Thompson's blood type. Tr. 986; cf. *supra*, at 84–85, n. 6. And he told the investigating prosecutor that the grand jury "w[ould] make [his] job more difficult." Tr. 978–979. In protest, that prosecutor tendered his resignation.

F

Thereafter, the Louisiana Court of Appeal reversed Thompson's murder conviction. *State* v. *Thompson*, 2002–0361, p. 10 (7/17/02), 825 So. 2d 552, 558. The unlawfully procured robbery conviction, the court held, had violated Thompson's right to testify and thus fully present his defense in the murder trial. *Id.*, at 557. The merits of several *Brady* claims arising out of the murder trial, the court observed, had therefore become "moot." 825 So. 2d, at 555; see also Record 684.[9] But cf. *ante*, at 63, n. 7, 69, n. 11 (suggesting that there were no *Brady* violations in the murder prosecution because no court had adjudicated any violations).[10]

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[9] Thompson argued that "the State failed to produce police reports 'and other information' which would have identified 'eye- and ear-witnesses' whose testimony would have exonerated him and inculpated [Freeman], . . . and would have shown that [Perkins,] . . . who stated [he] heard [Thompson] admit to committing the murder[,] had been promised reward money for [his] testimony." *Thompson*, 825 So. 2d, at 555. In leaving these arguments unaddressed, the Louisiana Court of Appeal surely did not defer to the Fifth Circuit's earlier assessment of those claims, made on an anemic record, in *Thompson* v. *Cain*, 161 F. 3d 802. Nor did the Louisiana Court of Appeal suggest that Thompson was "belatedly tr[ying] to reverse" the Fifth Circuit's decision. But cf. *ante*, at 69, n. 11.

[10] The Court notes that in *Thompson* v. *Cain*, the Fifth Circuit rejected *Brady* claims raised by Thompson, characterizing one of those claims as "without merit." *Ante*, at 69, n. 11 (quoting *Thompson*, 161 F. 3d, at 807); see *supra*, at 81, n. 2. The Court, however, overlooks the date of that Fifth Circuit decision. It was rendered before revelation of the *Brady* violations in the armed robbery trial, before Thompson had the opportunity for discovery in his § 1983 suit, and before Thompson or any court was aware of the "close cut hair" police reports. See *Thompson*, 161 F. 3d, at

Undeterred by his assistants' disregard of Thompson's rights, Connick retried him for the Liuzza murder. Thompson's defense was bolstered by evidence earlier unavailable to him: ten exhibits the prosecution had not disclosed when Thompson was first tried. The newly produced items included police reports describing the assailant in the murder case as having "close cut" hair, the police report recounting Perkins' meetings with the Liuzza family, see *supra*, at 81–82, audio recordings of those meetings, and a 35-page supplemental police report. After deliberating for only 35 minutes, the jury found Thompson not guilty.

On May 9, 2003, having served more than 18 years in prison for crimes he did not commit, Thompson was released.

II

On July 16, 2003, Thompson commenced a civil action under 42 U. S. C. § 1983 alleging that Connick, other officials of the Orleans Parish District Attorney's Office, and the Of-

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812, n. 8. It is these later revelations, not the little Thompson knew in 1998, that should count. For example, the Fifth Circuit, in 1998, believed that Perkins' statement recorded in the police report did not "differ from Freeman's trial testimony." *Id.*, at 808. But evidence put before the jury in 2007 in the § 1983 trial showed that the police report, in several material respects, was inconsistent with Freeman's trial testimony. Tr. 382–383.

Connick has never suggested to this Court that the jury in the § 1983 trial was bound by the Fifth Circuit's 1998 *Brady* rulings. That court "afford[ed] great deference to" the state trial court's findings, made after a 1995 postconviction relief hearing. *Thompson*, 161 F. 3d, at 805. The jury in the § 1983 trial, of course, had far more extensive and accurate information on which to reach its decision. Moreover, as earlier noted, the same trial court that made the 1995 findings was, in 1999, outraged by the subsequently discovered *Brady* violations and by Connick's reluctance to bring those violations to light. See *supra*, at 88. Certainly that judge would not have wanted the jury that assessed Connick's deliberate indifference in the § 1983 trial to defer to findings he earlier made on a notably incomplete record.

fice itself, had violated his constitutional rights by wrongfully withholding *Brady* evidence. Thompson sought to hold Connick and the District Attorney's Office liable for failure adequately to train prosecutors concerning their *Brady* obligations. Such liability attaches, I agree with the Court, only when the failure "amount[s] to 'deliberate indifference to the rights of persons with whom the [untrained employees] come into contact.'" *Ante*, at 61 (quoting *Canton* v. *Harris*, 489 U. S., at 388). I disagree, however, with the Court's conclusion that Thompson failed to prove deliberate indifference.

Having weighed all the evidence, the jury in the § 1983 case found for Thompson, concluding that the District Attorney's Office had been deliberately indifferent to Thompson's *Brady* rights and to the need for training and supervision to safeguard those rights. "Viewing the evidence in the light most favorable to [Thompson], as appropriate in light of the verdic[t] rendered by the jury," *Patrick* v. *Burget*, 486 U. S. 94, 98, n. 3 (1988), I see no cause to upset the District Court's determination, affirmed by the Fifth Circuit, that "ample evidence . . . adduced at trial" supported the jury's verdict. Record 1917.

Over 20 years ago, we observed that a municipality's failure to provide training may be so egregious that, even without notice of prior constitutional violations, the failure "could properly be characterized as 'deliberate indifference' to constitutional rights." *Canton*, 489 U. S., at 390, n. 10. "[I]n light of the duties assigned to specific officers or employees," *Canton* recognized, "it may happen that . . . the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers . . . can reasonably be said to have been deliberately indifferent to the need." *Id.*, at 390. Thompson presented convincing evidence to satisfy this standard.

A

Thompson's § 1983 suit proceeded to a jury trial on two theories of liability: First, the Orleans Parish Office's official *Brady* policy was unconstitutional; and second, Connick was deliberately indifferent to an obvious need to train his prosecutors about their *Brady* obligations. Connick's *Brady* policy directed prosecutors to "turn over what was required by state and federal law, but no more." Brief for Petitioners 6–7. The jury thus understandably rejected Thompson's claim that the official policy itself was unconstitutional. *Ante*, at 57.

The jury found, however, that Connick was deliberately indifferent to the need to train prosecutors about *Brady*'s command. On the special verdict form, the jury answered yes to the following question:

> "Was the *Brady* violation in the armed robbery case or any infringements of John Thompson's rights in the murder trial substantially caused by [Connick's] failure, through deliberate indifference, to establish policies and procedures to protect one accused of a crime from these constitutional violations?" Record 1585.

Consistent with the question put to the jury, and without objection, the court instructed the jurors: "[Y]ou are not limited to the nonproduced blood evidence and the resulting infringement of Mr. Thompson's right to testify at the murder trial. You may consider all of the evidence presented during this trial." Tr. 1099; Record 1620.[11] But cf. *ante*, at 54, 59,

[11] The court permitted Thompson to introduce evidence of other *Brady* violations, but because "the blood evidence alone proved the violation [of Thompson's constitutional rights]," the court declined specifically "to ask the jury [whether] this other stuff [was] also *Brady*." Tr. 1003. The court allowed Thompson to submit proof of other violations to "sho[w] the cumulative nature . . . and impact [of] evidence . . . as to . . . the training and deliberate indifference . . . ." *Ibid.* But cf. *ante*, at 69, n. 11 (questioning how "these violations are relevant" to this case). Far from indulg-

63, n. 7, 68; *ante*, at 72 (SCALIA, J., concurring) (maintaining that the case involves a single *Brady* violation). That evidence included a stipulation that in his retrial for the Liuzza murder, Thompson had introduced ten exhibits containing relevant information withheld by the prosecution in 1985. See *supra*, at 90.

Abundant evidence supported the jury's finding that additional *Brady* training was obviously necessary to ensure that *Brady* violations would not occur: (1) Connick, the Office's sole policymaker, misunderstood *Brady*. (2) Other leaders in the Office, who bore direct responsibility for training less experienced prosecutors, were similarly uninformed about *Brady*. (3) Prosecutors in the Office received no *Brady* training. (4) The Office shirked its responsibility to keep prosecutors abreast of relevant legal developments concerning *Brady* requirements. As a result of these multiple shortfalls, it was hardly surprising that *Brady* violations in fact occurred, severely undermining the integrity of Thompson's trials.

1

Connick was the Office's sole policymaker, and his testimony exposed a flawed understanding of a prosecutor's *Brady* obligations. Connick admitted to the jury that his

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ing in my own factfindings, but cf. *ibid.*, I simply recite the evidence supporting the jury's verdict in Thompson's § 1983 trial.

The Court misleadingly states that "the District Court instructed the jury that the 'only issue' was whether the nondisclosure [of the crime lab report] was caused by either a policy, practice, or custom of the district attorney's office or a deliberately indifferent failure to train the office's prosecutors." *Ante*, at 57. The jury instruction the majority cites simply directed the jury that, with regard to the blood evidence, as a matter of law, Thompson's constitutional rights had been violated. Record 1614–1615. The court did not preclude the jury from assessing evidence of other infringements of Thompson's rights. *Id.*, at 1585; see *Kyles* v. *Whitley*, 514 U. S. 419, 421 (1995) ("[T]he state's obligation under *Brady* . . . turns on the cumulative effect of all . . . evidence suppressed by the government . . . .").

earlier understanding of *Brady*, conveyed in prior sworn testimony, had been too narrow. Tr. 181–182. Even at trial Connick persisted in misstating *Brady*'s requirements. For example, Connick urged that there could be no *Brady* violation arising out of "the inadvertent conduct of [an] assistant under pressure with a lot of case load." Tr. 188–189. The court, however, correctly instructed the jury that, in determining whether there has been a *Brady* violation, the "good or bad faith of the prosecution does not matter." Tr. 1094–1095.

2

The testimony of other leaders in the District Attorney's Office revealed similar misunderstandings. Those misunderstandings, the jury could find, were in large part responsible for the gross disregard of *Brady* rights Thompson experienced. Dubelier admitted that he never reviewed police files, but simply relied on the police to flag any potential *Brady* information. Tr. 542. The court, however, instructed the jury that an individual prosecutor has a "duty . . . to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police." *Id.*, at 1095; Record 1614. Williams was asked whether "*Brady* material includes documents in the possession of the district attorney that could be used to impeach a witness, to show that he's lying"; he responded simply, and mistakenly, "No." Tr. 381. The testimony of "high-ranking individuals in the Orleans Parish District Attorney's Office," Thompson's expert explained,[12] exposed "complete errors . . . as to what

[12] With no objection from petitioners, the court found Thompson's expert, Joseph Lawless, qualified to testify as an expert in criminal law and procedure. Tr. 419, 426. Lawless has practiced criminal law for 30 years; from 1976 to 1979, he was an Assistant District Attorney, and thereafter he entered private practice. *Id.*, at 412. He is the author of Prosecutorial Misconduct: Law, Procedure, Forms (4th ed. 2008), first published in 1985. Tr. 414. The text is used in a class on ethics and tactics for the

Brady required [prosecutors] to do." *Id.*, at 427, 434. "Dubelier had no understanding of his obligations under *Brady* whatsoever," *id.*, at 458, the expert observed, and Williams "is still not sure what his obligations were under *Brady*," *id.*, at 448. But cf. *ante*, at 57 ("[I]t was undisputed at trial that the prosecutors were familiar with the general *Brady* requirement that the State disclose to the defense evidence in its possession that is favorable to the accused.").

The jury could attribute the violations of Thompson's rights directly to prosecutors' misapprehension of *Brady*. The prosecution had no obligation to produce the "close-cut hair" police reports, Williams maintained, because newspaper reports had suggested that witness descriptions were not consistent with Thompson's appearance. Therefore, Williams urged, the defense already "had everything." Tr. 139. Dubelier tendered an alternative explanation for the nondisclosure. In Dubelier's view, the descriptions were not "inconsistent with [Thompson's] appearance," as portrayed in a police photograph showing Thompson's hair extending at least three inches above his forehead. *Id.*, at 171–172; Record EX73. Williams insisted that he had discharged the prosecution's duty to disclose the blood evidence by mentioning, in a motion hearing, that the prosecution intended to obtain a blood sample from Thompson. Tr. 393–394. During the armed robbery trial, Williams told one of the victims that the results of the blood test made on the swatch had been "inconclusive." *Id.*, at 962. And he testified in the § 1983 action that the lab report was not *Brady* material "because I didn't know what the blood type of Mr. Thompson was." Tr. 393. But see *supra*, at 84, n. 5 (District Court instructed the jury that the lab report was *Brady* material).

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criminal lawyer at Harvard Law School and in the federal defender training program of the Administrative Office of the United States Courts. *Id.*, at 416.

3

Connick should have comprehended that Orleans Parish prosecutors lacked essential guidance on *Brady* and its application. In fact, Connick has effectively conceded that *Brady* training in his Office was inadequate. Tr. of Oral Arg. 60. Connick explained to the jury that prosecutors' offices must "make . . . very clear to [new prosecutors] what their responsibility [i]s" under *Brady* and must not "giv[e] them a lot of leeway." Tr. 834–835. But the jury heard ample evidence that Connick's Office gave prosecutors no *Brady* guidance, and had installed no procedures to monitor *Brady* compliance.

In 1985, Connick acknowledged, many of his prosecutors "were coming fresh out of law school," and the Office's "[h]uge turnover" allowed attorneys with little experience to advance quickly to supervisory positions. See Tr. 853–854, 832. By 1985, Dubelier and Williams were two of the highest ranking attorneys in the Office, *id.*, at 342, 356–357, yet neither man had even five years of experience as a prosecutor, see *supra*, at 83, n. 3; Record EX746; Tr. 55, 571–576.

Dubelier and Williams learned the prosecutorial craft in Connick's Office, and, as earlier observed, see *supra*, at 95, their testimony manifested a woefully deficient understanding of *Brady*. Dubelier and Williams told the jury that they did not recall any *Brady* training in the Office. Tr. 170–171, 364.

Connick testified that he relied on supervisors, including Dubelier and Williams, to ensure prosecutors were familiar with their *Brady* obligations. Tr. 805–806. Yet Connick did not inquire whether the supervisors themselves understood the importance of teaching newer prosecutors about *Brady*. Riehlmann could not "recall that [he] was ever trained or instructed by anybody about [his] *Brady* obligations," on the job or otherwise. Tr. 728–729. Whittaker agreed it was possible for "inexperienced lawyers, just a few weeks out of law school with no training," to bear responsi-

bility for "decisions on . . . whether material was *Brady* material and had to be produced." *Id.*, at 319.

Thompson's expert characterized Connick's supervision regarding *Brady* as "the blind leading the blind." Tr. 458. For example, in 1985 trial attorneys "sometimes . . . went to Mr. Connick" with *Brady* questions, "and he would tell them" how to proceed. Tr. 892. But Connick acknowledged that he had "stopped reading law books . . . and looking at opinions" when he was first elected District Attorney in 1974. *Id.*, at 175–176.

As part of their training, prosecutors purportedly attended a pretrial conference with the Office's chief of trials before taking a case to trial. Connick intended the practice to provide both training and accountability. But it achieved neither aim in Thompson's prosecutions, for Dubelier and Williams, as senior prosecutors in the Office, were free to take cases to trial without pretrying them, and that is just how they proceeded in Thompson's prosecutions. *Id.*, at 901–902; Record 685. But cf. *ante*, at 65 ("[T]rial chiefs oversaw the preparation of the cases.").

Prosecutors confirmed that training in the District Attorney's Office, overall, was deficient. Soon after Connick retired, a survey of assistant district attorneys in the Office revealed that more than half felt that they had not received the training they needed to do their jobs. Tr. 178.

Thompson, it bears emphasis, is not complaining about the absence of formal training sessions. Tr. of Oral Arg. 55. But cf. *ante*, at 68. His complaint does not demand that *Brady* compliance be enforced in any particular way. He asks only that *Brady* obligations be communicated accurately and genuinely enforced.[13] Because that did not happen in

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[13] To ward off *Brady* violations of the kind Connick conceded, for example, Connick could have communicated to Orleans Parish prosecutors, in no uncertain terms, that, "[i]f you have physical evidence that, if tested, can establish the innocence of the person who is charged, you have to turn it over." Tr. of Oral Arg. 34; *id.*, at 36 ("[I]f you have evidence that can

the District Attorney's Office, it was inevitable that prosecutors would misapprehend *Brady*. Had *Brady*'s importance been brought home to prosecutors, surely at least one of the four officers who knew of the swatch and lab report would have revealed their existence to defense counsel and the court.[14]

4

Louisiana did not require continuing legal education at the time of Thompson's trials. Tr. 361. But cf. *ante*, at 65. Primary responsibility for keeping prosecutors *au courant* with developments in the law, therefore, resided in the District Attorney's Office. Over the course of Connick's tenure as District Attorney, the jury learned, the Office's chief of appeals circulated memoranda when appellate courts issued important opinions. Tr. 751–754, 798.

The 1987 Office policy manual was a compilation of memoranda on criminal law and practice circulated to prosecutors from 1974, when Connick became District Attorney, through 1987. *Id.*, at 798. The manual contained four sentences, nothing more, on *Brady*.[15] This slim instruction, the jury

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conclusively establish to a scientific certainty the innocence of the person being charged, you have to turn it over . . . ."). Or Connick could have told prosecutors what he told the jury when he was asked whether a prosecutor must disclose a crime lab report to the defense, even if the prosecutor does not know the defendant's blood type: "Under the law it qualifies as *Brady* material. Under Louisiana law we must turn that over. Under *Brady* we must turn that over." Tr. 872. But cf. *ante*, at 78 (SCALIA, J., concurring) (questioning how Connick could have been on notice of the need to train prosecutors about the *Brady* violations conceded in this case).

[14] The Court can scarcely disagree with respect to Dubelier, Williams, and Whittaker, for it acknowledges the "flagran[cy]" of Deegan's conduct, see *ante*, at 60, n. 5, and does not dispute that, pretrial, other prosecutors knew of the existence of the swatch and lab report.

[15] Section 5.25 of the manual, titled "*Brady* Material," states in full:

"In most cases, in response to the request of defense attorneys, the Judge orders the State to produce so called *Brady* material—that is, information in the possession of the State which is exculpatory regarding the defendant. The duty to produce *Brady* material is ongoing and continues

learned, was notably inaccurate, incomplete, and dated. Tr. 798–804, 911–918. But cf. *ante*, at 65 ("Senior attorneys also circulated court decisions and instructional memoranda to keep the prosecutors abreast of relevant legal developments."). For example, the manual did not acknowledge what *Giglio* v. *United States*, 405 U. S. 150 (1972), made plain: Impeachment evidence is *Brady* material prosecutors are obligated to disclose.[16]

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throughout the entirety of the trial. Failure to produce *Brady* material has resulted in mistrials and reversals, as well as extended court battles over jeopardy issues. In all cases, a review of *Brady* issues, including apparently self-serving statements made by the defendant, must be included in a pre-trial conference and each Assistant must be familiar with the law regarding exculpatory information possessed by the State." Record EX427.

[16] During the relevant time period, there were many significant developments in this Court's *Brady* jurisprudence. Among the *Brady*-related decisions this Court handed down were *United States* v. *Bagley*, 473 U. S. 667, 676 (1985) ("This Court has rejected any . . . distinction between impeachment evidence and exculpatory evidence [in the *Brady* context]."); *Weatherford* v. *Bursey*, 429 U. S. 545, 559–560 (1977) ("*Brady* is not implicated . . . where the only claim is that the State should have revealed that it would present the eyewitness testimony of a particular agent against the defendant at trial."); and *United States* v. *Agurs*, 427 U. S. 97, 103, 104, 106–107 (1976) (*Brady* claim may arise when "the undisclosed evidence demonstrates that the prosecution's case includes perjured testimony and that the prosecution knew, or should have known, of the perjury," when defense counsel makes "a pretrial request for specific evidence" and the government fails to accede to that request, and when defense counsel makes no request and the government fails to disclose "obviously exculpatory" evidence). These decisions were not referenced in the manual that compiled circulated memoranda.

In the same period, the Louisiana Supreme Court issued dozens of opinions discussing *Brady*, including *State* v. *Sylvester*, 388 So. 2d 1155, 1161 (1980) (impeachment evidence must be disclosed in response to a specific request if it would create a "reasonable doubt that did not otherwise exist"); *State* v. *Brooks*, 386 So. 2d 1348, 1351 (1980) (*Brady* extends to any material information favorable to the accused); and *State* v. *Carney*, 334 So. 2d 415, 418–419 (1976) (reversible error if prosecution fails, even inadvertently, to disclose bargain with a witness).

In sum, the evidence permitted the jury to reach the following conclusions. First, Connick did not ensure that prosecutors in his Office knew their *Brady* obligations; he neither confirmed their familiarity with *Brady* when he hired them, nor saw to it that training took place on his watch. Second, the need for *Brady* training and monitoring was obvious to Connick. Indeed he so testified. Third, Connick's cavalier approach to his staff's knowledge and observation of *Brady* requirements contributed to a culture of inattention to *Brady* in Orleans Parish.

As earlier noted, see *supra,* at 88–89, Connick resisted an effort to hold prosecutors accountable for *Brady* compliance because he felt the effort would "make [his] job more difficult." Tr. 978. He never disciplined or fired a single prosecutor for violating *Brady.* Tr. 182–183. The jury was told of this Court's decision in *Kyles* v. *Whitley,* 514 U. S. 419 (1995), a capital case prosecuted by Connick's Office that garnered attention because it featured "so many instances of the state's failure to disclose exculpatory evidence." *Id.,* at 455 (Stevens, J., concurring). When questioned about *Kyles,* Connick told the jury he was satisfied with his Office's practices and saw no need, occasioned by *Kyles,* to make any changes. Tr. 184–185. In both quantity and quality, then, the evidence canvassed here was more than sufficient to warrant a jury determination that Connick and the prosecutors who served under him were not merely negligent regarding *Brady.* Rather, they were deliberately indifferent to what the law requires.

B

In *Canton,* this Court spoke of circumstances in which the need for training may be "so obvious," and the lack of training "so likely" to result in constitutional violations, that policymakers who do not provide for the requisite training "can reasonably be said to have been deliberately indifferent to the need" for such training. 489 U. S., at 390.

This case, I am convinced, belongs in the category *Canton* marked out.

Canton offered an often-cited illustration. "[C]ity policymakers know to a moral certainty that their police officers will be required to arrest fleeing felons." *Ibid.*, n. 10. Those policymakers, *Canton* observed, equip police officers with firearms to facilitate such arrests. *Ibid.* The need to instruct armed officers about "constitutional limitations on the use of deadly force," *Canton* said, is "'so obvious,' that failure to [train the officers] could properly be characterized as 'deliberate indifference' to constitutional rights." *Ibid.*

The District Court, tracking *Canton*'s language, instructed the jury that Thompson could prevail on his "deliberate indifference" claim only if the evidence persuaded the jury on three points. First, Connick "was certain that prosecutors would confront the situation where they would have to decide which evidence was required by the Constitution to be provided to the accused." Tr. 1099. Second, "the situation involved a difficult choice[,] or one that prosecutors had a history of mishandling, such that additional training, supervision or monitoring was clearly needed." *Ibid.* Third, "the wrong choice by a prosecutor in that situation would frequently cause a deprivation of an accused's constitutional rights." *Ibid.*; Record 1619–1620; see *Canton*, 489 U. S., at 390, and n. 10; *Walker* v. *New York*, 974 F. 2d 293, 297–298 (CA2 1992).[17]

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[17] JUSTICE SCALIA contends that this "theory of deliberate indifference would repeal the law of *Monell* [v. *New York City Dept. of Social Servs.*, 436 U. S. 658 (1978)]," and creates a danger that "'failure to train' would become a talismanic incantation producing municipal liability [i]n virtually every instance where a person has had his or her constitutional rights violated by a city employee." *Ante*, at 73–74 (some internal quotation marks omitted). The District Court's charge, however, cautiously cabined the jury's assessment of Connick's deliberate indifference. See, *e. g.*, Tr. 1100 ("Mr. Thompson must prove that more likely than not the *Brady* material would have been produced if the prosecutors involved in his un-

Petitioners used this formulation of the failure to train standard in pretrial and post-trial submissions, Record 1256–1257, 1662, and in their own proposed jury instruction on deliberate indifference.[18] Nor do petitioners dispute that

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derlying criminal cases had been properly trained, supervised or monitored regarding the production of *Brady* evidence."). See also *id.*, at 1096–1097, 1099–1100.

The deliberate indifference jury instruction in this case was based on the Second Circuit's opinion in *Walker* v. *New York*, 974 F. 2d 293, 297–298 (1992), applying *Canton* to a § 1983 complaint alleging that a district attorney failed to train prosecutors about *Brady.* JUSTICE SCALIA's fears should be calmed by post-*Walker* experience in the Second Circuit. There has been no "litigation flood or even rainfall," *Skinner* v. *Switzer*, 562 U. S. 521, 535 (2011), in that Circuit in *Walker*'s wake. See Brief for National Association of Criminal Defense Lawyers as *Amicus Curiae* 39 ("Tellingly, in the Second Circuit, in the nearly 20 years since the court decided *Walker*, there have been no successful lawsuits for non-*Brady* constitutional violations committed by prosecutors at trial (and no reported 'single violation' *Brady* case)." (citation omitted)); Brief for Center on the Administration of Criminal Law, New York University School of Law et al. as *Amici Curiae* 35–36 (*Walker* has prompted "no flood of § 1983 liability").

[18] The instruction Connick proposed resembled the charge given by the District Court. See *supra*, at 101. Connick's proposed instruction read: "Before a district attorney's failure to train or supervise constitutes deliberate indifference to the constitutional rights of citizens: (1) the plaintiff must show that Harry Connick knew 'to a moral certainty' that his employees will confront a given situation; (2) the plaintiff must show that the situation either presents the employee with a difficult choice . . . such that training or supervision will make the choice less difficult or that there is a history of employees mishandling the situation; and (3) the plaintiff must show that the wrong choice by the assistant district attorney will frequently cause the deprivation of a citizen's constitutional rights." Record 992 (citing *Canton*, 489 U. S., at 390; punctuation altered). But cf. *ante*, at 74 (SCALIA, J., concurring) (criticizing "Thompson's theory" of deliberate indifference).

Petitioners, it is true, argued all along that "[t]o prove deliberate indifference, Thompson had to demonstrate a pattern of violations," Brief for Appellants in No. 07–30443 (CA5), p. 41; see *ante*, at 74–75 (SCALIA, J., concurring), but the court rejected their categorical position. Petitioners

Connick "kn[e]w to a moral certainty that" his prosecutors would regularly face *Brady* decisions. See *Canton*, 489 U. S., at 390, n. 10.

The jury, furthermore, could reasonably find that *Brady* rights may involve choices so difficult that Connick obviously knew or should have known prosecutors needed more than perfunctory training to make the correct choices. See *Canton*, 489 U. S., at 390, and n. 10.[19] As demonstrated earlier, see *supra*, at 94–96, even at trial prosecutors failed to give an accurate account of their *Brady* obligations. And, again as emphasized earlier, see *supra*, at 96–98, the evidence permitted the jury to conclude that Connick should have known *Brady* training in his office bordered on "zero." See Tr. of Oral Arg. 41. Moreover, Connick understood that newer prosecutors needed "very clear" guidance and should not be left to grapple with *Brady* on their own. Tr. 834–835. It was thus "obvious" to him, the jury could find, that constitutional rights would be in jeopardy if prosecutors received slim to no *Brady* training.

Based on the evidence presented, the jury could conclude that *Brady* errors by untrained prosecutors would frequently cause deprivations of defendants' constitutional rights. The jury learned of several *Brady* oversights in Thompson's trials and heard testimony that Connick's Office had one of the worst *Brady* records in the country. Tr. 163. Because prosecutors faced considerable pressure to get convictions, *id.*, at 317, 341, and were instructed to "turn over what was required by state and federal law, but no more," Brief for

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did not otherwise assail the District Court's formulation of the deliberate indifference instruction. *E. g.*, Record 1662.

[19] Courts have noted the often trying nature of a prosecutor's *Brady* obligation. See, *e. g.*, *State* v. *Whitlock*, 454 So. 2d 871, 874 (La. App. 1984) (recognizing, in a case involving *Brady* issues in Connick's Office, that "it is usually most difficult to determine whether or not inconsistencies or omitted information in witnesses' statements are material to the defendant's guilt" (quoting *State* v. *Davenport*, 399 So. 2d 201, 204 (La. 1981))).

Petitioners 6–7, the risk was all too real that they would err by withholding rather than revealing information favorable to the defense.

In sum, despite JUSTICE SCALIA's protestations to the contrary, *ante*, at 72, 76, the *Brady* violations in Thompson's prosecutions were not singular and they were not aberrational. They were just what one would expect given the attitude toward *Brady* pervasive in the District Attorney's Office. Thompson demonstrated that no fewer than five prosecutors—the four trial prosecutors and Riehlmann—disregarded his *Brady* rights. He established that they kept from him, year upon year, evidence vital to his defense. Their conduct, he showed with equal force, was a foreseeable consequence of lax training in, and absence of monitoring of, a legal requirement fundamental to a fair trial.[20]

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[20] The jury could draw a direct, causal connection between Connick's deliberate indifference, prosecutors' misapprehension of *Brady*, and the *Brady* violations in Thompson's case. See, *e. g.*, *supra*, at 94 (prosecutors' misunderstandings of *Brady* "were in large part responsible for the gross disregard of *Brady* rights Thompson experienced"); *supra*, at 95 ("The jury could attribute the violations of Thompson's rights directly to prosecutors' misapprehension of *Brady*."); *supra*, at 94–95 (Williams did not believe *Brady* required disclosure of impeachment evidence and did not believe he had any obligation to turn over the impeaching "close-cut hair" police reports); *supra*, at 95 (At the time of the armed robbery trial, Williams reported that the results of the blood test on the swatch were "inconclusive."); *ibid.* ("[Williams] testified . . . that the lab report was not *Brady* material . . . ."); *supra*, at 96 (Dubelier and Williams, the lead prosecutors in Thompson's trials, "learned the prosecutorial craft in Connick's Office," "did not recall any *Brady* training," demonstrated "a woefully deficient understanding of *Brady*," and received no supervision during Thompson's trials); *supra*, at 98 ("Had *Brady*'s importance been brought home to prosecutors, surely at least one of the four officers who knew of the swatch and lab report would have revealed their existence to defense counsel and the court."); *supra*, at 100 (Connick did not want to hold prosecutors accountable for *Brady* compliance because he felt that doing so would make his job more difficult); *supra*, at 100 (Connick never disciplined a single prosecutor for violating *Brady*); *supra*, at 103 and this page ("Because prosecutors faced considerable pressure to get convictions, and were in-

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Unquestionably, a municipality that leaves police officers untrained in constitutional limits on the use of deadly weapons places lives in jeopardy. *Canton*, 489 U. S., at 390, n. 10. But as this case so vividly shows, a municipality that empowers prosecutors to press for a death sentence without ensuring that those prosecutors know and honor *Brady* rights may be no less "deliberately indifferent" to the risk to innocent lives.

Brady, this Court has long recognized, is among the most basic safeguards brigading a criminal defendant's fair trial right. See *Cone* v. *Bell*, 556 U. S. 449, 451 (2009). See also *United States* v. *Bagley*, 473 U. S. 667, 695 (1985) (Marshall, J., dissenting). Vigilance in superintending prosecutors' attention to *Brady*'s requirement is all the more important for

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structed to turn over what was required by state and federal law, but no more, the risk was all too real that they would err by withholding rather than revealing information favorable to the defense." (citations and internal quotation marks omitted)). But cf. *ante*, at 60, n. 5 ("The dissent believes that evidence that the prosecutors allegedly 'misapprehen[ded]' *Brady* proves causation.").

I note, furthermore, that the jury received clear instructions on the causation element, and neither Connick nor the majority disputes the accuracy or adequacy of the instruction that, to prevail, Thompson must prove "that more likely than not the *Brady* material would have been produced if the prosecutors involved in his underlying criminal cases had been properly trained, supervised or monitored regarding the production of *Brady* evidence." Tr. 1100.

The jury was properly instructed that "[f]or liability to attach because of a failure to train, the fault must be in the training program itself, not in any particular prosecutor." *Id.*, at 1098. Under that instruction, in finding Connick liable, the jury necessarily rejected the argument—echoed by JUSTICE SCALIA—that Deegan "was the only bad guy." *Id.*, at 1074. See also *id.*, at 1057; *ante*, at 76. If indeed Thompson had shown simply and only that Deegan deliberately withheld evidence, I would agree that there would be no basis for liability. But, as reams of evidence showed, disregard of *Brady* occurred, over and over again in Orleans Parish, before, during, and after Thompson's 1985 robbery and murder trials.

this reason: A *Brady* violation, by its nature, causes suppression of evidence beyond the defendant's capacity to ferret out. Because the absence of the withheld evidence may result in the conviction of an innocent defendant, it is unconscionable not to impose reasonable controls impelling prosecutors to bring the information to light.

The Court nevertheless holds *Canton*'s example inapposite. It maintains that professional obligations, ethics rules, and training—including on-the-job training—set attorneys apart from other municipal employees, including rookie police officers. *Ante*, at 64–68. Connick "had every incentive at trial to attempt to establish" that he could reasonably rely on the professional education and status of his staff. Cf. *ante*, at 62, n. 6. But the jury heard and rejected his argument to that effect. Tr. 364, 576–577, 834–835.

The Court advances Connick's argument with greater clarity, but with no greater support. On what basis can one be confident that law schools acquaint students with prosecutors' unique obligation under *Brady*? Whittaker told the jury he did not recall covering *Brady* in his criminal procedure class in law school. Tr. 335. Dubelier's *alma mater*, like most other law faculties, does not make criminal procedure a required course.[21]

Connick suggested that the bar examination ensures that new attorneys will know what *Brady* demands. Tr. 835. Research indicates, however, that from 1980 to the present, *Brady* questions have not accounted for even 10% of the total points in the criminal law and procedure section of any administration of the Louisiana Bar Examination.[22] A person sitting for the Louisiana Bar Examination, moreover, need

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[21] See Tulane University Law School, Curriculum, http://www.law.tulane.edu (select "Academics"; select "Curriculum") (as visited Mar. 21, 2011, and in Clerk of Court's case file).

[22] See Supreme Court of Louisiana, Committee on Bar Admissions, Compilation of Louisiana State Bar Examinations, Feb. 1980 through July 2010 (available in Clerk of Court's case file).

pass only five of the exam's nine sections.[23] One can qualify for admission to the profession with no showing of even passing knowledge of criminal law and procedure.

The majority's suggestion that lawyers do not need *Brady* training because they "are equipped with the tools to find, interpret, and apply legal principles," *ante*, at 70, "blinks reality" and is belied by the facts of this case. See Brief for Former Federal Civil Rights Officials and Prosecutors as *Amici Curiae* 13 (hereinafter Prosecutors Brief). Connick himself recognized that his prosecutors, because of their inexperience, were not so equipped. Indeed, "understanding and complying with *Brady* obligations are not easy tasks, and the appropriate way to resolve *Brady* issues is not always self-evident." Prosecutors Brief 6. "*Brady* compliance," therefore, "is too much at risk, and too fundamental to the fairness of our criminal justice system, to be taken for granted," and "training remains critical." *Id.*, at 3, 7.

The majority further suggests that a prior pattern of similar violations is necessary to show deliberate indifference to defendants' *Brady* rights. See *ante*, at 57–59, and n. 4, 63–64.[24]

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[23] See La. State Bar Assn., Articles of Incorporation, Art. 14, § 10(A), La. Rev. Stat. Ann. § 37, ch. 4, App. (West 1974); *ibid.* (West 1988).

[24] *Board of Comm'rs of Bryan Cty.* v. *Brown*, 520 U. S. 397 (1997), reaffirmed "that evidence of a single violation of federal rights, accompanied by a showing that a municipality has failed to train its employees to handle recurring situations presenting an obvious potential for such a violation, could trigger municipal liability." *Id.*, at 409. Conducting this inquiry, the Court has acknowledged, "may not be an easy task for the factfinder." *Canton* v. *Harris*, 489 U. S. 378, 391 (1989). *Bryan County* did not retreat from this Court's conclusion in *Canton* that "judge and jury, doing their respective jobs, will be adequate to the task." 489 U. S., at 391. See also *Bryan Cty.*, 520 U. S., at 410 (absent a pattern, municipal liability may be predicated on "a particular glaring omission in a training regimen"). But cf. *ante*, at 68–70 (suggesting that under no set of facts could a plaintiff establish deliberate indifference for failure to train prosecutors in their *Brady* obligation without showing a prior pattern of violations).

The text of § 1983 contains no such limitation.[25] Nor is there any reason to imply such a limitation.[26] A district attorney's deliberate indifference might be shown in several ways short of a prior pattern.[27] This case is one such instance. Connick created a tinderbox in Orleans Parish in which *Brady* violations were nigh inevitable. And when they did occur, Connick insisted there was no need to change anything, and opposed efforts to hold prosecutors accountable on the ground that doing so would make his job more difficult.

A district attorney aware of his office's high turnover rate, who recruits prosecutors fresh out of law school and promotes them rapidly through the ranks, bears responsibility

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[25] When Congress sought to render a claim for relief contingent on showing a pattern or practice, it did so expressly. See, *e. g.,* 42 U. S. C. § 14141(a) ("It shall be unlawful for any governmental authority . . . to engage in a pattern or practice of conduct by law enforcement officers . . . that deprives persons of rights . . . protected by the Constitution . . . ."); 15 U. S. C. § 6104(a) ("Any person adversely affected by any pattern or practice of telemarketing . . . may . . . bring a civil action . . . ."); 49 U. S. C. § 306(e) (authorizing the Attorney General to bring a civil action when he "has reason to believe that a person is engaged in a pattern or practice [of] violating this section"). See also 47 U. S. C. § 532(e)(2)–(3) (authorizing the Federal Communications Commission to establish additional rules when "the Commission finds that the prior adjudicated violations of this section constitute a pattern or practice of violations").

[26] In the end, the majority leaves open the possibility that something other than "a pattern of violations" could also give a district attorney "specific reason" to know that additional training is necessary. See *ante,* at 67. Connick, by his own admission, had such a reason. See *supra,* at 96–98.

[27] For example, a prosecutor's office could be deliberately indifferent if it had a longstanding open-file policy, abandoned that policy, but failed to provide training to show prosecutors how to comply with their *Brady* obligations in the altered circumstances. Or a district attorney could be deliberately indifferent if he had a practice of pairing well-trained prosecutors with untrained prosecutors, knew that such supervision had stopped untrained prosecutors from committing *Brady* violations, but nevertheless changed the staffing on cases so that untrained prosecutors worked without supervision.

for ensuring that on-the-job training takes place. In short, the buck stops with him.[28] As the Court recognizes, "the duty to produce *Brady* evidence to the defense" is "[a]mong prosecutors' unique ethical obligations." *Ante*, at 66. The evidence in this case presents overwhelming support for the conclusion that the Orleans Parish Office slighted its responsibility to the profession and to the State's system of justice by providing no on-the-job *Brady* training. Connick was not "entitled to rely on prosecutors' professional training," *ante*, at 67, for Connick himself should have been the principal insurer of that training.

* * *

For the reasons stated, I would affirm the judgment of the U. S. Court of Appeals for the Fifth Circuit. Like that court and, before it, the District Court, I would uphold the jury's verdict awarding damages to Thompson for the gross, deliberately indifferent, and long-continuing violation of his fair trial right.

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[28] If the majority reads this statement as an endorsement of *respondeat superior* liability, *ante*, at 70, n. 12, then it entirely "misses [my] point," cf. *ante*, at 69. *Canton* recognized that deliberate indifference liability and *respondeat superior* liability are not one and the same. 489 U. S., at 385, 388–389. Connick was directly responsible for the *Brady* violations in Thompson's prosecutions not because he hired prosecutors who violated *Brady*, but because of his own deliberate indifference.

Syllabus

ASTRA USA, INC., ET AL. *v.* SANTA CLARA COUNTY, CALIFORNIA

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

No. 09–1273. Argued January 19, 2011—Decided March 29, 2011

Section 340B of the Public Health Services Act imposes ceilings on prices drug manufacturers may charge for medications sold to specified health-care facilities (340B or covered entities), dominantly, local providers of medical care for the poor. The § 340B ceiling-price program (340B Program) is superintended by the Health Resources and Services Administration (HRSA), part of the Department of Health and Human Services (HHS). It is tied to the earlier-enacted, much larger Medicaid Drug Rebate Program, under which manufacturers gain Medicaid coverage for their drugs. To qualify for participation in this program, a manufacturer must enter into a standardized agreement with HHS undertaking to provide rebates to States on their Medicaid drug purchases. The amount of the rebates depends on a manufacturer's "average" and "best" prices, as defined by legislation and regulation. The 340B Program, like the Medicaid Rebate Program, uses a form contract as an opt-in mechanism. The 340B Program also draws on the larger scheme's pricing methodology. In the 340B Program's contract, called the Pharmaceutical Pricing Agreement (PPA), manufacturers agree to charge covered entities no more than predetermined ceiling prices, derived from the "average" and "best" prices and rebates calculated under the Medicaid Rebate Program.

HRSA may require a manufacturer who overcharges a covered entity to reimburse that entity. HRSA may also terminate the manufacturer's PPA, which terminates as well the manufacturer's eligibility for Medicaid coverage of its drugs. Currently, HRSA handles overcharge complaints through informal procedures, but the 2010 Patient Protection and Affordable Care Act (PPACA) directs the Secretary to develop formal procedures. Once those procedures are in place, HRSA will reach an "administrative resolution," which will be subject to judicial review under the Administrative Procedure Act (APA). In addition to authorizing compensation awards to overcharged entities, the PPACA provides for the imposition of monetary penalties payable to the Government.

Respondent Santa Clara County (County), operator of several 340B entities, filed suit against Astra and eight other pharmaceutical compa-

nies, alleging that they were overcharging 340B entities in violation of the PPAs. Asserting that 340B entities are the PPAs' intended beneficiaries, the County sought compensatory damages for breach of contract. The District Court dismissed the complaint, concluding that the PPAs conferred no enforceable rights on 340B entities. Reversing, the Ninth Circuit held that, while 340B entities have no right to sue under the statute, they could proceed against drug manufacturers as third-party beneficiaries of the PPAs.

Held: Suits by 340B entities to enforce ceiling-price contracts running between drug manufacturers and the Secretary of HHS are incompatible with the statutory regime. As the County has conceded, covered entities have no right of action under § 340B itself. Congress vested authority to oversee compliance with the 340B Program in HHS and assigned no auxiliary enforcement role to covered entities. Nonetheless, the County maintains that the PPAs are contracts enforceable by covered entities as third-party beneficiaries. This argument overlooks that the PPAs simply incorporate statutory obligations and record the manufacturers' agreement to abide by them. The agreements have no negotiable terms. Like the Medicaid Rebate Program agreements, the PPAs provide the means by which drug manufacturers opt into the statutory scheme. A third-party suit to enforce an HHS-drug manufacturer agreement, therefore, is in essence a suit to enforce the statute itself. Telling in this regard, the County based its suit on allegations that the manufacturers charged more than the § 340B ceiling price, not that they violated an independent substantive obligation arising from the PPAs.

The Ninth Circuit reasoned that suits like the County's would spread the enforcement burden instead of placing it entirely on the Government. But spreading the enforcement burden is hardly what Congress contemplated when it made HHS administrator of the interdependent Medicaid Rebate Program and 340B Program. Suits by 340B entities would undermine the agency's efforts to administer these two programs harmoniously and uniformly. Notably, the Medicaid Rebate Program's statute prohibits HHS from disclosing pricing information that could reveal the prices a manufacturer charges for its drugs. Had Congress meant to leave open the prospect of third-party beneficiary suits by 340B entities, it likely would not have barred them from obtaining the very information necessary to determine whether their asserted rights have been violated.

The Ninth Circuit noted that HHS's Office of the Inspector General has reported on HRSA's inadequate enforcement authority. But Congress did not respond to the reports of lax enforcement by inviting 340B entities to launch lawsuits. Instead, Congress opted to strengthen and

Syllabus

formalize HRSA's enforcement authority, to make the new adjudicative framework the proper remedy for covered entities' complaints, and to render the agency's resolution of those complaints binding, subject to judicial review under the APA. Pp. 117–122.

588 F. 3d 1237, reversed.

GINSBURG, J., delivered the opinion of the Court, in which all other Members joined, except KAGAN, J., who took no part in the consideration or decision of the case.

Lisa S. Blatt argued the cause for petitioners. With her on the briefs were *Jeffrey L. Handwerker*, *Anthony J. Franze*, *James P. Muehlberger*, *Robert J. McCully*, *Ina D. Chang*, *Paul J. Riehle*, *Lyndon M. Tretter*, *Richard D. Raskin*, *Scott D. Stein*, *Kirke M. Hasson*, *Brian W. Shaffer*, *Jennifer Beth Jordan*, *R. Ted Cruz*, *Allyson N. Ho*, *Peter N. Larson*, *Fletcher C. Alford*, and *Kelly J. Davidson.*

Ginger D. Anders argued the cause for the United States as *amicus curiae* in support of petitioners. With her on the brief were *Acting Solicitor General Katyal*, *Assistant Attorney General West*, *Deputy Solicitor General Kneedler*, *Michael S. Raab*, *Benjamin M. Shultz*, *Janice L. Hoffman*, and *Mark D. Polston.*

David C. Frederick argued the cause for respondent. With him on the brief were *Scott H. Angstreich*, *Scott K. Attaway*, *Greta S. Hansen*, *Juniper L. Downs*, *Sanford Svetcov*, *Jeffrey W. Lawrence*, *Susan K. Alexander*, and *Aelish M. Baig.**

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*Briefs of *amici curiae* urging reversal were filed for the Chamber of Commerce of the United States of America by *Kannon K. Shanmugam* and *Robin S. Conrad;* for the Pharmaceutical Research and Manufacturers of America by *Paul D. Clement* and *Jeffrey S. Bucholtz;* and for the Washington Legal Foundation by *Daniel J. Popeo* and *Richard A. Samp.*

Briefs of *amici curiae* urging affirmance were filed for the State of Kansas et al. by *Steve Six*, Attorney General of Kansas, and *Stephen R. McAllister*, Solicitor General, and by the Attorneys General for their respective jurisdictions as follows: *Terry Goddard* of Arizona, *Peter J. Nickles* of the District of Columbia, *Chris Koster* of Missouri, and *Darrell V. McGraw, Jr.*, of West Virginia; for AARP et al. by *Rochelle Bobroff*, *Stacy*

JUSTICE GINSBURG delivered the opinion of the Court.

Section 340B of the Public Health Services Act, 42 U. S. C. § 256b (2006 ed. and Supp. IV), imposes ceilings on prices drug manufacturers may charge for medications sold to specified health-care facilities. Those facilities, here called "340B" or "covered" entities, include public hospitals and community health centers, many of them providers of safety-net services to the poor. The § 340B ceiling-price program (340B Program) is superintended by the Health Resources and Services Administration (HRSA), a unit of the Department of Health and Human Services (HHS). Drug manufacturers opt into the 340B Program by signing a form Pharmaceutical Pricing Agreement (PPA) used nationwide. PPAs are not transactional, bargained-for contracts. They are uniform agreements that recite the responsibilities § 340B imposes, respectively, on drug manufacturers and the Secretary of HHS. Manufacturers' eligibility to participate in State Medicaid programs is conditioned on their entry into PPAs for covered drugs purchased by 340B entities.

It is conceded that Congress authorized no private right of action under § 340B for covered entities who claim they have been charged prices exceeding the statutory ceiling. This case presents the question whether 340B entities, though accorded no right to sue for overcharges under the statute itself, may nonetheless sue allegedly overcharging manufacturers as third-party beneficiaries of the PPAs to which the manufacturers subscribed. We hold that suits by 340B entities to enforce ceiling-price contracts running between drug manufacturers and the Secretary of HHS are incompatible with the statutory regime.

Canan, and *Michael Schuster;* for A Coalition of 340B Entity Groups by *Joel M. Hamme;* for Contract Law Professors by *Stephen M. Tillery;* and for Federal Courts Professors by *Michael J. Brickman*, *James C. Bradley*, *Nina H. Fields*, and *Lumen N. Mulligan.*

Lawrence J. Joseph filed a brief for APA Watch as *amicus curiae.*

Congress placed the Secretary (acting through her designate, HRSA) in control of § 340B's drug-price prescriptions. That control could not be maintained were potentially thousands of covered entities permitted to bring suits alleging errors in manufacturers' price calculations. If 340B entities may not sue under the statute, it would make scant sense to allow them to sue on a form contract implementing the statute, setting out terms identical to those contained in the statute. Though labeled differently, suits to enforce § 340B and suits to enforce PPAs are in substance one and the same. Their treatment, therefore, must be the same, "[n]o matter the clothing in which [340B entities] dress their claims." *Tenet* v. *Doe*, 544 U. S. 1, 8 (2005).

I

A

The 340B Program is tied to the earlier-enacted, much larger Medicaid Drug Rebate Program. Adopted by Congress in 1990, the Medicaid Rebate Program covers a significant portion of drug purchases in the United States. See GAO, J. Dicken, Prescription Drugs: Oversight of Drug Pricing in Federal Programs 1 (GAO–07–481T, 2007) (testimony before the Committee on Oversight and Government Reform, House of Representatives).[1] To gain payment under Medicaid for covered drugs, a manufacturer must enter a standardized agreement with HHS; in the agreement, the manufacturer undertakes to provide rebates to States on their Medicaid drug purchases. 104 Stat. 1388–143, as amended, 124 Stat. 3290, 42 U. S. C. § 1396r–8(a). The amount of the rebates depends on the manufacturer's "aver-

[1] "In 2004, Medicaid . . . prescription drug spending reached $31 billion," GAO, J. Dicken, Prescription Drugs: Oversight of Drug Pricing in Federal Programs 4 (GAO–07–481T, 2007) (testimony before the Committee on Oversight and Government Reform, House of Representatives), while in 2003, 340B entities "spent an estimated $3.4 billion on drugs," *id.*, at 5.

age" and "best" prices, as defined by legislation and regulation. § 1396r–8(c), (k).

Calculation of a manufacturer's "average" and "best" prices, undertaken by the pharmaceutical company, is a complex enterprise requiring recourse to detailed information about the company's sales and pricing. § 1396r–8(k); 42 CFR § 447.500–520 (2010). To enable HHS to calculate the rebate rate for each drug, manufacturers submit the relevant data to HHS on a quarterly basis. § 1396r–8(b)(3). With exceptions set out in the legislation, HHS is prohibited from disclosing the submitted information "in a form which discloses the identity of a specific manufacturer . . . [or] prices charged for drugs by such manufacturer." § 1396r–8(b)(3)(D).

Under § 340B, added in 1992, 106 Stat. 4967, as amended, 124 Stat. 823, manufacturers participating in Medicaid must offer discounted drugs to covered entities, dominantly, local facilities that provide medical care for the poor. See § 256b(a); § 1396r–8(a)(1) (2006 ed.). The 340B Program, like the Medicaid Drug Rebate Program, employs a form contract as an opt-in mechanism. The 340B Program also draws on the larger scheme's pricing methodology. In their 340B Program contracts with HHS, called Pharmaceutical Pricing Agreements (PPAs), see *supra,* at 113, manufacturers agree to charge covered entities no more than predetermined ceiling prices, derived from the "average" and "best" prices and rebates calculated under the Medicaid Drug Rebate Program. § 256b(a)(1) (2006 ed., Supp. IV); see App. to Pet. for Cert. 165a–171a (PPA § I–II).[2]

If a manufacturer overcharges a covered entity, HRSA may require the manufacturer to reimburse the covered entity; HRSA may also terminate the manufacturer's PPA,

[2] The 340B Program also covers over-the-counter medications for which there are no Medicaid rebates. 42 U. S. C. § 256b(a)(2)(B) (2006 ed. and Supp. IV). For such drugs, § 340B prescribes a substitute calculation method. § 256b(a)(2)(B)(i).

§ 1396r–8(b)(4)(B)(i), (v) (2006 ed.); App. to Pet. for Cert. 174a (PPA § IV(c)), which terminates as well the manufacturer's eligibility for Medicaid coverage of its drugs, § 1396r–8(a)(1), (5). Currently, HRSA handles overcharge complaints through informal procedures. Manufacturer Audit Guidelines and Dispute Resolution Process, 61 Fed. Reg. 65412 (1996). The 2010 Patient Protection and Affordable Care Act (PPACA), Pub. L. 111–148, 124 Stat. 119, provides for more rigorous enforcement. The PPACA directs the Secretary to develop formal procedures for resolving overcharge claims. *Id.*, at 826, 42 U. S. C. § 256b(d)(3)(A) (2006 ed., Supp. IV). Under those procedures, which are not yet in place, HRSA will reach an "administrative resolution" that is subject to judicial review under the Administrative Procedure Act (APA), 5 U. S. C. § 701 *et seq.* See 124 Stat. 827, 42 U. S. C. § 256b(d)(3)(C). In addition to authorizing compensation awards to overcharged entities, the PPACA provides for the imposition of monetary penalties payable to the Government. *Id.*, at 824–825, 42 U. S. C. § 256b(d)(1)(B)(ii), (vi).

B

Respondent Santa Clara County (County), operator of several 340B entities, commenced suit against Astra and eight other pharmaceutical companies, alleging that the companies were overcharging 340B health-care facilities in violation of the PPAs to which the companies subscribed. The County styled its suit a class action on behalf of both 340B entities in California and the counties that fund those entities. Asserting that the 340B entities and the counties that fund them are the intended beneficiaries of the PPAs, the County sought compensatory damages for the pharmaceutical companies' breach of contract.

The District Court dismissed the complaint, concluding that the PPAs conferred no enforceable rights on 340B entities. Reversing the District Court's judgment, the Ninth Circuit held that covered entities, although they have no

right to sue under the statute, could maintain the action as third-party beneficiaries of the PPAs. 588 F. 3d 1237, 1241 (2009).

We granted certiorari, 561 U. S. 1057 (2010),[3] and now reverse the Ninth Circuit's judgment.

II

As the County conceded below and before this Court, see 588 F. 3d, at 1249; Tr. of Oral Arg. 45, covered entities have no right of action under § 340B itself. "[R]ecognition of any private right of action for violating a federal statute," currently governing decisions instruct, "must ultimately rest on congressional intent to provide a private remedy." *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U. S. 1083, 1102 (1991). See also *Stoneridge Investment Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U. S. 148, 164 (2008); *Alexander* v. *Sandoval*, 532 U. S. 275, 286 (2001). Congress vested authority to oversee compliance with the 340B Program in HHS and assigned no auxiliary enforcement role to covered entities.

Notwithstanding its inability to assert a statutory right of action, the County maintains that the PPAs implementing the 340B Program are agreements enforceable by covered entities as third-party beneficiaries. A nonparty becomes legally entitled to a benefit promised in a contract, the County recognizes, only if the contracting parties so intend. Brief for Respondent 31 (citing Restatement (Second) of Contracts § 302(1)(b) (1979)). The PPAs "specifically

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[3] U. S. Courts of Appeals have divided on the circumstances under which suits may be brought by alleged third-party beneficiaries of Government contracts. Compare 588 F. 3d 1237, 1244 (CA9 2009) (case below) ("Any intended beneficiary has the right to enforce the obligor's duty of performance . . . ."), with *Grochowski* v. *Phoenix Construction*, 318 F. 3d 80, 85–86 (CA2 2003) ("there is no presumption in favor of a right to bring suit" as third-party beneficiary of a government contract), and *Dewakuku* v. *Martinez*, 271 F. 3d 1031, 1042 (CA Fed. 2001) (rejecting third-party suit).

nam[e]" covered entities as the recipients of discounted drugs, the County observes; indeed the very object of the agreements is to ensure that those entities would be "charge[d] . . . no more than the ceiling price." Brief for Respondent 33. When the Government uses a contract to secure a benefit, the County urges, the intended recipient acquires a right to the benefit enforceable under federal common law. *Id.*, at 30. But see 9 J. Murray, Corbin on Contracts § 45.6, p. 92 (rev. ed. 2007) ("The distinction between an intention to benefit a third party and an intention that the third party should have the right to enforce that intention is emphasized where the promisee is a governmental entity.").

The County's argument overlooks that the PPAs simply incorporate statutory obligations and record the manufacturers' agreement to abide by them. The form agreements, composed by HHS, contain no negotiable terms. Like the Medicaid Drug Rebate Program agreements, see *supra*, at 114–115, the 340B Program agreements serve as the means by which drug manufacturers opt into the statutory scheme. A third-party suit to enforce an HHS-drug manufacturer agreement, therefore, is in essence a suit to enforce the statute itself. The absence of a private right to enforce the statutory ceiling-price obligations would be rendered meaningless if 340B entities could overcome that obstacle by suing to enforce the contract's ceiling-price obligations instead. The statutory and contractual obligations, in short, are one and the same. See *Grochowski* v. *Phoenix Construction*, 318 F. 3d 80, 86 (CA2 2003) (when a government contract confirms a statutory obligation, "a third-party private contract action [to enforce that obligation] would be inconsistent with . . . the legislative scheme . . . to the same extent as would a cause of action directly under the statute" (internal quotation marks omitted)).

Telling in this regard, the County based its suit on allegations that the manufacturers charged more than the § 340B ceiling price, see, *e. g.*, Third Amended Complaint

in No. 3:05–cv–03740 (ND Cal.), ¶¶ 1, 65, not that they violated any independent substantive obligation arising only from the PPAs.[4] Repeatedly, the County acknowledged that § 340B is the source of the contractual term allegedly breached. See, *e. g.*, *id.*, ¶ 28 ("[Section] 340B requires pharmaceutical manufacturers to ensure that § 340B Participants pay no more than the 'ceiling price' . . . for any pharmaceutical product."); *id.*, ¶ 36 ("Under both § 340B and the PPA, [drug manufacturers] are required to ensure that the § 340B Participants . . . pay no more for any product than the § 340B ceiling price.").

The Ninth Circuit determined that "[p]ermitting covered entities to sue as intended beneficiaries of the PPA is . . . wholly compatible with the Section 340B program's objectives" to ensure "that drug companies comply with their obligations under the program and provide [the required] discounts." 588 F. 3d, at 1251. Suits like the County's, the Court of Appeals reasoned, would spread the enforcement burden instead of placing it "[entirely] on the government." *Ibid.* (citing *Price* v. *Pierce*, 823 F. 2d 1114, 1121 (CA7 1987)). But spreading the enforcement burden, the United States stressed, both in the Ninth Circuit and in this Court, is hardly what Congress contemplated when it "centralized enforcement in the government." Brief for United States as *Amicus Curiae* 32; see Brief for United States as *Amicus Curiae* in No. 09–15216 (CA9), p. 13 (County's challenge is at

[4] Whether a contracting agency may authorize third-party suits to enforce a Government contract is not at issue in this case. Cf. Brief for United States as *Amicus Curiae* 22. We can infer no such authorization where a contract simply incorporates statutorily required terms and otherwise fails to demonstrate any intent to allow beneficiaries to enforce those terms. Permitting such a suit, it is evident, would "allo[w] third parties to circumvent Congress's decision not to permit private enforcement of the statute." *Id.*, at 23–24; cf. Brief for United States as *Amicus Curiae* in No. 09–15216 (CA9), p. 21 ("In drafting and entering into [PPAs], HHS never imagined that a 340B entity could bring a third-party beneficiary lawsuit like [the County]'s.").

odds with Congress' unitary administrative and enforcement scheme).[5]

Congress made HHS administrator of both the Medicaid Drug Rebate Program and the 340B Program, the United States observed, Brief for United States as *Amicus Curiae* 33–34, and "[t]he interdependent nature of the two programs' requirements means that an adjudication of rights under one program must proceed with an eye towards any implications for the other," *id.*, at 34. Far from assisting HHS, suits by 340B entities would undermine the agency's efforts to administer both Medicaid and § 340B harmoniously and on a uniform, nationwide basis.[6] Recognizing the County's right to proceed in court could spawn a multitude of dispersed and uncoordinated lawsuits by 340B entities. With HHS unable to hold the control rein, the risk of conflicting adjudications would be substantial.

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[5] The County notes that in *In re Pharmaceutical Industry Average Wholesale Price Litigation*, 263 F. Supp. 2d 172 (Mass. 2003), the United States urged that the statute establishing the Medicaid Drug Rebate Program, § 1396r–8, does not preempt States from maintaining state-law fraud claims based on fraudulent reporting of "best prices" to HHS. Brief for Respondent 22–23. See Brief for United States as *Amicus Curiae* in No. 1:01–cv–12257 (D Mass.), pp. 6–9 (observing that States make their own payments to manufacturers and have long played a role in identifying and prosecuting Medicaid fraud). We take no position on this issue.

[6] Because the Ninth Circuit focused on the 340B Program in isolation, it failed to recognize that the interests of States under the Medicaid Drug Rebate Program and covered entities under the 340B Program may conflict. For example, "average" prices are used both to set the amount manufacturers must pay in Medicaid rebates and to establish § 340B ceiling prices. § 1396r–8(c); § 256b(a)(1). Typically, the lower the "average" price, the lower a product's price to a 340B entity. Brief for United States as *Amicus Curiae* in No. 09–15216, p. 31. But the higher the "average" price, the more a State Medicaid agency typically receives in rebates from the manufacturers. *Ibid.* HHS can use its expertise to ascertain and balance the competing interests. *Id.*, at 31–32. Courts as first-line decisionmakers are not similarly equipped to deal with the whole picture.

As earlier noted, see *supra*, at 115, the Medicaid Rebate Program's statute prohibits HHS from disclosing pricing information in a form that could reveal the prices a manufacturer charges for drugs it produces. § 1396r–8(b)(3)(D).[7] This ban on disclosure is a further indication of the incompatibility of private suits with the statute Congress enacted. If Congress meant to leave open the prospect of third-party beneficiary suits by 340B entities, it likely would not have barred the potential suitors from obtaining the very information necessary to determine whether their asserted rights have been violated.[8]

It is true, as the Ninth Circuit observed, that HHS's Office of the Inspector General (OIG) has published reports finding that "HRSA lacks the oversight mechanisms and authority to ensure that [covered] entities pay at or below the . . . ceiling price." 588 F. 3d, at 1242 (quoting OIG, D. Levinson, Deficiencies in the Oversight of the 340B Drug Pricing Program, p. ii (OEI–05–02–00072, Oct. 2005)). See also 588 F. 3d, at 1242–1243 (citing OIG, D. Levinson, Review of 340B Prices 11 (OEI–05–02–00073, July 2006) (estimating that covered entities overpaid $3.9 million in June 2005 alone)). But Congress did not respond to the reports of inadequate HRSA enforcement by inviting 340B entities to launch lawsuits in district courts across the country. Instead, in the PPACA, Congress directed HRSA to create a formal dispute resolution procedure, institute refund and civil penalty systems, and perform audits of manufacturers. 124 Stat. 823–827, 42 U. S. C. § 256b(d). Congress thus opted to strengthen and

[7] HHS interprets this provision, the United States informs us, as prohibiting the agency from disclosing to covered entities the ceiling prices calculated based on information submitted by the manufacturers. Brief for United States as *Amicus Curiae* 28.

[8] Going forward, the 2010 Patient Protection and Affordable Care Act, Pub. L. 111–148, 124 Stat. 119, in conjunction with the new administrative adjudication process directed by the Act, will require HHS to give covered entities access to some of the information submitted by manufacturers. *Id.*, at 826, 42 U. S. C. § 256b(d)(3)(B)(iii).

formalize HRSA's enforcement authority, to make the new adjudicative framework the proper remedy for covered entities complaining of "overcharges and other violations of the discounted pricing requirements," *id.*, at 823, 42 U. S. C. § 256b(d)(1)(A), and to render the agency's resolution of covered entities' complaints binding, subject to judicial review under the APA, *id.*, at 827, 42 U. S. C. § 256b(d)(3)(C).

* * *

For the reasons stated, the judgment of the U. S. Court of Appeals for the Ninth Circuit is

Reversed.

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

Syllabus

TOLENTINO *v.* NEW YORK

CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

No. 09–11556. Argued March 21, 2011—Decided March 29, 2011
Certiorari dismissed. Reported below: 14 N. Y. 3d 382, 900 N. E. 2d 708.

Kristina Schwarz argued the cause for petitioner. With her on the briefs were *Steven Banks*, *Andrew C. Fine*, *Lawrence T. Hausman*, and *Richard Joselson*.

Caitlin J. Halligan argued the cause for respondent. With her on the brief were *Cyrus R. Vance*, *Jr.*, *Hilary Hassler*, *Alan B. Gadlin*, *Eleanor J. Ostrow*, and *Allen J. Vickey*.

Pratik A. Shah argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Acting Solicitor General Katyal*, *Assistant Attorney General Breuer*, *Deputy Solicitor General Dreeben*, and *Scott A. C. Meisler*.*

**Marc Rotenberg* filed a brief for the Electronic Privacy Information Center et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the State of Massachusetts et al. by *Martha Coakley*, Attorney General of Massachusetts, and *Randall E. Ravitz*, Assistant Attorney General, by *William H. Ryan, Jr.*, Acting Attorney General of Pennsylvania, and by the Attorneys General for their respective States as follows: *Luther Strange* of Alabama, *John J. Burns* of Alaska, *John Suthers* of Colorado, *Joseph R. Biden III* of Delaware, *Pamela Jo Bondi* of Florida, *David M. Louie* of Hawaii, *Lawrence G. Wasden* of Idaho, *Gregory F. Zoeller* of Indiana, *James D. "Buddy" Caldwell* of Louisiana, *Douglas F. Gansler* of Maryland, *Chris Koster* of Missouri, *Steve Bullock* of Montana, *Jon Bruning* of Nebraska, *Catherine Cortez Masto* of Nevada, *Paula T. Dow* of New Jersey, *Gary K. King* of New Mexico, *E. Scott Pruitt* of Oklahoma, *Alan Wilson* of South Carolina, *Marty J. Jackley* of South Dakota, *Greg Abbott* of Texas, *Mark L. Shurtleff* of Utah, *Kenneth T. Cuccinelli II* of Virginia, *J. B. Van Hollen* of Wisconsin, and *Bruce A. Salzburg* of Wyoming; for the Criminal Justice Legal Foundation by *Kent S. Scheidegger;* and for the New York State Association of Chiefs of Police, Inc., et al. by *Meir Feder*.

PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

It is so ordered.

Syllabus

ARIZONA CHRISTIAN SCHOOL TUITION ORGANIZATION *v.* WINN ET AL.

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

No. 09–987. Argued November 3, 2010—Decided April 4, 2011*

Respondents, Arizona taxpayers, sued petitioner director of the State Department of Revenue, challenging Ariz. Rev. Stat. Ann. § 43–1089 on Establishment Clause grounds. The Arizona law gives tax credits for contributions to school tuition organizations, or STOs, which then use the contributions to provide scholarships to students attending private schools, including religious schools. Petitioner Arizona Christian School Tuition Organization and others later intervened. The District Court dismissed the suit for failure to state a claim. Reversing, the Ninth Circuit held that respondents had standing as taxpayers under *Flast* v. *Cohen*, 392 U. S. 83, and had stated an Establishment Clause claim.

Held: Because respondents challenge a tax credit as opposed to a governmental expenditure, they lack Article III standing under *Flast* v. *Cohen*, *supra.* Pp. 132–146.

(a) Article III vests in the Federal Judiciary the "Power" to resolve "Cases" and "Controversies." That language limits the Federal Judiciary to the traditional role of Anglo-American courts: redressing injuries resulting from a specific legal dispute. To obtain a ruling on the merits in federal court a plaintiff must assert more than just the "generalized interest of all citizens in constitutional governance." *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U. S. 208, 217. Instead the plaintiff must establish standing, which requires "an 'injury in fact'"; "a causal connection between the injury and the conduct complained of"; and a conclusion that it is "'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 560–561. Pp. 132–134.

(b) In general, the mere fact that someone is a taxpayer does not provide standing to seek relief in federal court. The typical assertion of taxpayer standing rests on unjustifiable economic and political speculation. See *Frothingham* v. *Mellon*, 262 U. S. 447; *Doremus* v. *Board of Ed. of Hawthorne*, 342 U. S. 429. When a government expends re-

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*Together with No. 09–991, *Garriott, Director, Arizona Department of Revenue* v. *Winn et al.*, also on certiorari to the same court.

sources or declines to impose a tax, its budget does not necessarily suffer. Even assuming the State's coffers are depleted, finding injury would require a court to speculate "that elected officials will increase a taxpayer-plaintiff's tax bill to make up a deficit." *DaimlerChrysler Corp.* v. *Cuno*, 547 U. S. 332, 344. And to find redressability a court must assume that, were the taxpayers' remedy allowed, "legislators [would] pass along the supposed increased revenue in the form of tax reductions." *Ibid.* These conclusions apply to the present cases. The costs of education may be a significant portion of Arizona's annual budget, but the tax credit, by facilitating the operation of both religious and secular private schools, could relieve the burden on public schools and provide cost savings to the State. Even if the tax credit had an adverse effect on Arizona's budget, problems would remain. To find a particular injury in fact would require speculation that Arizona lawmakers react to revenue shortfalls by increasing respondents' tax liability. A causation finding would depend on the additional assumption that any tax increase would be traceable to the STO tax credit. And respondents have not established that an injunction against the credit's application would prompt Arizona legislators to "pass along [any] increased revenue [as] tax reductions." *Ibid.* Pp. 134–138.

(c) Respondents' suit does not fall within the narrow exception to the rule against taxpayer standing established in *Flast* v. *Cohen*, *supra*. There, federal taxpayers had standing to mount an Establishment Clause challenge to a federal statute providing General Treasury funds to support, *inter alia*, textbook purchases for religious schools. To have standing under *Flast*, taxpayers must show (1) a "logical link" between the plaintiff's taxpayer status "and the type of legislative enactment attacked," and (2) "a nexus" between such taxpayer status and "the precise nature of the constitutional infringement alleged." *Id.*, at 102. Considering the two requirements together, *Flast* explained that individuals suffer a particular injury when, in violation of the Establishment Clause and by means of "the taxing and spending power," their property is transferred through the Government's Treasury to a sectarian entity. *Id.*, at 105–106. "The taxpayer's allegation in such cases would be that his tax money is being extracted and spent in violation of specific constitutional protections against such abuses of legislative power." *Id.*, at 106. The STO tax credit does not visit the injury identified in *Flast*. When the Government spends funds from the General Treasury, dissenting taxpayers know that they have been made to contribute to an establishment in violation of conscience. In contrast, a tax credit allows dissenting taxpayers to use their own funds in accordance with their own consciences. Here, the STO tax credit does not "extrac[t] and spen[d]" a conscientious dissenter's funds in service of an

establishment, *ibid.*, or "'force a citizen to contribute'" to a sectarian organization, *id.*, at 103. Rather, taxpayers are free to pay their own tax bills without contributing to an STO, to contribute to a religious or secular STO of their choice, or to contribute to other charitable organizations. Because the STO tax credit is not tantamount to a religious tax, respondents have not alleged an injury for standing purposes. Furthermore, respondents cannot satisfy the requirements of causation and redressability. When the government collects and spends taxpayer money, governmental choices are responsible for the transfer of wealth; the resulting subsidy of religious activity is, under *Flast*, traceable to the government's expenditures; and an injunction against those expenditures would address taxpayer-plaintiffs' objections of conscience. Here, by contrast, contributions result from the decisions of private taxpayers regarding their own funds. Private citizens create private STOs; STOs choose beneficiary schools; and taxpayers then contribute to STOs. Any injury the objectors may suffer are not fairly traceable to the government. And, while an injunction most likely would reduce contributions to STOs, that remedy would not affect noncontributing taxpayers or their tax payments. Pp. 138–143.

(d) Respondents' contrary position—that Arizonans benefiting from the tax credit in effect are paying their state income tax to STOs—assumes that all income is government property, even if it has not come into the tax collector's hands. That premise finds no basis in standing jurisprudence. This Court has sometimes reached the merits in Establishment Clause cases involving tax benefits as opposed to governmental expenditures. See *Mueller* v. *Allen*, 463 U. S. 388; *Committee for Public Ed. & Religious Liberty* v. *Nyquist*, 413 U. S. 756; *Hunt* v. *McNair*, 413 U. S. 734; *Walz* v. *Tax Comm'n of City of New York*, 397 U. S. 664. But those cases did not mention standing and so do not stand for the proposition that no jurisdictional defects existed. Moreover, it is far from clear that any nonbinding *sub silentio* standing determinations in those cases depended on *Flast*, as there are other ways of establishing standing in Establishment Clause cases involving tax benefits. Pp. 143–145.

562 F. 3d 1002, reversed.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, THOMAS, and ALITO, JJ., joined. SCALIA, J., filed a concurring opinion, in which THOMAS, J., joined, *post*, p. 146. KAGAN, J., filed a dissenting opinion, in which GINSBURG, BREYER, and SOTOMAYOR, JJ., joined, *post*, p. 147.

Paula S. Bickett, Chief Counsel, Civil Appeals, argued the cause for petitioners in both cases. With her on the briefs for petitioner in No. 09–991 were *Terry Goddard,* Attorney General of Arizona, *Mary O'Grady,* Solicitor General, and *Kathleen P. Sweeney* and *Barbara A. Bailey,* Assistant Attorneys General. *David A. Cortman, Benjamin W. Bull,* and *Jeremy D. Tedesco* filed briefs for petitioner in No. 09–987. *Timothy D. Keller, William H. Mellor, Richard D. Komer,* and *Clark M. Neily III* filed briefs for Glenn Dennard et al. as respondents under this Court's Rule 12.6 in support of petitioners.

Acting Solicitor General Katyal argued the cause for the United States as *amicus curiae* in support of petitioners. With him on the brief were *Assistant Attorney General West, Joseph R. Palmore, Robert M. Loeb,* and *Lowell Sturgill.*

Paul Bender argued the cause for respondents in both cases. With him on the briefs were *Isabel M. Humphrey, Steven R. Shapiro, Daniel Mach,* and *Daniel Pochoda.*†

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†Briefs of *amici curiae* urging reversal in both cases were filed for the State of Indiana et al. by *Gregory F. Zoeller,* Attorney General of Indiana, *Thomas M. Fisher,* Solicitor General, *Heather L. Hagan* and *Ashley E. Tatman,* Deputy Attorneys General, *Michael A. Cox,* Attorney General of Michigan, *B. Eric Restuccia,* Solicitor General, *Joel D. McGormley,* Appellate Division Chief, and by the Attorneys General for their respective States as follows: *Troy King* of Alabama, *John Suthers* of Colorado, *Bill McCollum* of Florida, *Thurbert E. Baker* of Georgia, *James D. "Buddy" Caldwell* of Louisiana, *Jim Hood* of Mississippi, *Thomas W. Corbett, Jr.,* of Pennsylvania, *Henry D. McMaster* of South Carolina, *Greg Abbott* of Texas, *Mark L. Shurtleff* of Utah, and *Robert M. McKenna* of Washington; for the American Center for Law and Justice by *Jay Alan Sekulow, Stuart J. Roth, Colby M. May, James M. Henderson, Sr.,* and *Walter M. Weber;* for the American Center for School Choice by *Richard W. Garnett* and *John E. Coons;* for the Becket Fund for Religious Liberty by *Kevin J. Hasson, Eric C. Rassbach, Hannah C. Smith,* and *Luke W. Goodrich;* for the Cato Institute et al. by *Ilya Shapiro;* for the Center for Constitutional Jurisprudence by *John Eastman, Anthony T. Caso,* and *Edwin Meese III;* for the Ethics and Religious Liberty Commission of the Southern Baptist

JUSTICE KENNEDY delivered the opinion of the Court.

Arizona provides tax credits for contributions to school tuition organizations, or STOs. STOs use these contributions to provide scholarships to students attending private schools, many of which are religious. Respondents are a group of Arizona taxpayers who challenge the STO tax credit as a violation of Establishment Clause principles under the First and Fourteenth Amendments. After the Arizona Supreme Court rejected a similar Establishment Clause claim on the merits, respondents sought intervention from the Federal Judiciary.

To obtain a determination on the merits in federal court, parties seeking relief must show that they have standing under Article III of the Constitution. Standing in Establishment Clause cases may be shown in various ways. Some plaintiffs may demonstrate standing based on the direct harm of what is claimed to be an establishment of religion,

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Convention et al. by *Kelly J. Shackleford* and *Hiram S. Sasser III;* for the Florida School Choice Fund et al. by *Nathan A. Adams IV;* for the Jewish Tuition Organization et al. by *Bennett Evan Cooper* and *Robert A. Destro;* for the Pacific Legal Foundation by *James S. Burling* and *Sharon L. Browne;* and for the United States Conference of Catholic Bishops et al. by *Thomas C. Berg*, *Anthony R. Picarello, Jr.*, *Jeffrey Hunter Moon*, *Douglas Laycock*, *Nathan J. Diament*, and *Kimberlee Wood Colby.*

Briefs of *amici curiae* urging affirmance in both cases were filed for the American Humanist Association et al. by *Robert V. Ritter;* and for the National School Boards Association et al. by *John W. Borkowski*, *Maree F. Sneed*, *Francisco M. Negrón, Jr.*, and *Naomi Gittins.*

Briefs of *amici curiae* were filed in both cases for Americans United for Separation of Church and State et al. by *Gregory M. Lipper* and *Ayesha N. Khan;* for the Christian Educators Association International et al. by *Robert H. Tyler* and *Jennifer L. Monk;* for the Goldwater Institute et al. by *Clint Bolick* and *Nicholas C. Dranias;* for the Justice and Freedom Fund by *James L. Hirsen* and *Deborah J. Dewart;* for the Rutherford Institute by *John W. Whitehead* and *Jason P. Gosselin.*

Mathew D. Staver, *Anita L. Staver*, *Stephen M. Crampton*, and *Mary E. McAlister* filed a brief for Liberty Counsel et al. as *amici curiae* in No. 09–987.

such as a mandatory prayer in a public school classroom. See *School Dist. of Abington Township* v. *Schempp*, 374 U. S. 203, 224, n. 9 (1963). Other plaintiffs may demonstrate standing on the ground that they have incurred a cost or been denied a benefit on account of their religion. Those costs and benefits can result from alleged discrimination in the tax code, such as when the availability of a tax exemption is conditioned on religious affiliation. See *Texas Monthly, Inc.* v. *Bullock*, 489 U. S. 1, 8 (1989) (plurality opinion).

For their part, respondents contend that they have standing to challenge Arizona's STO tax credit for one and only one reason: because they are Arizona taxpayers. But the mere fact that a plaintiff is a taxpayer is not generally deemed sufficient to establish standing in federal court. To overcome that rule, respondents must rely on an exception created in *Flast* v. *Cohen*, 392 U. S. 83 (1968). For the reasons discussed below, respondents cannot take advantage of *Flast*'s narrow exception to the general rule against taxpayer standing. As a consequence, respondents lacked standing to commence this action, and their suit must be dismissed for want of jurisdiction.

I

Respondents challenged § 43–1089, a provision of the Arizona Tax Code. See 1997 Ariz. Sess. Laws § 43–1087, codified, as amended, Ariz. Rev. Stat. Ann. § 43–1089 (West Supp. 2010). Section 43–1089 allows Arizona taxpayers to obtain dollar-for-dollar tax credits of up to $500 per person and $1,000 per married couple for contributions to STOs. § 43–1089(A). If the credit exceeds an individual's tax liability, the credit's unused portion can be carried forward up to five years. § 43–1089(D). Under a version of § 43–1089 in effect during the pendency of this lawsuit, a charitable organization could be deemed an STO only upon certain conditions. See § 43–1089 (West 2006). The organization was required to be exempt from federal taxation under § 501(c)(3) of the Inter-

nal Revenue Code of 1986. § 43–1089(G)(3) (West Supp. 2005). It could not limit its scholarships to students attending only one school. *Ibid.* And it had to allocate "at least ninety per cent of its annual revenue for educational scholarships or tuition grants" to children attending qualified schools. *Ibid.* A "qualified school," in turn, was defined in part as a private school in Arizona that did not discriminate on the basis of race, color, handicap, familial status, or national origin. § 43–1089(G)(2).

In an earlier lawsuit filed in state court, Arizona taxpayers challenged § 43–1089, invoking both the United States Constitution and the Arizona Constitution. The Arizona Supreme Court rejected the taxpayers' claims on the merits. *Kotterman* v. *Killian*, 193 Ariz. 273, 972 P. 2d 606 (1999). This Court denied certiorari. *Rhodes* v. *Killian*, 528 U. S. 810 (1999); *Kotterman* v. *Killian*, 528 U. S. 921 (1999).

The present action was filed in the United States District Court for the District of Arizona. It named the director of the Arizona Department of Revenue as defendant. The Arizona taxpayers who brought the suit claimed that § 43–1089 violates the Establishment Clause of the First Amendment, as incorporated against the States by the Fourteenth Amendment. Respondents alleged that § 43–1089 allows STOs "to use State income-tax revenues to pay tuition for students at religious schools," some of which "discriminate on the basis of religion in selecting students." Complaint in No. 00–0287 (D Ariz.), ¶¶ 29–31, App. to Pet. for Cert. in No. 09–987, pp. 125a–126a. Respondents requested, among other forms of relief, an injunction against the issuance of § 43–1089 tax credits for contributions to religious STOs. The District Court dismissed respondents' suit as jurisdictionally barred by the Tax Injunction Act, 28 U. S. C. § 1341. The Court of Appeals reversed. This Court agreed with the Court of Appeals and affirmed. *Hibbs* v. *Winn*, 542 U. S. 88 (2004).

On remand, the Arizona Christian School Tuition Organization and other interested parties intervened. The District Court once more dismissed respondents' suit, this time for failure to state a claim. Once again, the Court of Appeals reversed. It held that respondents had standing under *Flast* v. *Cohen*, *supra*. 562 F. 3d 1002 (CA9 2009). Reaching the merits, the Court of Appeals ruled that respondents had stated a claim that § 43–1089 violated the Establishment Clause of the First Amendment. The full Court of Appeals denied en banc review, with eight judges dissenting. 586 F. 3d 649 (CA9 2009). This Court granted certiorari. 560 U. S. 924 (2010).

II

The concept and operation of the separation of powers in our National Government have their principal foundation in the first three Articles of the Constitution. Under Article III, the Federal Judiciary is vested with the "Power" to resolve not questions and issues but "Cases" or "Controversies." This language restricts the federal judicial power "to the traditional role of the Anglo-American courts." *Summers* v. *Earth Island Institute*, 555 U. S. 488, 492 (2009). In the English legal tradition, the need to redress an injury resulting from a specific dispute taught the efficacy of judicial resolution and gave legitimacy to judicial decrees. The importance of resolving specific cases was visible, for example, in the incremental approach of the common law and in equity's consideration of exceptional circumstances. The Framers paid heed to these lessons. See U. S. Const., Art. III, § 2 ("The judicial Power shall extend to all Cases, in Law and Equity . . . "). By rules consistent with the longstanding practices of Anglo-American courts a plaintiff who seeks to invoke the federal judicial power must assert more than just the "generalized interest of all citizens in constitutional governance." *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U. S. 208, 217 (1974).

Continued adherence to the case-or-controversy requirement of Article III maintains the public's confidence in an unelected but restrained Federal Judiciary. If the judicial power were "extended to every *question* under the constitution," Chief Justice Marshall once explained, federal courts might take possession of "almost every subject proper for legislative discussion and decision." 4 Papers of John Marshall 95 (C. Cullen ed. 1984) (quoted in *DaimlerChrysler Corp.* v. *Cuno*, 547 U. S. 332, 341 (2006)). The legislative and executive departments of the Federal Government, no less than the judicial department, have a duty to defend the Constitution. See U. S. Const., Art. VI, cl. 3. That shared obligation is incompatible with the suggestion that federal courts might wield an "unconditioned authority to determine the constitutionality of legislative or executive acts." *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U. S. 464, 471 (1982). For the federal courts to decide questions of law arising outside of cases and controversies would be inimical to the Constitution's democratic character. And the resulting conflict between the judicial and the political branches would not, "in the long run, be beneficial to either." *United States* v. *Richardson*, 418 U. S. 166, 188–189 (1974) (Powell, J., concurring). Instructed by Chief Justice Marshall's admonition, this Court takes care to observe the "role assigned to the judiciary" within the Constitution's "tripartite allocation of power." *Valley Forge*, *supra*, at 474 (internal quotation marks omitted).

III

To state a case or controversy under Article III, a plaintiff must establish standing. *Allen* v. *Wright*, 468 U. S. 737, 751 (1984). The minimum constitutional requirements for standing were explained in *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555 (1992).

> "First, the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not "conjectural" or "hypothetical."' Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.' Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Id.*, at 560–561 (citations and footnote omitted).

In requiring a particular injury, the Court meant "that the injury must affect the plaintiff in a personal and individual way." *Id.*, at 560, n. 1. The question now before the Court is whether respondents, the plaintiffs in the trial court, satisfy the requisite elements of standing.

A

Respondents suggest that their status as Arizona taxpayers provides them with standing to challenge the STO tax credit. Absent special circumstances, however, standing cannot be based on a plaintiff's mere status as a taxpayer. This Court has rejected the general proposition that an individual who has paid taxes has a "continuing, legally cognizable interest in ensuring that those funds are not *used* by the Government in a way that violates the Constitution." *Hein* v. *Freedom From Religion Foundation, Inc.*, 551 U. S. 587, 599 (2007) (plurality opinion). This precept has been referred to as the rule against taxpayer standing.

The doctrinal basis for the rule was discussed in *Frothingham* v. *Mellon*, 262 U. S. 447 (1923) (decided with *Massachusetts* v. *Mellon*). There, a taxpayer-plaintiff had alleged that certain federal expenditures were in excess of congressional authority under the Constitution. The plaintiff argued that she had standing to raise her claim because she

had an interest in the Government Treasury and because the allegedly unconstitutional expenditure of Government funds would affect her personal tax liability. The Court rejected those arguments. The "effect upon future taxation, of any payment out of funds," was too "remote, fluctuating and uncertain" to give rise to a case or controversy. *Id.*, at 487. And the taxpayer-plaintiff's "interest in the moneys of the Treasury," the Court recognized, was necessarily "shared with millions of others." *Ibid.* As a consequence, *Frothingham* held that the taxpayer-plaintiff had not presented a "judicial controversy" appropriate for resolution in federal court but rather a "matter of public . . . concern" that could be pursued only through the political process. *Id.*, at 487–489.

In a second pertinent case, *Doremus* v. *Board of Ed. of Hawthorne*, 342 U. S. 429 (1952), the Court considered *Frothingham*'s prohibition on taxpayer standing in connection with an alleged Establishment Clause violation. A New Jersey statute had provided that public school teachers would read Bible verses to their students at the start of each schoolday. A plaintiff sought to have the law enjoined, asserting standing based on her status as a taxpayer. Writing for the Court, Justice Jackson reiterated the foundational role that Article III standing plays in our separation of powers.

> "'The party who invokes the power [of the federal courts] must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as a result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.'" *Doremus*, *supra*, at 434 (quoting *Frothingham*, *supra*, at 488).

The plaintiff in *Doremus* lacked any "direct and particular financial interest" in the suit, and, as a result, a decision on

the merits would have been merely "advisory." 342 U. S., at 434–435. It followed that the plaintiff's allegations did not give rise to a case or controversy subject to judicial resolution under Article III. *Ibid.* Cf. *School Dist. of Abington Township* v. *Schempp*, 374 U. S., at 224, n. 9 (finding standing where state laws required Bible readings or prayer in public schools, not because plaintiffs were state taxpayers but because their children were enrolled in public schools and so were "directly affected" by the challenged laws).

In holdings consistent with *Frothingham* and *Doremus*, more recent decisions have explained that claims of taxpayer standing rest on unjustifiable economic and political speculation. When a government expends resources or declines to impose a tax, its budget does not necessarily suffer. On the contrary, the purpose of many governmental expenditures and tax benefits is "to spur economic activity, which in turn *increases* government revenues." *DaimlerChrysler*, 547 U. S., at 344.

Difficulties persist even if one assumes that an expenditure or tax benefit depletes the government's coffers. To find injury, a court must speculate "that elected officials will increase a taxpayer-plaintiff's tax bill to make up a deficit." *Ibid.* And to find redressability, a court must assume that, were the remedy the taxpayers seek to be allowed, "legislators will pass along the supposed increased revenue in the form of tax reductions." *Ibid.* It would be "pure speculation" to conclude that an injunction against a government expenditure or tax benefit "would result in any actual tax relief" for a taxpayer-plaintiff. *ASARCO Inc.* v. *Kadish*, 490 U. S. 605, 614 (1989) (opinion of KENNEDY, J.).

These well-established principles apply to the present cases. Respondents may be right that Arizona's STO tax credits have an estimated annual value of over $50 million. See Brief for Respondent Winn et al. 42; see also Arizona Dept. of Revenue, Revenue Impact of Arizona's Tax Expenditures FY 2009/10, p. 48 (preliminary Nov. 15, 2010) (report-

ing the total estimated "value" of STO tax credits claimed over a 1-year period). The education of its young people is, of course, one of the State's principal missions and responsibilities; and the consequent costs will make up a significant portion of the state budget. That, however, is just the beginning of the analysis.

By helping students obtain scholarships to private schools, both religious and secular, the STO program might relieve the burden placed on Arizona's public schools. The result could be an immediate and permanent cost savings for the State. See Brief for Petitioner Arizona Christian School Tuition Organization 31 (discussing studies indicating that the STO program may on net save the State money); see also *Mueller* v. *Allen*, 463 U. S. 388, 395 (1983) ("By educating a substantial number of students [private] schools relieve public schools of a correspondingly great burden—to the benefit of all taxpayers"). Underscoring the potential financial benefits of the STO program, the average value of an STO scholarship may be far less than the average cost of educating an Arizona public school student. See Brief for Petitioner Garriott 38. Because it encourages scholarships for attendance at private schools, the STO tax credit may not cause the State to incur any financial loss.

Even assuming the STO tax credit has an adverse effect on Arizona's annual budget, problems would remain. To conclude there is a particular injury in fact would require speculation that Arizona lawmakers react to revenue shortfalls by increasing respondents' tax liability. *DaimlerChrysler*, 547 U. S., at 344. A finding of causation would depend on the additional determination that any tax increase would be traceable to the STO tax credits, as distinct from other governmental expenditures or other tax benefits. Respondents have not established that an injunction against application of the STO tax credit would prompt Arizona legislators to "pass along the supposed increased revenue in the

form of tax reductions." *Ibid.* Those matters, too, are conjectural.

Each of the inferential steps to show causation and redressability depends on premises as to which there remains considerable doubt. The taxpayers have not shown that any interest they have in protecting the state treasury would be advanced. Even were they to show some closer link, that interest is still of a general character, not particular to certain persons. Nor have the taxpayers shown that higher taxes will result from the tuition credit scheme. The rule against taxpayer standing, a rule designed both to avoid speculation and to insist on particular injury, applies to respondents' lawsuit. The taxpayers, then, must rely on an exception to the rule, an exception next to be considered.

B

The primary contention of respondents, of course, is that, despite the general rule that taxpayers lack standing to object to expenditures alleged to be unconstitutional, their suit falls within the exception established by *Flast* v. *Cohen*, 392 U. S. 83. It must be noted at the outset that, as this Court has explained, *Flast*'s holding provides a "narrow exception" to "the general rule against taxpayer standing." *Bowen* v. *Kendrick*, 487 U. S. 589, 618 (1988).

At issue in *Flast* was the standing of federal taxpayers to object, on First Amendment grounds, to a congressional statute that allowed expenditures of federal funds from the General Treasury to support, among other programs, "instruction in reading, arithmetic, and other subjects in religious schools, and to purchase textbooks and other instructional materials for use in such schools." 392 U. S., at 85–86. *Flast* held that taxpayers have standing when two conditions are met.

The first condition is that there must be a "logical link" between the plaintiff's taxpayer status "and the type of legislative enactment attacked." *Id.*, at 102. This condition

was not satisfied in *Doremus* because the statute challenged in that case—providing for the recitation of Bible passages in public schools—involved at most an "incidental expenditure of tax funds." *Flast*, 392 U. S., at 102. In *Flast*, by contrast, the allegation was that the Federal Government violated the Establishment Clause in the exercise of its legislative authority both to collect and spend tax dollars. *Id.*, at 103. In the decades since *Flast*, the Court has been careful to enforce this requirement. See *Hein*, 551 U. S. 587 (no standing under *Flast* to challenge federal executive actions funded by general appropriations); *Valley Forge*, 454 U. S. 464 (no standing under *Flast* to challenge an agency's decision to transfer a parcel of federal property pursuant to the Property Clause).

The second condition for standing under *Flast* is that there must be "a nexus" between the plaintiff's taxpayer status and "the precise nature of the constitutional infringement alleged." 392 U. S., at 102. This condition was deemed satisfied in *Flast* based on the allegation that Government funds had been spent on an outlay for religion in contravention of the Establishment Clause. *Id.*, at 85–86. In *Frothingham*, by contrast, the claim was that Congress had exceeded its constitutional authority without regard to any specific prohibition. 392 U. S., at 104–105. Confirming that *Flast* turned on the unique features of Establishment Clause violations, this Court has "declined to lower the taxpayer standing bar in suits alleging violations of any constitutional provision apart from the Establishment Clause." *Hein*, *supra*, at 609 (plurality opinion); see also *Richardson*, 418 U. S. 166 (Statement and Account Clause); *Schlesinger*, 418 U. S. 208 (Incompatibility Clause).

After stating the two conditions for taxpayer standing, *Flast* considered them together, explaining that individuals suffer a particular injury for standing purposes when, in violation of the Establishment Clause and by means of "the taxing and spending power," their property is transferred

through the Government's Treasury to a sectarian entity. 392 U. S., at 105–106. As *Flast* put it: "The taxpayer's allegation in such cases would be that his tax money is being extracted and spent in violation of specific constitutional protections against such abuses of legislative power." *Id.*, at 106. *Flast* thus "understood the 'injury' alleged in Establishment Clause challenges to federal spending to be the very 'extract[ion] and spen[ding]' of 'tax money' in aid of religion alleged by a plaintiff." *DaimlerChrysler*, 547 U. S., at 348 (quoting *Flast*, 392 U. S., at 106). "Such an injury," *Flast* continued, is unlike "generalized grievances about the conduct of government" and so is "appropriate for judicial redress." *Ibid.*

Flast found support for its finding of personal injury in "the history of the Establishment Clause," particularly James Madison's Memorial and Remonstrance Against Religious Assessments. *DaimlerChrysler*, *supra*, at 348. In 1785, the General Assembly of the Commonwealth of Virginia considered a "tax levy to support teachers of the Christian religion." *Flast*, *supra*, at 104, n. 24; see A Bill Establishing a Provision for Teachers of the Christian Religion, reprinted in *Everson* v. *Board of Ed. of Ewing*, 330 U. S. 1, 74 (1947) (supplemental appendix to dissent of Rutledge, J.). Under the proposed assessment bill, taxpayers would direct their payments to Christian societies of their choosing. *Ibid.* If a taxpayer made no such choice, the General Assembly was to divert his funds to "seminaries of learning," at least some of which "undoubtedly would have been religious in character." *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 869, n. 1 (1995) (Souter, J., dissenting) (internal quotation marks omitted); see also *id.*, at 853, n. 1 (THOMAS, J., concurring). However the "seminaries" provision might have functioned in practice, critics took the position that the proposed bill threatened compulsory religious contributions. See, *e. g.*, T. Buckley, Church and State in Revolutionary Virginia, 1776–1787,

pp. 133–134 (1977); H. Eckenrode, Separation of Church and State in Virginia 106–108 (1910).

In the Memorial and Remonstrance, Madison objected to the proposed assessment on the ground that it would coerce a form of religious devotion in violation of conscience. In Madison's view, government should not "'force a citizen to contribute three pence only of his property for the support of any one establishment.'" *Flast*, *supra*, at 103 (quoting 2 Writings of James Madison 183, 186 (G. Hunt ed. 1901)). This Madisonian prohibition does not depend on the amount of property conscripted for sectarian ends. Any such taking, even one amounting to "three pence only," violates conscience. 392 U. S., at 103; cf. *supra*, at 134–135. The proposed bill ultimately died in committee; and the General Assembly instead enacted legislation forbidding "compelled" support of religion. See A Bill for Establishing Religious Freedom, reprinted in 2 Papers of Thomas Jefferson 545–546 (J. Boyd ed. 1950); see also *Flast*, 392 U. S., at 104, n. 24. Madison himself went on to become, as *Flast* put it, "the leading architect of the religion clauses of the First Amendment." *Id.*, at 103. *Flast* was thus informed by "the specific evils" identified in the public arguments of "those who drafted the Establishment Clause and fought for its adoption." *Id.*, at 103–104; see also Feldman, Intellectual Origins of the Establishment Clause, 77 N. Y. U. L. Rev. 346, 351 (2002) ("[T]he Framers' generation worried that conscience would be violated if citizens were required to pay taxes to support religious institutions with whose beliefs they disagreed"); McConnell, Coercion: The Lost Element of Establishment, 27 Wm. & Mary L. Rev. 933, 936–939 (1986).

Respondents contend that these principles demonstrate their standing to challenge the STO tax credit. In their view the tax credit is, for *Flast* purposes, best understood as a governmental expenditure. That is incorrect.

It is easy to see that tax credits and governmental expenditures can have similar economic consequences, at least for

beneficiaries whose tax liability is sufficiently large to take full advantage of the credit. Yet tax credits and governmental expenditures do not both implicate individual taxpayers in sectarian activities. A dissenter whose tax dollars are "extracted and spent" knows that he has in some small measure been made to contribute to an establishment in violation of conscience. *Flast*, *supra*, at 106. In that instance the taxpayer's direct and particular connection with the establishment does not depend on economic speculation or political conjecture. The connection would exist even if the conscientious dissenter's tax liability were unaffected or reduced. See *DaimlerChrysler*, *supra*, at 348–349. When the government declines to impose a tax, by contrast, there is no such connection between dissenting taxpayer and alleged establishment. Any financial injury remains speculative. See *supra*, at 134–138. And awarding some citizens a tax credit allows other citizens to retain control over their own funds in accordance with their own consciences.

The distinction between governmental expenditures and tax credits refutes respondents' assertion of standing. When Arizona taxpayers choose to contribute to STOs, they spend their own money, not money the State has collected from respondents or from other taxpayers. Arizona's § 43–1089 does not "extrac[t] and spen[d]" a conscientious dissenter's funds in service of an establishment, *Flast*, 392 U. S., at 106, or " 'force a citizen to contribute three pence only of his property' " to a sectarian organization, *id.*, at 103 (quoting 2 Writings of James Madison, *supra*, at 186). On the contrary, respondents and other Arizona taxpayers remain free to pay their own tax bills, without contributing to an STO. Respondents are likewise able to contribute to an STO of their choice, either religious or secular. And respondents also have the option of contributing to other charitable organizations, in which case respondents may become eligible for a tax deduction or a different tax credit. See, *e. g.*, Ariz. Rev. Stat. Ann. § 43–1088 (West Supp. 2010). The STO tax credit

is not tantamount to a religious tax or to a tithe and does not visit the injury identified in *Flast*. It follows that respondents have neither alleged an injury for standing purposes under general rules nor met the *Flast* exception. Finding standing under these circumstances would be more than the extension of *Flast* "to the limits of its logic." *Hein*, 551 U. S., at 615 (plurality opinion). It would be a departure from *Flast*'s stated rationale.

Furthermore, respondents cannot satisfy the requirements of causation and redressability. When the government collects and spends taxpayer money, governmental choices are responsible for the transfer of wealth. In that case a resulting subsidy of religious activity is, for purposes of *Flast*, traceable to the government's expenditures. And an injunction against those expenditures would address the objections of conscience raised by taxpayer-plaintiffs. See *DaimlerChrysler*, 547 U. S., at 344. Here, by contrast, contributions result from the decisions of private taxpayers regarding their own funds. Private citizens create private STOs; STOs choose beneficiary schools; and taxpayers then contribute to STOs. While the State, at the outset, affords the opportunity to create and contribute to an STO, the tax credit system is implemented by private action and with no state intervention. Objecting taxpayers know that their fellow citizens, not the State, decide to contribute and in fact make the contribution. These considerations prevent any injury the objectors may suffer from being fairly traceable to the government. And while an injunction against application of the tax credit most likely would reduce contributions to STOs, that remedy would not affect noncontributing taxpayers or their tax payments. As a result, any injury suffered by respondents would not be remedied by an injunction limiting the tax credit's operation.

Resisting this conclusion, respondents suggest that Arizonans who benefit from § 43–1089 tax credits in effect are paying their state income tax to STOs. In respondents' view,

tax credits give rise to standing even if tax deductions do not, since only the former yield a dollar-for-dollar reduction in final tax liability. See Brief for Respondent Winn et al. 5–6; Tr. of Oral Arg. 35–36. But what matters under *Flast* is whether sectarian STOs receive government funds drawn from general tax revenues, so that moneys have been extracted from a citizen and handed to a religious institution in violation of the citizen's conscience. Under that inquiry, respondents' argument fails. Like contributions that lead to charitable tax deductions, contributions yielding STO tax credits are not owed to the State and, in fact, pass directly from taxpayers to private organizations. Respondents' contrary position assumes that income should be treated as if it were government property even if it has not come into the tax collector's hands. That premise finds no basis in standing jurisprudence. Private bank accounts cannot be equated with the Arizona state treasury.

The conclusion that the *Flast* exception is inapplicable at first may seem in tension with several earlier cases, all addressing Establishment Clause issues and all decided after *Flast.* See *Mueller*, 463 U. S. 388; *Committee for Public Ed. & Religious Liberty* v. *Nyquist*, 413 U. S. 756 (1973); *Hunt* v. *McNair*, 413 U. S. 734 (1973); *Walz* v. *Tax Comm'n of City of New York*, 397 U. S. 664 (1970); cf. *Hibbs* v. *Winn*, 542 U. S. 88 (reaching only threshold jurisdictional issues). But those cases do not mention standing and so are not contrary to the conclusion reached here. When a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed. See, *e. g.*, *Hagans* v. *Lavine*, 415 U. S. 528, 535, n. 5 (1974) ("[W]hen questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us"); *United States* v. *L. A. Tucker Truck Lines, Inc.*, 344 U. S. 33, 38 (1952) ("Even as to our own judicial power of jurisdiction, this Court has

followed the lead of Mr. Chief Justice Marshall who held that this Court is not bound by a prior exercise of jurisdiction in a case where it was not questioned and it was passed *sub silentio*"); *Frothingham*, 262 U. S., at 486. The Court would risk error if it relied on assumptions that have gone unstated and unexamined.

Furthermore, if a law or practice, including a tax credit, disadvantages a particular religious group or a particular nonreligious group, the disadvantaged party would not have to rely on *Flast* to obtain redress for a resulting injury. See *Texas Monthly, Inc.* v. *Bullock*, 489 U. S., at 8 (plurality opinion) (finding standing where a general interest magazine sought to recover tax payments on the ground that religious periodicals were exempt from the tax). Because standing in Establishment Clause cases can be shown in various ways, it is far from clear that any nonbinding *sub silentio* holdings in the cases respondents cite would have depended on *Flast.* See, *e. g., Walz, supra,* at 666–667 (explaining that the plaintiff was an "owner of real estate" in New York City who objected to the city's issuance of "property tax exemptions to religious organizations"). That the plaintiffs in those cases could have advanced arguments for jurisdiction independent of *Flast* makes it particularly inappropriate to determine whether or why standing should have been found where the issue was left unexplored.

If an establishment of religion is alleged to cause real injury to particular individuals, the federal courts may adjudicate the matter. Like other constitutional provisions, the Establishment Clause acquires substance and meaning when explained, elaborated, and enforced in the context of actual disputes. That reality underlies the case-or-controversy requirement, a requirement that has not been satisfied here.

* * *

Few exercises of the judicial power are more likely to undermine public confidence in the neutrality and integrity of

the Judiciary than one which casts the Court in the role of a Council of Revision, conferring on itself the power to invalidate laws at the behest of anyone who disagrees with them. In an era of frequent litigation, class actions, sweeping injunctions with prospective effect, and continuing jurisdiction to enforce judicial remedies, courts must be more careful to insist on the formal rules of standing, not less so. Making the Article III standing inquiry all the more necessary are the significant implications of constitutional litigation, which can result in rules of wide applicability that are beyond Congress' power to change.

The present suit serves as an illustration of these principles. The fact that respondents are state taxpayers does not give them standing to challenge the subsidies that § 43–1089 allegedly provides to religious STOs. To alter the rules of standing or weaken their requisite elements would be inconsistent with the case-or-controversy limitation on federal jurisdiction imposed by Article III.

The judgment of the Court of Appeals is reversed.

It is so ordered.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, concurring.

Taxpayers ordinarily do not have standing to challenge federal or state expenditures that allegedly violate the Constitution. See *DaimlerChrysler Corp.* v. *Cuno*, 547 U. S. 332, 343–345 (2006). In *Flast* v. *Cohen*, 392 U. S. 83 (1968), we created a narrow exception for taxpayers raising Establishment Clause challenges to government expenditures. Today's majority and dissent struggle with whether respondents' challenge to the Arizona tuition tax credit falls within that narrow exception. Under a principled reading of Article III, their struggles are unnecessary. *Flast* is an anomaly in our jurisprudence, irreconcilable with the Article III restrictions on federal judicial power that our opinions have

established. I would repudiate that misguided decision and enforce the Constitution. See *Hein* v. *Freedom From Religion Foundation, Inc.*, 551 U. S. 587, 618 (2007) (SCALIA, J., concurring in judgment).

I nevertheless join the Court's opinion because it finds respondents lack standing by applying *Flast* rather than distinguishing it away on unprincipled grounds. Cf. *Hein*, *supra*, at 628–631.

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

Since its inception, the Arizona private-school-tuition tax credit has cost the State, by its own estimate, nearly $350 million in diverted tax revenue. The Arizona taxpayers who instituted this suit (collectively, Plaintiffs) allege that the use of these funds to subsidize school tuition organizations (STOs) breaches the Establishment Clause's promise of religious neutrality. Many of these STOs, the Plaintiffs claim, discriminate on the basis of a child's religion when awarding scholarships.

For almost half a century, litigants like the Plaintiffs have obtained judicial review of claims that the government has used its taxing and spending power in violation of the Establishment Clause. Beginning in *Flast* v. *Cohen*, 392 U. S. 83 (1968), and continuing in case after case for over four decades, this Court and others have exercised jurisdiction to decide taxpayer-initiated challenges not materially different from this one. Not every suit has succeeded on the merits, or should have. But every taxpayer-plaintiff has had her day in court to contest the government's financing of religious activity.

Today, the Court breaks from this precedent by refusing to hear taxpayers' claims that the government has unconstitutionally subsidized religion through its tax system. These litigants lack standing, the majority holds, because the funding of religion they challenge comes from a tax credit, rather

than an appropriation. A tax credit, the Court asserts, does not injure objecting taxpayers, because it "does not extract and spend [their] funds in service of an establishment." *Ante*, at 142 (internal quotation marks and alterations omitted).

This novel distinction in standing law between appropriations and tax expenditures has as little basis in principle as it has in our precedent. Cash grants and targeted tax breaks are means of accomplishing the same government objective—to provide financial support to select individuals or organizations. Taxpayers who oppose state aid of religion have equal reason to protest whether that aid flows from the one form of subsidy or the other. Either way, the government has financed the religious activity. And so either way, taxpayers should be able to challenge the subsidy.

Still worse, the Court's arbitrary distinction threatens to eliminate *all* occasions for a taxpayer to contest the government's monetary support of religion. Precisely because appropriations and tax breaks can achieve identical objectives, the government can easily substitute one for the other. Today's opinion thus enables the government to end-run *Flast*'s guarantee of access to the Judiciary. From now on, the government need follow just one simple rule—subsidize through the tax system—to preclude taxpayer challenges to state funding of religion.

And that result—the effective demise of taxpayer standing—will diminish the Establishment Clause's force and meaning. Sometimes, no one other than taxpayers has suffered the injury necessary to challenge government sponsorship of religion. Today's holding therefore will prevent federal courts from determining whether some subsidies to sectarian organizations comport with our Constitution's guarantee of religious neutrality. Because I believe these challenges warrant consideration on the merits, I respectfully dissent from the Court's decision.

I

As the majority recounts, this Court has held that paying taxes usually does not give an individual Article III standing to challenge government action. *Ante,* at 133–138. Taxpayers cannot demonstrate the requisite injury because each person's "interest in the moneys of the Treasury . . . is comparatively minute and indeterminable." *Frothingham* v. *Mellon,* 262 U. S. 447, 487 (1923) (decided with *Massachusetts* v. *Mellon*). Given the size and complexity of government budgets, it is a "fiction" to contend that an unlawful expenditure causes an individual "any measurable economic harm." *Hein* v. *Freedom From Religion Foundation, Inc.*, 551 U. S. 587, 593 (2007) (plurality opinion). Nor can taxpayers in the ordinary case establish causation (*i. e.*, that the disputed government measure affects their tax burden) or redressability (*i. e.*, that a judicial remedy would result in tax reductions). *Ante,* at 136. On these points, all agree.

The disagreement concerns their relevance here. This case is not about the general prohibition on taxpayer standing, and cannot be resolved on that basis. This case is instead about the exception to the rule—the principle established decades ago in *Flast* that taxpayers *may* challenge certain government actions alleged to violate the Establishment Clause. The Plaintiffs have standing if their suit meets *Flast*'s requirements—and it does so under any fair reading of that decision.

Taxpayers have standing, *Flast* held, when they allege that a statute enacted pursuant to the legislature's taxing and spending power violates the Establishment Clause. 392 U. S., at 105–106. In this situation, the Court explained, a plaintiff can establish a two-part nexus "between the [taxpayer] status asserted and the claim sought to be adjudicated." *Id.*, at 102. First, by challenging legislative action taken under the taxing and spending clause, the taxpayer shows "a logical link between [her] status and the type of . . . enactment attacked." *Ibid.* Second, by invoking the

Establishment Clause—a specific limitation on the legislature's taxing and spending power—the taxpayer demonstrates "a nexus between [her] status and the precise nature of the constitutional infringement alleged." *Ibid.* Because of these connections, *Flast* held, taxpayers alleging that the government is using tax proceeds to aid religion have "the necessary stake . . . in the outcome of the litigation to satisfy Article III." *Ibid.* They are "proper and appropriate part[ies]"—indeed, often the only possible parties—to seek judicial enforcement of the Constitution's guarantee of religious neutrality. *Ibid.*

That simple restatement of the *Flast* standard should be enough to establish that the Plaintiffs have standing. They attack a provision of the Arizona tax code that the legislature enacted pursuant to the State Constitution's taxing and spending clause (*Flast* nexus, part 1). And they allege that this provision violates the Establishment Clause (*Flast* nexus, part 2). By satisfying both of *Flast*'s conditions, the Plaintiffs have demonstrated their "stake as taxpayers" in enforcing constitutional restraints on the provision of aid to STOs. *Ibid.* Indeed, the connection in this case between "the [taxpayer] status asserted and the claim sought to be adjudicated," *ibid.*, could not be any tighter: As noted when this Court previously addressed a different issue in this lawsuit, the Plaintiffs invoke the Establishment Clause to challenge "an integral part of the State's *tax* statute" that "is reflected on state *tax* forms" and that "is part of the calculus necessary to determine *tax* liability." *Hibbs* v. *Winn*, 542 U. S. 88, 119 (2004) *(Winn I)* (KENNEDY, J., dissenting) (emphasis added). Finding standing here is merely a matter of applying *Flast*. I would therefore affirm the Court of Appeals' determination (not questioned even by the eight judges who called for rehearing en banc on the merits) that the Plaintiffs can pursue their claim in federal court.

II

The majority reaches a contrary decision by distinguishing between two methods of financing religion: A taxpayer has standing to challenge state subsidies to religion, the Court announces, when the mechanism used is an appropriation, but not when the mechanism is a targeted tax break, otherwise called a "tax expenditure."[1] In the former case, but not in the latter, the Court declares, the taxpayer suffers cognizable injury. *Ante,* at 141–143.

But this distinction finds no support in case law, and just as little in reason. In the decades since *Flast,* no court—not one—has differentiated between appropriations and tax expenditures in deciding whether litigants have standing. Over and over again, courts (including this one) have faced Establishment Clause challenges to tax credits, deductions, and exemptions; over and over again, these courts have reached the merits of these claims. And that is for a simple reason: Taxpayers experience the same injury for standing purposes whether government subsidization of religion takes the form of a cash grant or a tax measure. The only rationale the majority offers for its newfound distinction—that

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[1] "Tax expenditures" are monetary subsidies the government bestows on particular individuals or organizations by granting them preferential tax treatment. The co-chairmen of the National Commission on Fiscal Responsibility and Reform recently referred to these tax breaks as "the various deductions, credits and loopholes that are just spending by another name." Washington Post, Feb. 20, 2011, p. A19, col. 3; see also 2 U. S. C. § 622(3) (defining "tax expenditures," for purposes of the Federal Government's budgetary process, as "those revenue losses attributable to provisions of the . . . tax laws which allow a special exclusion, exemption, or deduction from gross income or which provide a special credit, a preferential rate of tax, or a deferral of tax liability"); S. Surrey & P. McDaniel, Tax Expenditures 3 (1985) (explaining that tax expenditures "represent government spending for favored activities or groups, effected through the tax system rather than through direct grants, loans, or other forms of government assistance").

grants, but not tax expenditures, somehow come from a complaining taxpayer's own wallet—cannot bear the weight the Court places on it. If *Flast* is still good law—and the majority today says nothing to the contrary—then the Plaintiffs should be able to pursue their claim on the merits.

A

Until today, this Court has never so much as hinted that litigants in the same shoes as the Plaintiffs lack standing under *Flast*. To the contrary: We have faced the identical situation five times—including in a prior incarnation of this very case!—and we have five times resolved the suit without questioning the plaintiffs' standing. Lower federal courts have followed our example and handled the matter in the same way. I count 14 separate cases (involving 20 appellate and district courts) that adjudicated taxpayer challenges to tax expenditures alleged to violate the Establishment Clause.[2] I suspect I have missed a few. I have not found

[2] See *Johnson* v. *Economic Development Corporation of Cty. of Oakland*, 241 F. 3d 501 (CA6 2001), aff'g 64 F. Supp. 2d 657 (ED Mich. 1999); *Steele* v. *Industrial Development Bd. of Metropolitan Govt. Nashville*, 301 F. 3d 401 (CA6 2002), rev'g 117 F. Supp. 2d 693 (MD Tenn. 2000); *Christie* v. *United States*, 31 Fed. Appx. 571 (CA9 2002), aff'g No. 00–cv–02392–J (SD Cal., Apr. 23, 2001); *Mueller* v. *Allen*, 676 F. 2d 1195 (CA8 1982), aff'g 514 F. Supp. 998 (Minn. 1981); *Rhode Island Federation of Teachers, AFL–CIO* v. *Norberg*, 630 F. 2d 855 (CA1 1980), aff'g 479 F. Supp. 1364 (RI 1979); *Public Funds for Public Schools of N. J.* v. *Byrne*, 590 F. 2d 514 (CA3 1979), aff'g 444 F. Supp. 1228 (NJ 1978); *Freedom From Religion Foundation, Inc.* v. *Geithner*, 715 F. Supp. 2d 1051 (ED Cal. 2010); *Gillam* v. *Harding Univ.*, No. 4:08–CV–00363BSM, 2009 WL 1795303, *1 (ED Ark., June 24, 2009); *Leverett* v. *United States Bur. of HHS*, No. Civ. A. 99–S–1670, 2003 WL 21770810, *1 (D Colo., June 9, 2003); *Luthens* v. *Bair*, 788 F. Supp. 1032 (SD Iowa 1992); *Minnesota Civ. Liberties Union* v. *Roemer*, 452 F. Supp. 1316 (Minn. 1978); *Kosydar* v. *Wolman*, 353 F. Supp. 744 (SD Ohio 1972) *(per curiam)* (three-judge court); *Committee for Public Ed. & Religious Liberty* v. *Nyquist*, 350 F. Supp. 655 (SDNY 1972) (three-judge court); *United Ams. for Public Schools* v. *Franchise Tax Bd. of Cal.*, No. C–73–0090 (ND Cal., Feb. 1, 1974) (three-judge

any instance of a court dismissing such a claim for lack of standing.

Consider the five cases in which this Court entertained suits filed by taxpayers alleging that tax expenditures unlawfully subsidized religion. We first took up such a challenge in *Walz* v. *Tax Comm'n of City of New York*, 397 U. S. 664, 666–667 (1970), where we upheld the constitutionality of a property tax exemption for religious organizations. Next, in *Hunt* v. *McNair*, 413 U. S. 734, 735–736, 738–739 (1973), we decided that the Establishment Clause permitted a state agency to issue tax-exempt bonds to sectarian institutions. The same day, in *Committee for Public Ed. & Religious Liberty* v. *Nyquist*, 413 U. S. 756, 789–794 (1973), we struck down a state tax deduction for parents who paid tuition at religious and other private schools. A decade later, in *Mueller* v. *Allen*, 463 U. S. 388, 390–391 (1983), we considered, but this time rejected, a similar Establishment Clause challenge to a state tax deduction for expenses incurred in attending such schools. And most recently, we decided a preliminary issue *in this very case*, ruling that the Tax Injunction Act, 28 U. S. C. § 1341, posed no barrier to the Plaintiffs' litigation of their Establishment Clause claim. See *Winn I*, 542 U. S., at 112.[3] The Court in all five of these

court), reprinted in App. to Juris. Statement in *Franchise Tax Bd. of Cal.* v. *United Ams. for Public Schools*, O. T. 1973, No. 73–1718, pp. 1–4.

[3] We have also several times summarily affirmed lower court decisions adjudicating taxpayer challenges to tax expenditures alleged to violate the Establishment Clause. See *Byrne* v. *Public Funds for Public Schools of N. J.*, 442 U. S. 907 (1979), summarily aff'g 590 F. 2d 514, 516, n. 3 (CA3) (holding that "plaintiffs, as taxpayers, have standing under *Flast*" to challenge a tax deduction for dependents attending religious and other private schools); *Grit* v. *Wolman*, 413 U. S. 901 (1973), summarily aff'g *Kosydar* v. *Wolman*, 353 F. Supp. 744, 749 (SD Ohio 1972) (three-judge court) (noting that no party had questioned the standing of taxpayers to contest tax credits for private-school tuition payments); *Franchise Tax Bd. of Cal.* v. *United Ams. for Public Schools*, 419 U. S. 890 (1974), summarily aff'g No. C–73–0090 (ND Cal., Feb. 1, 1974) (three-judge court) (invalidating a tax credit for children attending private schools).

cases divided sharply on the merits of the disputes. But in one respect, the Justices were unanimous: Not a single one thought to question the litigants' standing.

The Solicitor General, participating here as *amicus curiae*, conceded at oral argument that under the Federal Government's—and now the Court's—view of taxpayer standing, each of these five cases should have been dismissed for lack of jurisdiction.

> "[The Court]: So if you are right, . . . the Court was without authority to decide *Walz*, *Nyquist*, *Hunt*, *Mueller*, [and] *Hibbs* [v. *Winn*], this very case, just a few years ago? . . .
>
> [Solicitor General]: Right. . . . [M]y answer to you is yes.
>
> [The Court]: I just want to make sure I heard your answer to the—you said the answer is yes. In other words, you agree . . . those cases were wrongly decided. . . . [Y]ou would have said there would have been no standing in those cases.
>
> [Solicitor General]: No taxpayer standing." Tr. of Oral Arg. 10–12 (some paragraph breaks omitted).

Nor could the Solicitor General have answered differently. Each of these suits, as described above, alleged that a state tax expenditure violated the Establishment Clause. And each relied *only* on taxpayer standing as the basis for federal-court review.[4] The Court today speculates that "the plaintiffs in those cases could have advanced arguments for jurisdiction independent of *Flast*." *Ante*, at 145. But whatever could have been, in fact not one of them did so.

And the Court itself understood the basis of standing in these five cases. This and every federal court has an inde-

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[4] See App. in *Hibbs* v. *Winn*, O. T. 2003, No. 02–1809, pp. 7–8 (complaint); Pet. for Cert. in *Mueller* v. *Allen*, O. T. 1982, No. 82–195, p. 7; App. in *Committee for Public Ed. & Religious Liberty* v. *Nyquist*, O. T. 1972, No. 72–694, p. 9a (complaint); App. in *Hunt* v. *McNair*, O. T. 1972, No. 71–1523, p. 5 (complaint); App. in *Walz* v. *Tax Comm'n of City of New York*, O. T. 1969, No. 135, pp. 5–7 (complaint).

pendent obligation to consider standing, even when the parties do not call it into question. See, *e. g.*, *FW/PBS, Inc.* v. *Dallas*, 493 U. S. 215, 230–231 (1990). To do anything else would risk an unlawful exercise of judicial authority. And in these cases the Court had an additional prompt: In several of them, *amici*, including the United States, contested—or at least raised as a question—the plaintiffs' standing as taxpayers to pursue their claims.[5] The Court, moreover, was well aware at the time of the issues presented by taxpayer standing. We decided three of the cases within a year of elaborating the general bar on taxpayer suits, see, *e. g.*, *United States* v. *Richardson*, 418 U. S. 166 (1974); *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U. S. 208 (1974), and the fourth just after we held that bar applicable to a different kind of Establishment Clause claim, see *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U. S. 464 (1982). Indeed, the decisions on their face reflect the Court's recognition of what gave the plaintiffs standing; in each, we specifically described the plaintiffs as taxpayers who challenged the use of the tax system to fund religious activities. See *Winn I*, 542 U. S., at 94; *Mueller*, 463 U. S., at 392; *Nyquist*, 413 U. S., at 759, 762; *Hunt*, 413 U. S., at 735–736; *Walz*, 397 U. S., at 666–667. In short, we considered and decided all these cases because we thought taxpayer standing existed.

The majority shrugs off these decisions because they did not discuss what was taken as obvious. *Ante*, at 144–145. But we have previously stressed that the Court should not "disregard the implications of an exercise of judicial authority assumed to be proper for over 40 years." *Brown Shoe Co.*

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[5] See, *e. g.*, Brief for United States as *Amicus Curiae* in *Mueller* v. *Allen*, *supra*, at 12, n. 15; Brief for United States as *Amicus Curiae* in *Hibbs* v. *Winn*, *supra*, at 3, n. 1; Brief for Honorable Trent Franks et al. as *Amici Curiae* in *Hibbs* v. *Winn*, *supra*, at 6, n. 2; Brief for United States Catholic Conference as *Amicus Curiae* in *Walz* v. *Tax Comm'n of City of New York*, *supra*, at 23–24.

v. *United States*, 370 U. S. 294, 307 (1962); see *Bowen* v. *Kendrick*, 487 U. S. 589, 619 (1988) (finding standing partly because the Court, in deciding similar cases, had "not questioned the standing of taxpayer plaintiffs to raise Establishment Clause challenges"); *Bank of United States* v. *Deveaux*, 5 Cranch 61, 88 (1809) (Marshall, C. J.) (prior decisions exercising but not discussing jurisdiction "have much weight, as they show that [a jurisdictional flaw] neither occurred to the bar or the bench"). And that principle has extra force here, because we have relied on some of these decisions to support the Court's jurisdiction in other cases. Pause on that for a moment: The very decisions the majority today so easily dismisses are featured in our prior cases as exemplars of jurisdiction. So in *School Dist. of Grand Rapids* v. *Ball*, 473 U. S. 373 (1985), we relied on *Nyquist* and *Hunt* to conclude that taxpayers had standing to challenge a program of aid to religious and other private schools. 473 U. S., at 380, n. 5, overruled in part on other grounds by *Agostini* v. *Felton*, 521 U. S. 203 (1997). And in *Winn I* (recall, an earlier iteration of this case), we rejected a different jurisdictional objection in part by relying on *Mueller* and *Nyquist*. We called those cases "adjudications of great moment discerning no [jurisdictional] barrier" and warned that they could not "be written off as reflecting nothing more than unexamined custom or unthinking habit." 542 U. S., at 112, n. 13 (internal quotation marks and citations omitted). Until today, that is—when the majority does write off these adjudications and reaches a result against all precedent.

B

Our taxpayer standing cases have declined to distinguish between appropriations and tax expenditures for a simple reason: Here, as in many contexts, the distinction is one in search of a difference. To begin to see why, consider an example far afield from *Flast* and, indeed, from religion. Imagine that the Federal Government decides it should pay

hundreds of billions of dollars to insolvent banks in the midst of a financial crisis. Suppose, too, that many millions of taxpayers oppose this bailout on the ground (whether right or wrong is immaterial) that it uses their hard-earned money to reward irresponsible business behavior. In the face of this hostility, some Members of Congress make the following proposal: Rather than give the money to banks via appropriations, the Government will allow banks to subtract the exact same amount from the tax bill they would otherwise have to pay to the U. S. Treasury. Would this proposal calm the furor? Or would most taxpayers respond by saying that a subsidy is a subsidy (or a bailout is a bailout), whether accomplished by the one means or by the other? Surely the latter; indeed, we would think the less of our countrymen if they failed to see through this cynical proposal.

And what ordinary people would appreciate, this Court's case law also recognizes—that targeted tax breaks are often "economically and functionally indistinguishable from a direct monetary subsidy." *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 859 (1995) (THOMAS, J., concurring). Tax credits, deductions, and exemptions provided to an individual or organization have "much the same effect as a cash grant to the [recipient] of the amount of tax it would have to pay" absent the tax break. *Regan* v. *Taxation With Representation of Wash.*, 461 U. S. 540, 544 (1983). "Our opinions," therefore, "have long recognized . . . the reality that [tax expenditures] are a form of subsidy that is administered through the tax system." *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U. S. 221, 236 (1987) (SCALIA, J., dissenting) (internal quotation marks omitted). Or again: Tax breaks "can be viewed as a form of government spending," *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U. S. 564, 589–590, n. 22 (1997), even assuming the diverted tax funds do not pass through the public treasury. And once more: Both special tax benefits and cash grants "represen[t] a charge made upon the state," *Nyquist*, 413

U. S., at 790–791 (internal quotation marks omitted); both deplete funds in the government's coffers by transferring money to select recipients.[6]

For just this reason, government budgeting rules routinely insist on calculation of tax subsidies, in addition to appropriations. The President must provide information on the estimated cost of tax expenditures in the budget he submits to Congress each year. See 31 U. S. C. § 1105(a)(16); n. 1, *supra*. Similarly, congressional budget committees must report to all Members on the level of tax expenditures in the federal budget. See 2 U. S. C. § 632(e)(2)(E). Many States—including Arizona—likewise compute the impact of targeted tax breaks on the public treasury, in recognition that these measures are just spending under a different name, see n. 1, *supra*. The Arizona Department of Revenue must issue an annual report "detailing the approximate costs in lost revenue for all state tax expenditures." Ariz. Rev. Stat. Ann. § 42–1005(A)(4) (West 2006). The most recent report notes the significance of this accounting in the budget process. It explains that "the fiscal impact of implementing" targeted tax breaks, including the STO credit challenged here, is "similar to a direct expenditure of state funds." Arizona Dept. of Revenue, Revenue Impact of Arizona's Tax Expenditures FY 2009/10, p. 1 (preliminary Nov. 15, 2010); see also Surrey, Tax Incentives as a Device for Implementing Government Policy: A Comparison With Direct Government Expenditures, 83 Harv. L. Rev. 705, 717 (1970) ("A dollar is a dollar—both for the person who re-

[6] The majority observes that special tax benefits may in fact "*increas[e]* government revenues" by "spur[ring] economic activity." *Ante*, at 136 (internal quotation marks omitted). That may be so in the long run (although the only non-speculative effect is to immediately diminish funds in the public treasury). But as the majority acknowledges, *ibid.*, this possibility holds just as true for appropriations; that is why we (optimistically) refer to some government outlays as "investments." The insight therefore cannot help the majority distinguish between tax expenditures and appropriations.

ceives it and the government that pays it, whether the dollar comes with a tax credit label or a direct expenditure label").

And because these financing mechanisms result in the same bottom line, taxpayers challenging them can allege the same harm. Our prior cases have often recognized the cost that targeted tax breaks impose on taxpayers generally. "When the Government grants exemptions or allows deductions" to some, we have observed, "all taxpayers are affected; the very fact of the exemption or deduction . . . means that other taxpayers can be said to be indirect and vicarious 'donors.'" *Bob Jones Univ.* v. *United States*, 461 U. S. 574, 591 (1983). And again: "Every tax exemption constitutes a subsidy that affects nonqualifying taxpayers, forcing them to" bear its cost. *Texas Monthly, Inc.* v. *Bullock*, 489 U. S. 1, 14 (1989) (plurality opinion). Indeed, we have specifically compared the harm arising from a tax subsidy with that arising from a cash grant, and declared those injuries equivalent because both kinds of support deplete the public fisc. "In either case," we stated, "the alleged injury is based on the asserted effect of the allegedly illegal activity on public revenues, to which the taxpayer contributes." *DaimlerChrysler Corp.* v. *Cuno*, 547 U. S. 332, 344 (2006). This taxpayer injury of course fails to establish standing in the mine-run case, whatever form the state aid takes. See, *e. g.*, *id.*, at 343–344; *ante*, at 133–138; *supra*, at 149. But the key is this: Whenever taxpayers have standing under *Flast* to challenge an appropriation, they should also have standing to contest a tax expenditure. Their access to the federal courts should not depend on which type of financial subsidy the State has offered.

Consider some further examples of the point, but this time concerning state funding of religion. Suppose a State desires to reward Jews—by, say, $500 per year—for their religious devotion. Should the nature of taxpayers' concern vary if the State allows Jews to claim the aid on their tax returns, in lieu of receiving an annual stipend? Or assume a State wishes to subsidize the ownership of crucifixes. It

could purchase the religious symbols in bulk and distribute them to all takers. Or it could mail a reimbursement check to any individual who buys her own and submits a receipt for the purchase. Or it could authorize that person to claim a tax credit equal to the price she paid. Now, really—do taxpayers have less reason to complain if the State selects the last of these three options? The Court today says they do, but that is wrong. The effect of each form of subsidy is the same, on the public fisc and on those who contribute to it. Regardless of which mechanism the State uses, taxpayers have an identical stake in ensuring that the State's exercise of its taxing and spending power complies with the Constitution.[7]

Here, the mechanism Arizona has selected is a dollar-for-dollar tax credit to aid STOs. Each year come April 15, the State tells Arizonans: Either pay the full amount of your tax liability to the State, or subtract up to $500 from your tax bill by contributing that sum to an STO. See *Winn I*, 542 U. S., at 95. To claim the credit, an individual makes a notation on her tax return and splits her tax payment into two checks, one made out to the State and the other to the STO. As this Court recognized in *Winn I*, the STO payment is therefore "costless" to the individual, *ibid.;* it comes out of what she otherwise would be legally obligated to pay the State—hence, out of public resources. And STOs capitalize on this aspect of the tax credit for all it is worth—which is quite a lot. To drum up support, STOs highlight that "donations" are made not with an individual's own, but with

[7] The majority indicates that some persons could challenge these hypothetical government actions based on individualized injury, separate and apart from taxpayer status. See *ante,* at 129–130, 145. That is quite right; indeed, some parents or children likely have standing to challenge the Arizona tax credit on such grounds. But this possibility does not detract from the point made here. The purpose of these illustrations is to show that *if* taxpayer status is the thing alleged to confer standing, it should do so irrespective of the form of the government subsidy.

other people's—*i. e.*, taxpayers'—money. One STO advertises that "[w]ith Arizona's scholarship tax credit, you can send children to our community's [religious] day schools and it won't cost you a dime!" Brief for Respondents 13 (internal quotation marks and emphasis omitted). Another urges potential donors to "imagine giving [to charity] with someone else's money. . . . Stop Imagining, thanks to Arizona tax laws you can!" *Id.*, at 14 (internal quotation marks and emphasis omitted). And so Arizonans do just that: It is, after all, good fun to spend other people's money. By the State's reckoning, from 1998 to 2008 the credit cost Arizona almost $350 million in redirected tax revenue.[8]

The Plaintiffs contend that this expenditure violates the Establishment Clause. If the legislature had appropriated these monies for STOs, the Plaintiffs would have standing, beyond any dispute, to argue the merits of their claim in federal court. But the Plaintiffs have no such recourse, the Court today holds, because Arizona funds STOs through a tax credit rather than a cash grant. No less than in the hypothetical examples offered above, here too form prevails over substance, and differences that make no difference determine access to the Judiciary. And the casualty is a historic and vital method of enforcing the Constitution's guarantee of religious neutrality.

C

The majority offers just one reason to distinguish appropriations and tax expenditures: A taxpayer experiences

[8] See Arizona Dept. of Revenue, Revenue Impact of Arizona's Tax Expenditures FY 2009/10, p. 48 (preliminary Nov. 15, 2010); FY 2008/09, p. 54 (preliminary Nov. 16, 2009); FY 2007/08, p. 58 (preliminary Nov. 17, 2008); FY 2006/07, p. 65 (preliminary Nov. 15, 2007/final Sept. 2010); FY 2005/06, p. 73 (preliminary Nov. 15, 2006/final Dec. 2009); FY 2004/05, p. 72 (preliminary Nov. 15, 2005/final June 2009); FY 2003/04, p. 74 (preliminary Nov. 14, 2004/final Feb. 2007); FY 2002/03, p. 74 (preliminary Nov. 15, 2003/final Mar. 2007); FY 2001/02, p. 71 (preliminary Nov. 15, 2002/final Mar. 2004); FY 2000/01, p. 73 (preliminary Nov. 15, 2001/final July 2003); FY 1999/00, p. 72 (preliminary Nov. 15, 2000/final Aug. 2002).

injury, the Court asserts, only when the government "extracts and spends" her very own tax dollars to aid religion. *Ante*, at 142 (internal quotation marks and alterations omitted). In other words, a taxpayer suffers legally cognizable harm if but only if her particular tax dollars wind up in a religious organization's coffers. See also Tr. of Oral Arg. 4 (Solicitor General proposing that the "key point" was: "If you placed an electronic tag to track and monitor each cent that the [Plaintiffs] pay in tax," none goes to religious STOs). And no taxpayer can make this showing, the Court concludes, if the government subsidizes religion through tax credits, deductions, or exemptions (rather than through appropriations).[9]

The majority purports to rely on *Flast* to support this new "extraction" requirement. It plucks the three words "extrac[t] and spen[d]" from the midst of the *Flast* opinion, and suggests that they severely constrict the decision's scope. *Ante*, at 142 (quoting 392 U. S., at 106). And it notes that *Flast* partly relied on James Madison's famed argument in

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[9] Even taken on its own terms, the majority's reasoning does not justify the conclusion that the Plaintiffs lack standing. Arizona's tuition-tax-credit program in fact necessitates the direct expenditure of funds from the state treasury. After all, the statute establishing the initiative requires the Arizona Department of Revenue to certify STOs, maintain an STO registry, make the registry available to the public on request and post it on a website, collect annual reports filed by STOs, and send written notice to STOs that have failed to comply with statutory requirements. Ariz. Rev. Stat. Ann. §§ 43–1502(A)–(C), 43–1506 (West Supp. 2010). Presumably all these activities cost money, which comes from the state treasury. Thus, on the majority's own theory, the government has "extract[ed] and spen[t]" the Plaintiffs' (along with other taxpayers') dollars to implement the challenged program, and the Plaintiffs should have standing. (The majority, after all, makes clear that nothing in its analysis hinges on the size or proportion of the Plaintiffs' contribution. *Ante*, at 141.) But applying the majority's theory in this way reveals the hollowness at its core. Can anyone believe that the Plaintiffs have suffered injury through the costs involved in administering the program, but not through the far greater costs of granting the tax expenditure in the first place?

the Memorial and Remonstrance Against Religious Assessments: " '[T]he same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever.' " 392 U. S., at 103 (quoting 2 Writings of James Madison 183, 186 (G. Hunt ed. 1901)); see *ante*, at 139–141. And that is all the majority can come up with.

But as indicated earlier, everything of import in *Flast* cuts against the majority's position. Here is how *Flast* stated its holding: "[W]e hold that a taxpayer will have standing consistent with Article III to invoke federal judicial power when he alleges that congressional action under the taxing and spending clause is in derogation of" the Establishment Clause. 392 U. S., at 105–106. Nothing in that straightforward sentence supports the idea that a taxpayer can challenge only legislative action that disburses his particular contribution to the state treasury. And here is how *Flast* primarily justified its holding: "[O]ne of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would be used to favor one religion over another or to support religion in general." *Id.*, at 103. That evil arises even if the specific dollars that the government uses do not come from citizens who object to the preference. Likewise, the two-part nexus test, which is the heart of *Flast*'s doctrinal analysis, contains no hint of an extraction requirement. See *supra*, at 149–150. And finally, James Madison provides no comfort to today's majority. He referred to "three pence" exactly because it was, even in 1785, a meaningless sum of money; then, as today, the core injury of a religious establishment had naught to do with any given individual's out-of-pocket loss. See *infra*, at 166–168 (further discussing Madison's views). So the majority is left with nothing, save for three words *Flast* used to describe the particular facts in that case: In not a single non-trivial

respect could the *Flast* Court recognize its handiwork in the majority's depiction.

The injury to taxpayers that *Flast* perceived arose whenever the legislature used its taxing and spending power to channel tax dollars to religious activities. In that and subsequent cases (including the five in this Court involving tax expenditures), a taxpayer pleaded the requisite harm by stating that public resources were funding religion; the tracing of particular dollars (whether by the Solicitor General's "electronic tag" or other means) did not enter into the question. See *DaimlerChrysler Corp.*, 547 U. S., at 348 (describing how the *Flast* Court's understanding of the Establishment Clause's history led the Court to view the alleged "injury" as the expenditure of "'tax money' in aid of religion" (quoting *Flast*, 392 U. S., at 106)). And for all the reasons already given, that standard is met regardless whether the funding is provided via cash grant or tax expenditure. See *supra*, at 156–161. Taxpayers pick up the cost of the subsidy in either form. See *ibid.* So taxpayers have an interest in preventing the use of either mechanism to infringe religious neutrality.[10]

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[10] On this traditional view of the harm to taxpayers arising from state financing of religion, the Plaintiffs here can satisfy not only Article III's injury requirement, but also its causation and redressability requirements. The majority's contrary position, *ante*, at 143, stems from its miscasting of the injury involved; once that harm is stated correctly, all the rest follows. To wit: The Plaintiffs allege they suffer *injury* when the State funnels public resources to religious organizations through the tax credit. Arizona, they claim, has *caused* this injury by enacting legislation that establishes the credit. And an injunction limiting the credit's operation would *redress* the harm by preventing the allegedly unlawful diversion of tax revenues. The Plaintiffs need not, as the majority insists, show that this remedy would "affect . . . their tax payments," *ibid.;* any more than the taxpayer in *Flast* had to establish that her tax burden would decrease absent the Government's funding of religious schools. As we have previously recognized, when taxpayers object to the spending of tax money in violation of the Establishment Clause (whether through tax credits or appropriations), "an injunction against the spending

Indeed, the majority's new conception of injury is at odds not merely with *Flast*, but also (if ironically) with our cases precluding taxpayer standing generally. See *supra*, at 149; *ante*, at 134–138. Today's majority insists that legislation challenged under the Establishment Clause must "extrac[t] and spen[d] a conscientious dissenter's funds." *Ante*, at 142. But we have rejected taxpayer standing in other contexts because each taxpayer's share of treasury funds is "minute and indeterminable." *Frothingham*, 262 U. S., at 487. No taxpayer can point to an expenditure (by cash grant or otherwise) and say that her own tax dollars are in the mix; in fact, they almost surely are not. "[I]t is," as we have noted, "a complete fiction to argue that an unconstitutional . . . expenditure causes an individual . . . taxpayer any measurable economic harm." *Hein*, 551 U. S., at 593 (plurality opinion). That is as true in Establishment Clause cases as in any others. Taxpayers have standing in these cases *despite* their foreseeable failure to show that the alleged constitutional violation involves their own tax dollars, not *because* the State has used their particular funds.

And something still deeper is wrong with the majority's "extract and spend" requirement: It does not measure what matters under the Establishment Clause. Let us indulge the Court's fiction that a taxpayer's ".000000000001 penny" is somehow involved in an ordinary appropriation of public funds for religious activity (thus supposedly distinguishing it from a tax expenditure). Still, consider the following example: Imagine the Internal Revenue Service places a checkbox on tax returns asking filers if they object to the government using their taxes to aid religion. If the government keeps "yes" money separate from "no" money and subsidizes religious activities only from the nonobjectors' account, the

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would . . . redress [their] injury, regardless of whether lawmakers would dispose of the savings in a way that would benefit the taxpayer-plaintiffs personally." *DaimlerChrysler Corp.* v. *Cuno*, 547 U. S. 332, 348–349 (2006).

majority's analysis suggests that no taxpayer would have standing to allege a violation of the Establishment Clause. The funds used, after all, would not have been "extracted from a citizen and handed to a religious institution in violation of the citizen's conscience." *Ante*, at 144. But this Court has never indicated that States may insulate subsidies to religious organizations from legal challenge by eliciting the consent of some taxpayers. And the Court has of course been right not to take this approach. Taxpayers incur the same harm, and should have the same ability to bring suit, whether the government stores tax funds in one bank account or two. None of the principles underlying the Establishment Clause suggests otherwise.

James Madison, whom the Court again rightly labels "the leading architect of the religion clauses," *ante*, at 141 (quoting *Flast*, 392 U. S., at 103; internal quotation marks omitted), had something important to say about the matter of "extraction." As the majority notes, Madison's Memorial and Remonstrance criticized a tax levy proposed in Virginia to aid teachers of the Christian religion. *Ante*, at 140–141. But Madison's passionate opposition to that proposal informs this case in a manner different than the majority suggests. The Virginia tax in fact would not have extracted any monies (not even "three pence") from unwilling citizens, as the Court now requires. The plan allowed conscientious objectors to opt out of subsidizing religion by contributing their assessment to an alternative fund for the construction and maintenance of county schools.[11] See A Bill Establishing a

[11] The opt-out provision described county schools as "seminaries of learning." A Bill for Establishing a Provision for Teachers of the Christian Religion, reprinted in *Everson* v. *Board of Ed. of Ewing*, 330 U. S. 1, 74 (1947) (supplemental appendix to dissent of Rutledge, J.). In 1785, that phrase had no particular religious connotation: It "meant schools for general education, not schools for the training of ministers." Berg & Laycock, Mistakes in *Locke v. Davey* and the Future of State Payments for Services Provided by Religious Institutions, 40 Tulsa L. Rev. 227, 244, n. 113 (2004); see also, *e. g.*, 2 S. Johnson, Dictionary of the English Lan-

Provision for Teachers of the Christian Religion, reprinted in *Everson* v. *Board of Ed. of Ewing*, 330 U. S. 1, 74 (1947) (supplemental appendix to dissent of Rutledge, J.); Letter From James Madison to Thomas Jefferson (Jan. 9, 1785), reprinted in 2 Writings of James Madison, at 102, 113; see also Blasi, School Vouchers and Religious Liberty: Seven Questions from Madison's *Memorial and Remonstrance*, 87 Cornell L. Rev. 783, 784 (2002) (the tax provision "permitted each taxpayer to specify which Christian denomination should receive his payment" and "[t]hose who did not wish to support a church could direct their assessment to a proposed common school fund"). Indeed, the Virginia assessment was specifically "designed to avoid any charges of coercion of dissenters to pay taxes to support religious teachings with which they disagreed." Feldman, Intellectual Origins of the Establishment Clause, 77 N. Y. U. L. Rev. 346, 383 (2002).[12]

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guage 1741 (1773) ("seminary" means "place of education, from whence scholars are transplanted into life").

[12] The majority speculates that the Virginia General Assembly would have given some of the monies collected from conscientious objectors to schools with a sectarian bent. *Ante*, at 140. Because the Assessment never became law, no one can know which county schools would have received aid; indeed, the first of these schools did not open its doors until decades later. See W. Miller, First Liberty 26 (2003); see generally J. Buck, Development of Public Schools in Virginia 1607–1952 (1952). But historians and legal scholars have uniformly understood the opt-out provision as a considered attempt to accommodate taxpayers who did not want their tax dollars to go to religion. See Berg & Laycock, *supra*, at 244, n. 113 (the "provision for payment to a school fund was not an effort to support religious schools as part of support for education overall," but rather "was an effort to accommodate the possibility of non-Christian taxpayers"); T. Buckley, Church and State in Revolutionary Virginia, 1776–1787, p. 133 (1977) (under the "text of the proposed bill . . . nonbelievers would [not] be forced to contribute to religion" because "[t]he assessment had been carefully drafted to permit those who preferred to support education rather than religion to do so"); see also, *e. g.*, Miller, *supra*, at 26; Underkuffler-Freund, Separation of the Religious and the Secular: A Foundational Challenge to First Amendment Theory, 36 Wm. & Mary

In this respect, the Virginia Assessment is just like the Arizona tax credit. Although both funnel tax funds to religious organizations (and so saddle *all* taxpayers with the cost), neither forces any given taxpayer to pay for the subsidy out of her pocket. Madison thought that feature of the Assessment insufficient to save it. By relying on the selfsame aspect of the Arizona scheme to deny the Plaintiffs' claim of injury, the majority betrays Madison's vision.

III

Today's decision devastates taxpayer standing in Establishment Clause cases. The government, after all, often uses tax expenditures to subsidize favored persons and activities. Still more, the government almost *always* has this option. Appropriations and tax subsidies are readily interchangeable; what is a cash grant today can be a tax break tomorrow. The Court's opinion thus offers a roadmap—more truly, just a one-step instruction—to any government that wishes to insulate its financing of religious activity from legal challenge. Structure the funding as a tax expenditure, and *Flast* will not stand in the way. No taxpayer will have standing to object. However blatantly the government may violate the Establishment Clause, taxpayers cannot gain access to the federal courts.

And by ravaging *Flast* in this way, today's decision damages one of this Nation's defining constitutional commitments. "Congress shall make no law respecting an establishment of religion"—ten simple words that have stood for over 200 years as a foundation stone of American religious liberty. Ten words that this Court has long understood, as James Madison did, to limit (though by no means eliminate)

L. Rev. 837, 889–890, n. 265 (1995); Adams & Emmerich, Heritage of Religious Liberty, 137 U. Pa. L. Rev. 1559, 1573 (1989); Laycock, "Nonpreferential" Aid to Religion: A False Claim About Original Intent, 27 Wm. & Mary L. Rev. 875, 897, and n. 108 (1985–1986); L. Pfeffer, Church State and Freedom 110 (rev. ed. 1967).

the government's power to finance religious activity. The Court's ruling today will not shield all state subsidies for religion from review; as the Court notes, some persons alleging Establishment Clause violations have suffered individualized injuries, and therefore have standing, independent of their taxpayer status. See *ante*, at 129–130, 145. But *Flast* arose because "the taxing and spending power [may] be used to favor one religion over another or to support religion in general," 392 U. S., at 103, without causing particularized harm to discrete persons. It arose because state sponsorship of religion sometimes harms individuals only (but this "only" is no small matter) in their capacity as contributing members of our national community. In those cases, the *Flast* Court thought, our Constitution's guarantee of religious neutrality still should be enforced.

Because that judgment was right then, and remains right today, I respectfully dissent.

Syllabus

CULLEN, ACTING WARDEN *v.* PINHOLSTER

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

No. 09–1088. Argued November 9, 2010—Decided April 4, 2011

A California jury convicted respondent Pinholster on two counts of first-degree murder. At the penalty phase before the same jury, the prosecution produced eight witnesses, who testified about Pinholster's history of threatening and violent behavior. Pinholster's trial counsel, who unsuccessfully sought to exclude the aggravating evidence on the ground that the prosecution had not given Pinholster proper notice under California law, called only Pinholster's mother. Counsel did not call a psychiatrist, though they had consulted with Dr. Stalberg, who had diagnosed Pinholster with antisocial personality disorder. The jury recommended the death penalty, and Pinholster was sentenced to death. Pinholster twice sought habeas relief in the California Supreme Court, alleging, *inter alia*, that his trial counsel had failed to adequately investigate and present mitigating evidence during the penalty phase. He introduced additional evidence to support his claim: school, medical, and legal records; and declarations from family members, one of his trial attorneys, and Dr. Woods, a psychiatrist who diagnosed him with bipolar mood disorder and seizure disorders, and who criticized Dr. Stalberg's report. Each time, the State Supreme Court unanimously and summarily denied the claim on the merits. Subsequently, a Federal District Court held an evidentiary hearing and granted Pinholster federal habeas relief under 28 U. S. C. § 2254. Affirming, the en banc Ninth Circuit considered the new evidence adduced in the District Court hearing and held that the State Supreme Court's decision "involved an unreasonable application of . . . clearly established Federal law," § 2254(d)(1).

Held:

1. Review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits. Pp. 180–187.

(a) As amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), § 2254 sets several limits on a federal court's power to grant habeas relief to a state prisoner. As relevant here, a claim that has been "adjudicated on the merits in State court proceedings," "shall not be granted . . . unless the adjudication" "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law," or "(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the

evidence presented in the State court proceeding." § 2254(d). This "difficult to meet," *Harrington* v. *Richter*, 562 U. S. 86, 102, and " 'highly deferential standard' . . . demands that state-court decisions be given the benefit of the doubt," *Woodford* v. *Visciotti*, 537 U. S. 19, 24. Section 2254(d)(1)'s backward-looking language—"resulted in" and "involved"—requires an examination of the state-court decision at the time it was made. It follows that the record under review is also limited to the record in existence at that same time—*i. e.*, the state-court record. This understanding is compelled by "the broader context of the statute as a whole," which demonstrates Congress' intent to channel prisoners' claims first to state courts. *Robinson* v. *Shell Oil Co.*, 519 U. S. 337, 341. It is also consistent with this Court's precedents, which emphasize that § 2254(d)(1) review focuses on what a state court knew and did. See, *e. g.*, *Lockyer* v. *Andrade*, 538 U. S. 63, 71–72. Moreover, it is consistent with *Schriro* v. *Landrigan*, 550 U. S. 465, 474, which explained that a federal habeas court is "not required to hold an evidentiary hearing" when the state-court record "precludes habeas relief" under § 2254(d)'s limitations. The Ninth Circuit wrongly interpreted *Williams* v. *Taylor*, 529 U. S. 420, and *Holland* v. *Jackson*, 542 U. S. 649, as supporting the contrary view. Pp. 181–185.

(b) This holding does not render superfluous § 2254(e)(2)—which limits the federal habeas courts' discretion to take new evidence in an evidentiary hearing. At a minimum, § 2254(e)(2) still restricts their discretion in claims that were not adjudicated on the merits in state court. Although state prisoners may sometimes submit new evidence in federal court, AEDPA's statutory scheme is designed to strongly discourage them from doing so. Pp. 185–186.

(c) Remand for a properly limited review is inappropriate here, because the Ninth Circuit ruled, in the alternative, that Pinholster merited habeas relief on the state-court record alone. Pp. 186–187.

2. On the record before the state court, Pinholster was not entitled to federal habeas relief. Pp. 187–203.

(a) To satisfy § 2254(d)(1)'s "unreasonable application" prong, he must show that "there was no reasonable basis" for the State Supreme Court's summary decision. *Richter*, *supra*, at 98. Pp. 187–188.

(b) *Strickland* v. *Washington*, 466 U. S. 668, provides the clearly established federal law here. To overcome the strong presumption that counsel has acted competently, *id.*, at 690, a defendant must show that counsel failed to act "reasonabl[y] considering all the circumstances," *id.*, at 688, and must prove the "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.*, at 694. Review here is thus "doubly deferential," *Knowles* v. *Mirzayance*, 556 U. S. 111, 123, requiring a

"highly deferential" look at counsel's performance, *Strickland*, *supra*, at 689, through § 2254(d)'s "deferential lens," *Mirzayance*, *supra*, at 121, n. 2. Pp. 189–190.

(c) Pinholster has not shown that the State Supreme Court's decision that he could not demonstrate deficient performance by his trial counsel necessarily involved an unreasonable application of federal law. Pp. 190–197.

(1) The state-court record supports the idea that his counsel acted strategically to get the prosecution's aggravation witnesses excluded for lack of notice, and if that failed, to put on his mother as a mitigation witness. Billing records show that they spent time investigating mitigating evidence. The record also shows that they had an unsympathetic client who had boasted about his criminal history during the guilt phase, leaving them with limited mitigation strategies. In addition, when Dr. Stalberg concluded that Pinholster had no significant mental disorder or defect, he was aware of Pinholster's medical and social history. Given these impediments, it would have been a reasonable penalty-phase strategy to focus on evoking sympathy for Pinholster's mother. Pinholster has responded with only a handful of *post hoc* nondenials by one of his lawyers. Pp. 190–194.

(2) The Ninth Circuit misapplied *Strickland* when it drew from this Court's recent cases a "constitutional duty to investigate" and a principle that it was prima facie ineffective for counsel to abandon an investigation based on rudimentary knowledge of Pinholster's background. Beyond the general requirement of reasonableness, "specific guidelines are not appropriate" under *Strickland*. 466 U. S., at 688. Nor did the Ninth Circuit properly apply the strong presumption of competence mandated by *Strickland*. Pp. 195–197.

(d) Even if his trial counsel had performed deficiently, Pinholster also has failed to show that the State Supreme Court must have unreasonably concluded that he was not prejudiced. Pp. 197–203.

(1) To determine "whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that" death was not warranted, *Strickland*, *supra*, at 695, the aggravating evidence is reweighed "against the totality of available mitigating evidence," *Wiggins* v. *Smith*, 539 U. S. 510, 534. Here, the State presented extensive aggravating evidence at both the guilt and penalty phases. The mitigating evidence consisted primarily of the penalty-phase testimony of Pinholster's mother and guilt-phase testimony given by his brother. After considering the evidence, the jury returned a sentence of death, which the state trial court found supported overwhelmingly by the weight of the evidence. Pp. 197–200.

(2) There is no reasonable probability that the additional evidence presented at Pinholster's state proceedings would have changed

the verdict. The "new" evidence largely duplicated the mitigation evidence of his mother and brother at trial. To the extent that there were new factual allegations or evidence, much of it is of questionable mitigating value. Dr. Woods' testimony would have opened the door to rebuttal by a state expert; and new evidence relating to Pinholster's substance abuse, mental illness, and criminal problems could lead a jury to conclude that he was beyond rehabilitation. The remaining new material in the state habeas record is sparse. Given what little additional mitigating evidence Pinholster presented in state habeas, the Court cannot say that the State Supreme Court's determination was unreasonable. Pp. 200–202.

(3) Because this Court did not apply AEDPA deference to the question of prejudice in *Williams* v. *Taylor*, 529 U. S. 362, and *Rompilla* v. *Beard*, 545 U. S. 374, those cases lack the important "doubly deferential" standard of *Strickland* and AEDPA, and thus offer no guidance with respect to whether a state court has unreasonably determined that prejudice is lacking. Pp. 202–203.

590 F. 3d 651, reversed.

THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA and KENNEDY, JJ., joined in full; in which ALITO, J., joined as to all but Part II; in which BREYER, J., joined as to Parts I and II; and in which GINSBURG and KAGAN, JJ., joined as to Part II. ALITO, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 203. BREYER, J., filed an opinion concurring in part and dissenting in part, *post*, p. 204. SOTOMAYOR, J., filed a dissenting opinion, in which GINSBURG and KAGAN, JJ., joined as to Part II, *post*, p. 206.

James William Bilderback II, Supervising Deputy Attorney General of California, argued the cause for petitioner. With him on the briefs were *Edmund G. Brown, Jr.*, Attorney General, *Dane R. Gillette*, Chief Assistant Attorney General, *Pamela C. Hamanaka*, Senior Assistant Attorney General, *Donald E. de Nicola*, Deputy State Solicitor General, and *Lawrence M. Daniels* and *Keith H. Borjon*, Supervising Deputy Attorneys General.

Sean K. Kennedy argued the cause for respondent. With him on the brief was *Mark R. Drozdowski.**

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*Briefs of *amici curiae* urging reversal were filed for the State of Pennsylvania et al. by *Thomas W. Corbett, Jr.*, Attorney General of Pennsylvania, and *Amy Zapp*, Chief Deputy Attorney General, and by the Attorneys General for their respective States as follows: *Troy King* of

JUSTICE THOMAS delivered the opinion of the Court.*

Scott Lynn Pinholster and two accomplices broke into a house in the middle of the night and brutally beat and stabbed to death two men who happened to interrupt the burglary. A jury convicted Pinholster of first-degree murder, and he was sentenced to death.

After the California Supreme Court twice unanimously denied Pinholster habeas relief, a Federal District Court held an evidentiary hearing and granted Pinholster habeas relief under 28 U. S. C. § 2254. The District Court concluded that Pinholster's trial counsel had been constitutionally ineffective at the penalty phase of trial. Sitting en banc, the Court of Appeals for the Ninth Circuit affirmed. *Pinholster* v. *Ayers*, 590 F. 3d 651 (2009). Considering the new evidence adduced in the District Court hearing, the Court of Appeals held that the California Supreme Court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law." § 2254(d)(1).

We granted certiorari and now reverse.

I

A

On the evening of January 8, 1982, Pinholster solicited Art Corona and Paul David Brown to help him rob Michael Kumar, a local drug dealer. On the way, they stopped at

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Alabama, *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, *Gregory F. Zoeller* of Indiana, *Steve Bullock* of Montana, *Catherine Cortez Masto* of Nevada, *Gary K. King* of New Mexico, *Richard Cordray* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *Henry D. McMaster* of South Carolina, *Marty J. Jackley* of South Dakota, *Greg Abbott* of Texas, *Mark L. Shurtleff* of Utah, and *Bruce A. Salzburg* of Wyoming; and for the Criminal Justice Legal Foundation by *Kent S. Scheidegger.*

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union by *Larry Yackle*, *Steven R. Shapiro*, and *John Holdridge;* and for the Disability Rights Legal Center by *Neil M. Soltman* and *Donald M. Falk.*

*JUSTICE GINSBURG and JUSTICE KAGAN join only Part II.

Lisa Tapar's house, where Pinholster put his buck knife through her front door and scratched a swastika into her car after she refused to talk to him. The three men, who were all armed with buck knives, found no one at Kumar's house, broke in, and began ransacking the home. They came across only a small amount of marijuana before Kumar's friends, Thomas Johnson and Robert Beckett, arrived and shouted that they were calling the police.

Pinholster and his accomplices tried to escape through the rear door, but Johnson blocked their path. Pinholster backed Johnson onto the patio, demanding drugs and money and repeatedly striking him in the chest. Johnson dropped his wallet on the ground and stopped resisting. Beckett then came around the corner, and Pinholster attacked him, too, stabbing him repeatedly in the chest. Pinholster forced Beckett to the ground, took both men's wallets, and began kicking Beckett in the head. Meanwhile, Brown stabbed Johnson in the chest, "'bury[ing] his knife to the hilt.'" 35 Reporter's Tr. 4947 (hereinafter Tr.). Johnson and Beckett died of their wounds.

Corona drove the three men to Pinholster's apartment. While in the car, Pinholster and Brown exulted, "'We got 'em, man, we got 'em good.'" *Ibid.* At the apartment, Pinholster washed his knife, and the three split the proceeds of the robbery: $23 and one quarter-ounce of marijuana. Although Pinholster instructed Corona to "lay low," Corona turned himself in to the police two weeks later. *Id.*, at 4955. Pinholster was arrested shortly thereafter and threatened to kill Corona if he did not keep quiet about the burglary and murders. Corona later became the State's primary witness. The prosecution brought numerous charges against Pinholster, including two counts of first-degree murder.

B

The California trial court appointed Harry Brainard and Wilbur Dettmar to defend Pinholster on charges of first-degree murder, robbery, and burglary. Before their ap-

pointment, Pinholster had rejected other attorneys and insisted on representing himself. During that time, the State had mailed Pinholster a letter in jail informing him that the prosecution planned to offer aggravating evidence during the penalty phase of trial to support a sentence of death.

The guilt phase of the trial began on February 28, 1984. Pinholster testified on his own behalf and presented an alibi defense. He claimed that he had broken into Kumar's house alone at around 8 p.m. on January 8, 1982, and had stolen marijuana but denied killing anyone. Pinholster asserted that later that night around 1 a.m., while he was elsewhere, Corona went to Kumar's house to steal more drugs and did not return for three hours. Pinholster told the jury that he was a "professional robber," not a murderer. 43 *id.*, at 6204. He boasted of committing hundreds of robberies over the previous six years but insisted that he always used a gun, never a knife. The jury convicted Pinholster on both counts of first-degree murder.

Before the penalty phase, Brainard and Dettmar moved to exclude any aggravating evidence on the ground that the prosecution had failed to provide notice of the evidence to be introduced, as required by Cal. Penal Code Ann. § 190.3 (West 2008). At a hearing on April 24, Dettmar argued that, in reliance on the lack of notice, he was "not presently prepared to offer anything by way of mitigation." 52 Tr. 7250. He acknowledged, however, that the prosecutor "possibly ha[d] met the [notice] requirement." *Ibid.* The trial court asked whether a continuance might be helpful, but Dettmar declined, explaining that he could not think of a mitigation witness other than Pinholster's mother and that additional time would not "make a great deal of difference." *Id.*, at 7257–7258. Three days later, after hearing testimony, the court found that Pinholster had received notice while representing himself and denied the motion to exclude.

The penalty phase was held before the same jury that had convicted Pinholster. The prosecution produced eight wit-

nesses, who testified about Pinholster's history of threatening and violent behavior, including resisting arrest and assaulting police officers, involvement with juvenile gangs, and a substantial prison disciplinary record. Defense counsel called only Pinholster's mother, Burnice Brashear. She gave an account of Pinholster's troubled childhood and adolescent years, discussed Pinholster's siblings, and described Pinholster as "a perfect gentleman at home." *Id.*, at 7405. Defense counsel did not call a psychiatrist, though they had consulted Dr. John Stalberg at least six weeks earlier. Dr. Stalberg noted Pinholster's "psychopathic personality traits," diagnosed him with antisocial personality disorder, and concluded that he "was not under the influence of extreme mental or emotional disturbance" at the time of the murders. App. 131.

After 2½ days of deliberation, the jury unanimously voted for death on each of the two murder counts. On mandatory appeal, the California Supreme Court affirmed the judgment. *People* v. *Pinholster*, 1 Cal. 4th 865, 824 P. 2d 571 (1992).

C

In August 1993, Pinholster filed his first state habeas petition. Represented by new counsel, Pinholster alleged, *inter alia*, ineffective assistance of counsel at the penalty phase of his trial. He alleged that Brainard and Dettmar had failed to adequately investigate and present mitigating evidence, including evidence of mental disorders. Pinholster supported this claim with school, medical, and legal records, as well as declarations from family members, Brainard, and Dr. George Woods, a psychiatrist who diagnosed Pinholster with bipolar mood disorder and seizure disorders. Dr. Woods criticized Dr. Stalberg's report as incompetent, unreliable, and inaccurate. The California Supreme Court unanimously and summarily[1] denied Pinholster's penalty-

[1] Although the California Supreme Court initially issued an order asking the State to respond, it ultimately withdrew that order as "improvidently issued." App. to Pet. for Cert. 302.

phase ineffective-assistance claim "on the substantive ground that it is without merit." App. to Pet. for Cert. 302.

Pinholster filed a federal habeas petition in April 1997. He reiterated his previous allegations about penalty-phase ineffective assistance and also added new allegations that his trial counsel had failed to furnish Dr. Stalberg with adequate background materials. In support of the new allegations, Dr. Stalberg provided a declaration stating that in 1984, Pinholster's trial counsel had provided him with only some police reports and a 1978 probation report. Dr. Stalberg explained that, had he known about the material that had since been gathered by Pinholster's habeas counsel, he would have conducted "further inquiry" before concluding that Pinholster suffered only from a personality disorder. App. to Brief in Opposition 219. He noted that Pinholster's school records showed evidence of "some degree of brain damage." *Ibid.* Dr. Stalberg did not, however, retract his earlier diagnosis. The parties stipulated that this declaration had never been submitted to the California Supreme Court, and the federal petition was held in abeyance to allow Pinholster to go back to state court.

In August 1997, Pinholster filed his second state habeas petition, this time including Dr. Stalberg's declaration and requesting judicial notice of the documents previously submitted in support of his first state habeas petition. His allegations of penalty-phase ineffective assistance of counsel mirrored those in his federal habeas petition. The California Supreme Court again unanimously and summarily denied the petition "on the substantive ground that it is without merit."[2] App. to Pet. for Cert. 300.

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[2] A majority also "[s]eparately and independently" denied several claims, including penalty-phase ineffective assistance of counsel, as untimely, successive, and barred by res judicata. *Id.*, at 300. The State has not argued that these procedural rulings constitute adequate and independent state grounds that bar federal habeas review.

Having presented Dr. Stalberg's declaration to the state court, Pinholster returned to the District Court. In November 1997, he filed an amended petition for a writ of habeas corpus. His allegations of penalty-phase ineffective assistance of counsel were identical to those in his second state habeas petition. Both parties moved for summary judgment, and Pinholster also moved, in the alternative, for an evidentiary hearing.

The District Court concluded that the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214, did not apply and granted an evidentiary hearing. Before the hearing, the State deposed Dr. Stalberg, who stated that none of the new material he reviewed altered his original diagnosis. Dr. Stalberg disagreed with Dr. Woods' conclusion that Pinholster suffers from bipolar disorder. Pinholster did not call Dr. Stalberg to testify at the hearing. He presented two new medical experts: Dr. Sophia Vinogradov, a psychiatrist who diagnosed Pinholster with organic personality syndrome and ruled out antisocial personality disorder, and Dr. Donald Olson, a pediatric neurologist who suggested that Pinholster suffers from partial epilepsy and brain injury. The State called Dr. F. David Rudnick, a psychiatrist who, like Dr. Stalberg, diagnosed Pinholster with antisocial personality disorder and rejected any diagnosis of bipolar disorder.

D

The District Court granted habeas relief. Applying pre-AEDPA standards, the court granted the habeas petition "for inadequacy of counsel by failure to investigate and present mitigation evidence at the penalty hearing." App. to Pet. for Cert. 262. After *Woodford* v. *Garceau*, 538 U. S. 202 (2003), clarified that AEDPA applies to cases like Pinholster's, the court amended its order but did not alter its conclusion. Over a dissent, a panel of the Court of Appeals for the Ninth Circuit reversed. *Pinholster* v. *Ayers*, 525 F. 3d 742 (2008).

On rehearing en banc, the Court of Appeals vacated the panel opinion and affirmed the District Court's grant of habeas relief. The en banc court held that the District Court's evidentiary hearing was not barred by 28 U. S. C. § 2254(e)(2). The court then determined that new evidence from the hearing could be considered in assessing whether the California Supreme Court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law" under § 2254(d)(1). See 590 F. 3d, at 666 ("Congress did not intend to restrict the inquiry under § 2254(d)(1) only to the evidence introduced in the state habeas court"). Taking the District Court evidence into account, the en banc court determined that the California Supreme Court unreasonably applied *Strickland* v. *Washington*, 466 U. S. 668 (1984), in denying Pinholster's claim of penalty-phase ineffective assistance of counsel.

Three judges dissented and rejected the majority's conclusion that the District Court hearing was not barred by § 2254(e)(2). 590 F. 3d, at 689 (opinion of Kozinski, C. J.) (characterizing Pinholster's efforts as "habeas-by-sandbagging"). Limiting its review to the state-court record, the dissent concluded that the California Supreme Court did not unreasonably apply *Strickland*. 590 F. 3d, at 691–723.

We granted certiorari to resolve two questions. 560 U. S. 964 (2010). First, whether review under § 2254(d)(1) permits consideration of evidence introduced in an evidentiary hearing before the federal habeas court. Second, whether the Court of Appeals properly granted Pinholster habeas relief on his claim of penalty-phase ineffective assistance of counsel.

II

We first consider the scope of the record for a § 2254(d)(1) inquiry. The State argues that review is limited to the record that was before the state court that adjudicated the claim on the merits. Pinholster contends that evidence pre-

sented to the federal habeas court may also be considered. We agree with the State.

A

As amended by AEDPA, 28 U. S. C. § 2254 sets several limits on the power of a federal court to grant an application for a writ of habeas corpus on behalf of a state prisoner. Section 2254(a) permits a federal court to entertain only those applications alleging that a person is in state custody "in violation of the Constitution or laws or treaties of the United States." Sections 2254(b) and (c) provide that a federal court may not grant such applications unless, with certain exceptions, the applicant has exhausted state remedies.

If an application includes a claim that has been "adjudicated on the merits in State court proceedings," § 2254(d), an additional restriction applies. Under § 2254(d), that application "shall not be granted with respect to [such a] claim . . . unless the adjudication of the claim":

> "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> "(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

This is a "difficult to meet," *Harrington* v. *Richter*, 562 U. S. 86, 102 (2011), and "highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt," *Woodford* v. *Visciotti*, 537 U. S. 19, 24 (2002) *(per curiam)* (citation and internal quotation marks omitted). The petitioner carries the burden of proof. *Id.*, at 25.

We now hold that review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits. Section 2254(d)(1) refers, in the

past tense, to a state-court adjudication that "resulted in" a decision that was contrary to, or "involved" an unreasonable application of, established law. This backward-looking language requires an examination of the state-court decision at the time it was made. It follows that the record under review is limited to the record in existence at that same time—*i. e.*, the record before the state court.

This understanding of the text is compelled by "the broader context of the statute as a whole," which demonstrates Congress' intent to channel prisoners' claims first to the state courts. *Robinson* v. *Shell Oil Co.*, 519 U. S. 337, 341 (1997). "The federal habeas scheme leaves primary responsibility with the state courts . . . ." *Visciotti*, *supra*, at 27. Section 2254(b) requires that prisoners must ordinarily exhaust state remedies before filing for federal habeas relief. It would be contrary to that purpose to allow a petitioner to overcome an adverse state-court decision with new evidence introduced in a federal habeas court and reviewed by that court in the first instance effectively *de novo*.

Limiting § 2254(d)(1) review to the state-court record is consistent with our precedents interpreting that statutory provision. Our cases emphasize that review under § 2254(d)(1) focuses on what a state court knew and did. State-court decisions are measured against this Court's precedents as of "the time the state court renders its decision." *Lockyer* v. *Andrade*, 538 U. S. 63, 71–72 (2003). To determine whether a particular decision is "contrary to" then-established law, a federal court must consider whether the decision "applies a rule that contradicts [such] law" and how the decision "confronts [the] set of facts" that were before the state court. *Williams* v. *Taylor*, 529 U. S. 362, 405, 406 (2000) *(Terry Williams)*. If the state-court decision "identifies the correct governing legal principle" in existence at the time, a federal court must assess whether the decision "unreasonably applies that principle to the facts of the prisoner's case." *Id.*, at 413. It would be strange to ask federal

courts to analyze whether a state court's adjudication resulted in a decision that unreasonably applied federal law to facts not before the state court.[3]

Our recent decision in *Schriro* v. *Landrigan*, 550 U. S. 465 (2007), is consistent as well with our holding here. We explained that "[b]ecause the deferential standards prescribed by § 2254 control whether to grant habeas relief, a federal court must take into account those standards in deciding whether an evidentiary hearing is appropriate." *Id.*, at 474. In practical effect, we went on to note, this means that when the state-court record "precludes habeas relief" under the limitations of § 2254(d), a district court is "not required to hold an evidentiary hearing." *Id.*, at 474 (citing with approval the Ninth Circuit's recognition that "an evidentiary hearing is not required on issues that can be resolved by reference to the state court record" (internal quotation marks omitted)).

The Court of Appeals wrongly interpreted *Williams* v. *Taylor*, 529 U. S. 420 (2000) *(Michael Williams)*, as supporting the contrary view. The question there was whether the lower court had correctly determined that § 2254(e)(2) barred the petitioner's request for a federal evidentiary hearing.[4]

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[3] JUSTICE SOTOMAYOR argues that there is nothing strange about allowing consideration of new evidence under § 2254(d)(1) because, in her view, it would not be "so different" from some other tasks that courts undertake. *Post*, at 218 (dissenting opinion). What makes the consideration of new evidence strange is not how "different" the task would be, but rather the notion that a state court can be deemed to have unreasonably applied federal law to evidence it did not even know existed. We cannot comprehend how exactly a state court would have any control over its application of law to matters beyond its knowledge. Adopting JUSTICE SOTOMAYOR's approach would not take seriously AEDPA's requirement that federal courts defer to state-court decisions and would effectively treat the statute as no more than a "'mood' that the Federal Judiciary must respect," *Terry Williams*, 529 U. S., at 386 (opinion of Stevens, J.).

[4] If a prisoner has "failed to develop the factual basis of a claim in State court proceedings," § 2254(e)(2) bars a federal court from holding an evidentiary hearing, unless the applicant meets certain statutory requirements.

Michael Williams did not concern whether evidence introduced in such a hearing could be considered under § 2254(d)(1). In fact, only one claim at issue in that case was even subject to § 2254(d); the rest had not been adjudicated on the merits in state-court proceedings. See *id.*, at 429 ("Petitioner did not develop, or raise, his claims . . . until he filed his federal habeas petition").[5]

If anything, the decision in *Michael Williams* supports our holding. The lower court in that case had determined that the one claim subject to § 2254(d)(1) did not satisfy that statutory requirement. In light of that ruling, this Court concluded that it was "unnecessary to reach the question whether § 2254(e)(2) would permit a [federal] hearing on th[at] claim." *Id.*, at 444. That conclusion is fully consistent with our holding that evidence later introduced in federal court is irrelevant to § 2254(d)(1) review.

The Court of Appeals' reliance on *Holland* v. *Jackson*, 542 U. S. 649 (2004) *(per curiam)*, was also mistaken. In *Holland*, we initially stated that "whether a state court's decision was unreasonable [under § 2254(d)(1)] must be assessed in light of the record the court had before it." *Id.*, at 652. We then went on to *assume* for the sake of argument what some Courts of Appeals had held—that § 2254(d)(1), despite its mandatory language, simply does not apply when a federal habeas court has admitted new evidence that supports a claim previously adjudicated in state court.[6] *Id.*, at 653. There was no reason to decide that question because regardless, the hearing should have been barred by § 2254(e)(2).

[5] JUSTICE SOTOMAYOR's suggestion that *Michael Williams* "rejected" the conclusion here, see *post*, at 220, is thus quite puzzling. In the passage that she quotes, see *ibid.*, the Court merely explains that § 2254(e)(2) should be interpreted in a way that does not preclude a state prisoner, who was diligent in state habeas court and who can satisfy § 2254(d), from receiving an evidentiary hearing.

[6] In *Bradshaw* v. *Richey*, 546 U. S. 74 (2005) *(per curiam)*, on which the Court of Appeals also relied, we made the same assumption. *Id.*, at 79–80 (discussing the State's "*Holland* argument").

Today, we reject that assumption and hold that evidence introduced in federal court has no bearing on § 2254(d)(1) review. If a claim has been adjudicated on the merits by a state court, a federal habeas petitioner must overcome the limitation of § 2254(d)(1) on the record that was before that state court.[7]

B

Pinholster's contention that our holding renders § 2254(e)(2) superfluous is incorrect. Section 2254(e)(2) imposes a limitation on the discretion of federal habeas courts to take new evidence in an evidentiary hearing. See *Landrigan*, *supra*, at 473 (noting that district courts, under AEDPA, generally retain the discretion to grant an evidentiary hearing). Like § 2254(d)(1), it carries out "AEDPA's goal of promoting comity, finality, and federalism by giving state courts the first opportunity to review [a] claim, and to correct any constitutional violation in the first instance." *Jimenez* v. *Quarterman*, 555 U. S. 113, 121 (2009) (internal quotation marks omitted).[8]

Section 2254(e)(2) continues to have force where § 2254(d)(1) does not bar federal habeas relief. For example,

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[7] Pinholster and JUSTICE SOTOMAYOR place great weight on the fact that § 2254(d)(2) includes the language "in light of the evidence presented in the State court proceeding," whereas § 2254(d)(1) does not. See *post*, at 211–212. The additional clarity of § 2254(d)(2) on this point, however, does not detract from our view that § 2254(d)(1) also is plainly limited to the state-court record. The omission of clarifying language from § 2254(d)(1) just as likely reflects Congress' belief that such language was unnecessary as it does anything else.

[8] JUSTICE SOTOMAYOR's argument that § 2254(d)(1) must be read in a way that "accommodates" § 2254(e)(2), see *post*, at 214, rests on a fundamental misunderstanding of § 2254(e)(2). The focus of that section is not on "preserving the opportunity" for hearings, *post*, at 214, but rather on *limiting* the discretion of federal district courts in holding hearings. We see no need in this case to address the proper application of § 2254(e)(2). See n. 20, *infra*. But see *post*, at 217 (suggesting that we have given § 2254(e)(2) "an unnaturally cramped reading").

not all federal habeas claims by state prisoners fall within the scope of § 2254(d), which applies only to claims "adjudicated on the merits in State court proceedings." At a minimum, therefore, § 2254(e)(2) still restricts the discretion of federal habeas courts to consider new evidence when deciding claims that were not adjudicated on the merits in state court. See, *e. g.*, *Michael Williams*, 529 U. S., at 427–429.[9]

Although state prisoners may sometimes submit new evidence in federal court, AEDPA's statutory scheme is designed to strongly discourage them from doing so. Provisions like §§ 2254(d)(1) and (e)(2) ensure that "[f]ederal courts sitting in habeas are not an alternative forum for trying facts and issues which a prisoner made insufficient effort to pursue in state proceedings." *Id.*, at 437; see also *Richter*, 562 U. S., at 103 ("Section 2254(d) is part of the basic structure of federal habeas jurisdiction, designed to confirm that state courts are the principal forum for asserting constitutional challenges to state convictions"); *Wainwright* v. *Sykes*, 433 U. S. 72, 90 (1977) ("[T]he state trial on the merits [should be] the 'main event,' so to speak, rather than a 'tryout on the road' for what will later be the determinative federal habeas hearing").[10]

C

Accordingly, we conclude that the Court of Appeals erred in considering the District Court evidence in its review under § 2254(d)(1). Although we might ordinarily remand for a properly limited review, the Court of Appeals also ruled, in the alternative, that Pinholster merited habeas re-

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[9] In all events, of course, the requirements of §§ 2254(a) through (c) remain significant limitations on the power of a federal court to grant habeas relief.

[10] Though we do not decide where to draw the line between new claims and claims adjudicated on the merits, see n. 11, *infra*, JUSTICE SOTOMAYOR's hypothetical involving new evidence of withheld exculpatory witness statements, see *post*, at 214–215, may well present a new claim.

lief even on the state-court record alone. 590 F. 3d, at 669. Remand is therefore inappropriate, and we turn next to a review of the state-court record.

III

The Court of Appeals' alternative holding was also erroneous. Pinholster has failed to demonstrate that the California Supreme Court unreasonably applied clearly established federal law to his penalty-phase ineffective-assistance claim on the state-court record. Section 2254(d) prohibits habeas relief.

A

Section 2254(d) applies to Pinholster's claim because that claim was adjudicated on the merits in state-court proceedings. No party disputes that Pinholster's federal petition alleges an ineffective-assistance-of-counsel claim that had been included in both of Pinholster's state habeas petitions. The California Supreme Court denied each of those petitions "on the substantive ground that it is without merit."[11]

Section 2254(d) applies even where there has been a summary denial. See *Richter*, 562 U. S., at 98. In these cir-

[11] The State does not contest that the *alleged* claim was adjudicated on the merits by the California Supreme Court, but it asserts that some of the evidence adduced in the federal evidentiary hearing fundamentally changed Pinholster's claim so as to render it effectively unadjudicated. See Brief for Petitioner 28–31; Reply Brief for Petitioner 4–5; Tr. of Oral Arg. 18. Pinholster disagrees and argues that the evidence adduced in the evidentiary hearing simply supports his alleged claim. Brief for Respondent 33–37.

We need not resolve this dispute because, even accepting Pinholster's position, he is not entitled to federal habeas relief. Pinholster has failed to show that the California Supreme Court unreasonably applied clearly established federal law on the record before that court, *infra*, at 190–194, 197–202, which brings our analysis to an end. Even if the evidence adduced in the District Court additionally supports his claim, as Pinholster contends, we are precluded from considering it. See n. 20, *infra*.

cumstances, Pinholster can satisfy the "unreasonable application" prong of § 2254(d)(1) only by showing that "there was no reasonable basis" for the California Supreme Court's decision. *Id.*, at 98. "[A] habeas court must determine what arguments or theories . . . could have supporte[d] the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." *Id.*, at 102. After a thorough review of the state-court record,[12] we conclude that Pinholster has failed to meet that high threshold.

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[12] The parties agree that the state-court record includes both the "allegations of [the] habeas corpus petition . . . and . . . 'any matter of record pertaining to the case.'" *In re Hochberg*, 2 Cal. 3d 870, 874, n. 2, 471 P. 2d 1, 3–4, n. 2 (1970) (quoting Cal. Rule of Court 60), rejected on another ground by *In re Fields*, 51 Cal. 3d 1063, 1070, n. 3, 800 P. 2d 862, 866, n. 3 (1990); see Reply Brief for Petitioner 16–17; Tr. of Oral Arg. 45–46. Under California law, the California Supreme Court's summary denial of a habeas petition on the merits reflects that court's determination that "the claims made in th[e] petition do not state a prima facie case entitling the petitioner to relief." *In re Clark*, 5 Cal. 4th 750, 770, 855 P. 2d 729, 741–742 (1993). It appears that the court generally assumes the allegations in the petition to be true, but does not accept wholly conclusory allegations, *People* v. *Duvall*, 9 Cal. 4th 464, 474, 886 P. 2d 1252, 1258 (1995), and will also "review the record of the trial . . . to assess the merits of the petitioner's claims," *Clark*, *supra*, at 770, 855 P. 2d, at 742.

The specific contents of the state-court record depend on which of the two state habeas proceedings is at issue. One *amicus curiae* suggests that both are at issue—that is, Pinholster must prove that *both* California Supreme Court proceedings involved an unreasonable application of law under § 2254(d)(1). See Brief for Criminal Justice Legal Foundation 26. By contrast, the most favorable approach for Pinholster would be review of only the second state habeas proceeding, the record of which includes all of the evidence that Pinholster ever submitted in state habeas. We have not previously ruled on how to proceed in these circumstances, and we need not do so here. Even taking the approach most favorable to Pinholster, and reviewing only whether the California Supreme Court was objectively unreasonable in the second state habeas proceeding, we find that Pinholster has failed to satisfy § 2254(d)(1).

B

There is no dispute that the clearly established federal law here is *Strickland* v. *Washington.* In *Strickland,* this Court made clear that "the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation . . . [but] simply to ensure that criminal defendants receive a fair trial." 466 U. S., at 689. Thus, "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct *so undermined* the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.,* at 686 (emphasis added). The Court acknowledged that "[t]here are countless ways to provide effective assistance in any given case," and that "[e]ven the best criminal defense attorneys would not defend a particular client in the same way." *Id.,* at 689.

Recognizing the "tempt[ation] for a defendant to second-guess counsel's assistance after conviction or adverse sentence," *ibid.,* the Court established that counsel should be "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment," *id.,* at 690. To overcome that presumption, a defendant must show that counsel failed to act "reasonabl[y] considering all the circumstances." *Id.,* at 688. The Court cautioned that "[t]he availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges." *Id.,* at 690.

The Court also required that defendants prove prejudice. *Id.,* at 691–692. "The 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." *Id.,* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Ibid.* That requires a "substantial," not just "conceivable," likelihood of a different result. *Richter, supra,* at 112.

Our review of the California Supreme Court's decision is thus "doubly deferential." *Knowles* v. *Mirzayance*, 556 U. S. 111, 123 (2009) (citing *Yarborough* v. *Gentry*, 540 U. S. 1, 5–6 (2003) *(per curiam)*). We take a "highly deferential" look at counsel's performance, *Strickland*, *supra*, at 689, through the "deferential lens of § 2254(d)," *Mirzayance*, *supra*, at 121, n. 2. Pinholster must demonstrate that it was necessarily unreasonable for the California Supreme Court to conclude: (1) that he had not overcome the strong presumption of competence; and (2) that he had failed to undermine confidence in the jury's sentence of death.

C

1

Pinholster has not shown that the California Supreme Court's decision that he could not demonstrate deficient performance by his trial counsel necessarily involved an unreasonable application of federal law. In arguing to the state court that his counsel performed deficiently, Pinholster contended that they should have pursued and presented additional evidence about: his family members and their criminal, mental, and substance abuse problems; his schooling; and his medical and mental health history, including his epileptic disorder. To support his allegation that his trial counsel had "no reasonable tactical basis" for the approach they took, Pinholster relied on statements his counsel made at trial. App. to Brief in Opposition 143. When arguing the motion to exclude the State's aggravating evidence at the penalty phase for failure to comply with Cal. Penal Code Ann. § 190.3, Dettmar, one of Pinholster's counsel, contended that because the State did not provide notice, he "[was] not presently prepared to offer anything by way of mitigation," 52 Tr. 7250. In response to the trial court's inquiry as to whether a continuance might be helpful, Dettmar noted that the only mitigation witness he could think of was Pinholster's

mother. Additional time, Dettmar stated, would not "make a great deal of difference." *Id.*, at 7257–7258.

We begin with the premise that "under the circumstances, the challenged action[s] might be considered sound trial strategy." *Strickland*, *supra*, at 689 (internal quotation marks omitted). The Court of Appeals dissent described one possible strategy:

> "[Pinholster's attorneys] were fully aware that they would have to deal with mitigation sometime during the course of the trial, did spend considerable time and effort investigating avenues for mitigation[,] and made a reasoned professional judgment that the best way to serve their client would be to rely on the fact that they never got [the required § 190.3] notice and hope the judge would bar the state from putting on their aggravation witnesses." 590 F. 3d, at 701–702 (opinion of Kozinski, C. J.).

Further, if their motion was denied, counsel were prepared to present only Pinholster's mother in the penalty phase to create sympathy not for Pinholster, but for his mother. After all, the "'family sympathy'" mitigation defense was known to the defense bar in California at the time and had been used by other attorneys. *Id.*, at 707. Rather than displaying neglect, we presume that Dettmar's arguments were part of this trial strategy. See *Gentry*, *supra*, at 8 ("[T]here is a strong presumption that [counsel took certain actions] for tactical reasons rather than through sheer neglect" (citing *Strickland*, *supra*, at 690)).

The state-court record supports the idea that Pinholster's counsel acted strategically to get the prosecution's aggravation witnesses excluded for lack of notice, and if that failed, to put on Pinholster's mother. Other statements made during the argument regarding the motion to exclude suggest that defense counsel were trying to take advantage of a legal technicality and were not truly surprised. Brainard and

Dettmar acknowledged that the prosecutor had invited them on numerous occasions to review Pinholster's state prison file but argued that such an invitation did not meet with the "strict demands" of § 190.3. 52 Tr. 7260. Dettmar admitted that the prosecutor, "being as thorough as she is, possibly ha[d] met the requirement." *Id.*, at 7250. But if so, he wanted her "to make that representation to the court."[13] *Ibid.*

Timesheets indicate that Pinholster's trial counsel investigated mitigating evidence.[14] Long before the guilty verdict, Dettmar talked with Pinholster's mother and contacted a psychiatrist.[15] On February 26, two months before the penalty phase started, he billed six hours for "[p]reparation argument, death penalty phase." See Clerk's Tr. 864. Brainard, who merely assisted Dettmar for the penalty phase, researched epilepsy and also interviewed Pinholster's mother.[16] We know that Brainard likely spent additional time, not reflected in these entries, preparing Pinholster's brother, Terry, who provided some mitigation testimony

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[13] Counsel's argument was persuasive enough to cause the trial court to hold a hearing and take testimony before denying the motion to exclude.

[14] Both parties agree that these billing records were before the California Supreme Court. See Tr. of Oral Arg. 45, 48–49.

[15] See Clerk's Tr. 798 (entry on Jan. 13 for "phone call to defendant's mother re medical history"); *id.*, at 864 (entries on Feb. 21 for "Penal Code research on capital punishment"; Feb. 23 for "conference with defendant's mother re childhood problems"; Feb. 25 for "Research on Pen. C. 190.3"; and Feb. 29 for "photocopying reports for appointed expert," "Preparation of Declaration and Order for appointment of psychiatrist," "Preparation order of visitation for investigator," and "Further research on Pen. C. 190.3"). The time records for Dettmar unfortunately stop with March 14, so we do not know what he did during the critical weeks leading up to the penalty phase on May 1.

[16] See *id.*, at 869 (entries on Feb. 23 for "Conf. with Bernice Brashear, Pinholster's mother"; and Feb. 25 for "Research re; epilepsy and conf. with nurse"); *id.*, at 1160 (entries on Apr. 11 for "Start prep. for penalty phase"; Apr. 25 for "Prep. penalty phase and conf. with Mrs. Brashear"; and Apr. 26 for "Prep. penalty phase").

about Pinholster's background during the guilt phase. *Infra*, at 200.

The record also shows that Pinholster's counsel confronted a challenging penalty phase with an unsympathetic client, which limited their feasible mitigation strategies. By the end of the guilt phase, the jury had observed Pinholster "glor[y]" in "his criminal disposition" and "hundreds of robberies." *Pinholster*, 1 Cal. 4th, at 945, 907, 824 P. 2d, at 611, 584. During his cross-examination, Pinholster laughed or smirked when he told the jury that his "occupation" was "a crook," when he was asked whether he had threatened a potential witness, and when he described thwarting police efforts to recover a gun he had once used. 44 Tr. 6225. He bragged about being a "professional robber." 43 *id.*, at 6204. To support his defense, Pinholster claimed that he used only guns—not knives—to commit his crimes. But during cross-examination, Pinholster admitted that he had previously been convicted of using a knife in a kidnaping. Pinholster also said he was a white supremacist and that he frequently carved swastikas into other people's property as "a sideline to robbery." 44 *id.*, at 6246.

Trial counsel's psychiatric expert, Dr. Stalberg, had concluded that Pinholster showed no significant signs or symptoms of mental disorder or defect other than his "psychopathic personality traits." App. 131. Dr. Stalberg was aware of Pinholster's hyperactivity as a youngster, hospitalization at age 14 for incorrigibility, alleged epileptic disorder, and history of drug dependency. Nevertheless, Dr. Stalberg told counsel that Pinholster did not appear to suffer from brain damage, was not significantly intoxicated or impaired on the night in question, and did not have an impaired ability to appreciate the criminality of his conduct.

Given these impediments, it would have been a reasonable penalty-phase strategy to focus on evoking sympathy for Pinholster's mother. In fact, such a family-sympathy defense is precisely how the State understood defense coun-

sel's strategy. The prosecutor carefully opened her cross-examination of Pinholster's mother with, "I hope you understand I don't enjoy cross-examining a mother of anybody." 52 Tr. 7407. And in her closing argument, the prosecutor attempted to undercut defense counsel's strategy by pointing out, "Even the most heinous person born, even Adolph Hitler[,] probably had a mother who loved him." 53 *id.*, at 7452.

Pinholster's only response to this evidence is a series of declarations from Brainard submitted with Pinholster's first state habeas petition, seven years after the trial. Brainard declares that he has "no recollection" of interviewing any family members (other than Pinholster's mother) regarding penalty-phase testimony, of attempting to secure Pinholster's school or medical records, or of interviewing any former teachers or counselors. Pet. for Writ of Habeas Corpus in No. S004616 (Cal.), Exh. 3. Brainard also declares that Dettmar was primarily responsible for mental health issues in the case, but he has "no recollection" of Dettmar ever having secured Pinholster's medical records. *Id.*, Exh. 2. Dettmar neither confirmed nor denied Brainard's statements, as he had died by the time of the first state habeas petition. 590 F. 3d, at 700 (Kozinski, C. J., dissenting).

In sum, Brainard and Dettmar made statements suggesting that they were not surprised that the State intended to put on aggravating evidence, billing records show that they spent time investigating mitigating evidence, and the record demonstrates that they represented a psychotic client whose performance at trial hardly endeared him to the jury. Pinholster has responded to this evidence with only a handful of *post hoc* nondenials by one of his lawyers. The California Supreme Court could have reasonably concluded that Pinholster had failed to rebut the presumption of competence mandated by *Strickland*—here, that counsel had adequately performed at the penalty phase of trial.

2

The Court of Appeals held that the California Supreme Court had unreasonably applied *Strickland* because Pinholster's attorneys "w[ere] far more deficient than . . . the attorneys in *Terry Williams*, *Wiggins* [v. *Smith*, 539 U. S. 510 (2003)], and *Rompilla* [v. *Beard*, 545 U. S. 374 (2005)], where in each case the Supreme Court upheld the petitioner's ineffective assistance claim." 590 F. 3d, at 671. The court drew from those cases a "constitutional duty to investigate," *id.*, at 674, and the principle that "[i]t is prima facie ineffective assistance for counsel to 'abandon[ ] their investigation of [the] petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources,'" *ibid.* (quoting *Wiggins* v. *Smith*, 539 U. S. 510, 524–525 (2003)). The court explained that it could not "lightly disregard" a failure to introduce evidence of "excruciating life history" or "nightmarish childhood." 590 F. 3d, at 684 (internal quotation marks omitted).

The Court of Appeals misapplied *Strickland* and overlooked "the constitutionally protected independence of counsel and . . . the wide latitude counsel must have in making tactical decisions." 466 U. S., at 689. Beyond the general requirement of reasonableness, "specific guidelines are not appropriate." *Id.*, at 688. "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions . . . ." *Id.*, at 688–689. *Strickland* itself rejected the notion that the same investigation will be required in every case. *Id.*, at 691 ("[C]ounsel has a duty to make reasonable investigations *or* to make a reasonable decision that makes particular investigations unnecessary" (emphasis added)). It is "[r]are" that constitutionally competent representation will require "any one technique or approach." *Richter*, 562 U. S., at 106. The Court of Ap-

peals erred in attributing strict rules to this Court's recent case law.[17]

Nor did the Court of Appeals properly apply the strong presumption of competence that *Strickland* mandates. The court dismissed the dissent's application of the presumption as "fabricat[ing] an excuse that the attorneys themselves could not conjure up." 590 F. 3d, at 673. But *Strickland* specifically commands that a court "must indulge [the] strong presumption" that counsel "made all significant decisions in the exercise of reasonable professional judgment." 466 U. S., at 689–690. The Court of Appeals was required not simply to "give [the] attorneys the benefit of the doubt," 590 F. 3d, at 673, but to affirmatively entertain the range of possible "reasons Pinholster's counsel may have had for proceeding as they did," *id.*, at 692 (Kozinski, C. J., dissenting). See also *Richter, supra*, at 110 ("*Strickland* . . . calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind").

JUSTICE SOTOMAYOR questions whether it would have been a reasonable professional judgment for Pinholster's trial counsel to adopt a family-sympathy mitigation defense. *Post*, at 231. She cites no evidence, however, that such an approach would have been inconsistent with the standard of professional competence in capital cases that prevailed in Los Angeles in 1984. Indeed, she does not contest that, at the time, the defense bar in California had been using that strategy. See *supra*, at 191; *post*, at 232, n. 21. JUSTICE SOTOMAYOR relies heavily on *Wiggins*, but in that case the defendant's trial counsel specifically acknowledged a standard practice for capital cases in Maryland that was inconsistent with what he had done. 539 U. S., at 524.

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[17] The Court of Appeals was not necessarily wrong in looking to other precedents of this Court for guidance, but "the *Strickland* test 'of necessity requires a case-by-case examination of the evidence.'" *Terry Williams*, 529 U. S. 362, 391 (2000) (quoting *Wright* v. *West*, 505 U. S. 277, 308 (1992) (KENNEDY, J., concurring in judgment)).

At bottom, JUSTICE SOTOMAYOR's view is grounded in little more than her own sense of "prudence," *post*, at 231 (internal quotation marks omitted), and what appears to be her belief that the only reasonable mitigation strategy in capital cases is to "help" the jury "understand" the defendant, *post*, at 239. According to JUSTICE SOTOMAYOR, that Pinholster was an unsympathetic client "compound[ed], rather than excuse[d], counsel's deficiency" in pursuing further evidence "that could explain why Pinholster was the way he was." *Post*, at 234. But it certainly can be reasonable for attorneys to conclude that creating sympathy for the defendant's *family* is a better idea because the defendant himself is simply unsympathetic.

JUSTICE SOTOMAYOR's approach is flatly inconsistent with *Strickland*'s recognition that "[t]here are countless ways to provide effective assistance in any given case." 466 U. S., at 689. There comes a point where a defense attorney will reasonably decide that another strategy is in order, thus "mak[ing] particular investigations unnecessary." *Id.*, at 691; cf. 590 F. 3d, at 692 (Kozinski, C. J., dissenting) ("The current infatuation with 'humanizing' the defendant as the be-all and end-all of mitigation disregards the possibility that this may be the wrong tactic in some cases because experienced lawyers conclude that the jury simply won't buy it"). Those decisions are due "a heavy measure of deference." *Strickland*, *supra*, at 691. The California Supreme Court could have reasonably concluded that Pinholster's counsel made such a reasoned decision in this case.

We have recently reiterated that "'[s]urmounting *Strickland*'s high bar is never an easy task.'" *Richter*, *supra*, at 105 (quoting *Padilla* v. *Kentucky*, 559 U. S. 356, 371 (2010)). The *Strickland* standard must be applied with "scrupulous care." *Richter*, *supra*, at 105. The Court of Appeals did not do so here.

D

Even if his trial counsel had performed deficiently, Pinholster also has failed to show that the California Supreme

Court must have unreasonably concluded that Pinholster was not prejudiced. "[T]he question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, *supra*, at 695. We therefore "reweigh the evidence in aggravation against the totality of available mitigating evidence." *Wiggins*, *supra*, at 534.

1

We turn first to the aggravating and mitigating evidence that the sentencing jury considered. See *Strickland*, *supra*, at 695 ("[A] court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury"). Here, the same jury heard both the guilt and penalty phases and was instructed to consider all the evidence presented. Cf. *Visciotti*, 537 U. S., at 25 (noting that the state habeas court had correctly considered mitigating evidence introduced during the guilt phase).

The State presented extensive aggravating evidence. As we have already discussed, the jury watched Pinholster revel in his extensive criminal history. *Supra*, at 193. Then, during the penalty phase, the State presented evidence that Pinholster had threatened to kill the State's lead witness, assaulted a man with a straight razor, and kidnaped another person with a knife. The State showed that Pinholster had a history of violent outbursts, including striking and threatening a bailiff after a court proceeding at age 17, breaking his wife's jaw,[18] resisting arrest by faking seizures, and assaulting and spitting on police officers. The jury also heard about Pinholster's involvement in juvenile gangs and his substantial disciplinary record in both county and state jails, where he had threatened, assaulted, and thrown urine at

[18] Pinholster's wife waived her spousal privilege to testify to this fact. She acknowledged that her testimony would be used to argue that her husband should be executed.

guards, and fought with other inmates. While in jail, Pinholster had been segregated for a time due to his propensity for violence and placed on a "special disciplinary diet" reserved only for the most disruptive inmates. 52 Tr. 7305.

The mitigating evidence consisted primarily of the penalty-phase testimony of Pinholster's mother, Brashear, who gave a detailed account of Pinholster's troubled childhood and adolescence. Early childhood was quite difficult. The family "didn't have lots of money." *Id.*, at 7404. When he was very young, Pinholster suffered two serious head injuries, first at age 2 or 3 when he was run over by a car, and again at age 4 or 5 when he went through the windshield during a car accident. When he was 5, Pinholster's stepfather moved in and was abusive, or nearly so.

Pinholster always struggled in school. He was disruptive in kindergarten and was failing by first grade. He got in fights and would run out of the classroom. In third grade, Pinholster's teacher suggested that he was more than just a "'disruptive child.'" *Id.*, at 7394. Following tests at a clinic, Pinholster was sent to a school for educationally handicapped children where his performance improved.

At age 10, psychiatrists recommended that Pinholster be sent to a mental institution, although he did not go. Pinholster had continued to initiate fights with his brothers and to act like "Robin Hood" around the neighborhood, "[s]tealing from the rich and giving to the poor." *Id.*, at 7395. Brashear had thought then that "[s]omething was not working right." *Id.*, at 7396.

By age 10 or 11, Pinholster was living in boys' homes and juvenile halls. He spent six months when he was 12 in a state mental institution for emotionally handicapped children. By the time he was 18, Pinholster was in county jail, where he was beaten badly. Brashear suspected that the beating caused Pinholster's epilepsy, for which he has been prescribed medication. After a stint in state prison, Pinhol-

ster returned home but acted "unusual" and had trouble readjusting to life. *Id.*, at 7405.

Pinholster's siblings were "basically very good children," although they would get into trouble. *Id.*, at 7401. His brother, Terry, had been arrested for drunk driving and his sister, Tammy, for public intoxication. Tammy also was arrested for drug possession and was self-destructive and "wild." *Ibid.* Pinholster's eldest brother, Alvin, died a fugitive from California authorities.[19]

In addition to Brashear's penalty-phase testimony, Pinholster had previously presented mitigating evidence during the guilt phase from his brother, Terry. Terry testified that Pinholster was "more or less in institutions all his life," suffered from epilepsy, and was "more or less" drunk on the night of the murders. 42 *id.*, at 6015, 6036.

After considering this aggravating and mitigating evidence, the jury returned a sentence of death. The state trial court found that the jury's determination was "supported overwhelmingly by the weight of the evidence" and added that "the factors in aggravation beyond all reasonable doubt outweigh those in mitigation." Clerk's Tr. 1184, 1186.

2

There is no reasonable probability that the additional evidence Pinholster presented in his state habeas proceedings would have changed the jury's verdict. The "new" evidence largely duplicated the mitigation evidence at trial. School and medical records basically substantiate the testimony of

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[19] JUSTICE SOTOMAYOR criticizes Brashear's testimony as "self-interested," *post*, at 235, but the whole premise of the family-sympathy defense is *the family's interest.* She similarly makes much of the fact that the prosecutor "belittle[d]" Brashear's testimony in closing argument. *Post*, at 237. We fail to see the point. Any diligent prosecutor would have challenged whatever mitigating evidence the defense had put on. And, we would certainly not expect the prosecutor's closing argument to have described the evidence in the light most favorable to Pinholster. But see *ibid.*, n. 26.

Pinholster's mother and brother. Declarations from Pinholster's siblings support his mother's testimony that his stepfather was abusive and explain that Pinholster was beaten with fists, belts, and even wooden boards.

To the extent the state habeas record includes new factual allegations or evidence, much of it is of questionable mitigating value. If Pinholster had called Dr. Woods to testify consistently with his psychiatric report, Pinholster would have opened the door to rebuttal by a state expert. See, *e. g.*, *Wong* v. *Belmontes*, 558 U. S. 15, 24 (2009) *(per curiam)* (taking into account that certain mitigating evidence would have exposed the petitioner to further aggravating evidence). The new evidence relating to Pinholster's family—their more serious substance abuse, mental illness, and criminal problems, see *post*, at 226—is also by no means clearly mitigating, as the jury might have concluded that Pinholster was simply beyond rehabilitation. Cf. *Atkins* v. *Virginia*, 536 U. S. 304, 321 (2002) (recognizing that mitigating evidence can be a "two-edged sword" that juries might find to show future dangerousness).

The remaining new material in the state habeas record is sparse. We learn that Pinholster's brother Alvin died of suicide by drug overdose, and there are passing references to Pinholster's own drug dependency. According to Dr. Stalberg, Pinholster's "school records" apparently evidenced "some degree" of brain damage. App. to Brief in Opposition 219. Mostly, there are just a few new details about Pinholster's childhood. Pinholster apparently looked like his biological father, whom his grandparents "loathed." Pet. for Writ of Habeas Corpus in No. S004616 (Cal.), Exh. 98, p. 1. Accordingly, whenever his grandparents "spanked or disciplined" the kids, Pinholster "always got the worst of it." *Ibid.* Pinholster was mostly unsupervised and "didn't get much love," because his mother and stepfather were always working and "were more concerned with their own lives than the welfare of their kids." *Id.*, at 2. Neither parent

seemed concerned about Pinholster's schooling. Finally, Pinholster's aunt once saw the children mixing flour and water to make something to eat, although "[m]ost meals consisted of canned spaghetti and foods of that ilk." *Id.*, at 1.

Given what little additional mitigating evidence Pinholster presented in state habeas, we cannot say that the California Supreme Court's determination was unreasonable. Having already heard much of what is included in the state habeas record, the jury returned a sentence of death. Moreover, some of the new testimony would likely have undercut the mitigating value of the testimony by Pinholster's mother. The new material is thus not so significant that, even assuming Pinholster's trial counsel performed deficiently, it was necessarily unreasonable for the California Supreme Court to conclude that Pinholster had failed to show a "substantial" likelihood of a different sentence. *Richter*, 562 U. S., at 112 (citing *Strickland*, 466 U. S., at 693).

3

As with deficiency, the Court of Appeals found this case to be "materially indistinguishable" from *Terry Williams* and *Rompilla* v. *Beard*, 545 U. S. 374 (2005). 590 F. 3d, at 684. But this Court did not apply AEDPA deference to the question of prejudice in those cases; each of them lack the important "doubly deferential" standard of *Strickland* and AEDPA. See *Terry Williams*, 529 U. S., at 395–397 (reviewing a state-court decision that did not apply the correct legal standard); *Rompilla*, *supra*, at 390 (reviewing *Strickland* prejudice *de novo* because the state-court decision did not reach the question). Those cases therefore offer no guidance with respect to whether a state court has *unreasonably* determined that prejudice is lacking. We have said time and again that "an *unreasonable* application of federal law is different from an *incorrect* application of federal law." *Richter*, *supra*, at 101 (internal quotation marks omitted). Even if the Court of Appeals might have reached a different

conclusion as an initial matter, it was not an unreasonable application of our precedent for the California Supreme Court to conclude that Pinholster did not establish prejudice.[20]

* * *

The judgment of the United States Court of Appeals for the Ninth Circuit is reversed.

It is so ordered.

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

Although I concur in the Court's judgment, I agree with the conclusion reached in Part I of the dissent, namely, that, when an evidentiary hearing is properly held in federal court, review under 28 U. S. C. § 2254(d)(1) must take into account the evidence admitted at that hearing. As the dissent points out, refusing to consider the evidence received in the hearing in federal court gives § 2254(e)(2) an implausibly narrow scope and will lead either to results that Congress surely did not intend or to the distortion of other provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214, and the law on "cause and prejudice." See *post*, at 214–217 (opinion of SOTOMAYOR, J.).

Under AEDPA evidentiary hearings in federal court should be rare. The petitioner generally must have made a diligent effort to produce in state court the new evidence on which he seeks to rely. See § 2254(e)(2); *Williams* v. *Taylor*,

[20] Because Pinholster has failed to demonstrate that the adjudication of his claim based on the state-court record resulted in a decision "contrary to" or "involv[ing] an unreasonable application" of federal law, a writ of habeas corpus "shall not be granted" and our analysis is at an end. 28 U. S. C. § 2254(d). We are barred from considering the evidence Pinholster submitted in the District Court that he contends additionally supports his claim. For that reason, we need not decide whether § 2254(e)(2) prohibited the District Court from holding the evidentiary hearing or whether a district court may ever choose to hold an evidentiary hearing before it determines that § 2254(d) has been satisfied.

529 U. S. 420, 433–434 (2000). If that requirement is not satisfied, the petitioner may establish the factual predicate for a claim in a federal-court hearing only if, among other things, "the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." § 2254(e)(2)(B).

Even when the petitioner does satisfy the diligence standard adopted in *Williams* v. *Taylor*, *supra*, a hearing should not be held in federal court unless the new evidence that the petitioner seeks to introduce was not and could not have been offered in the state-court proceeding. Section 2254(e)(2) bars a hearing in certain situations, but it does not mean that a hearing is allowed in all other situations. See *Schriro* v. *Landrigan*, 550 U. S. 465, 473–474 (2007). The whole thrust of AEDPA is essentially to reserve federal habeas relief for those cases in which the state courts acted unreasonably. See §§ 2254(d)(1), (2), (e)(1). Permitting a petitioner to obtain federal habeas relief on the basis of evidence that could have been but was not offered in state court would upset this scheme.

In this case, for essentially the reasons set out in the dissent from the Court of Appeals' en banc decision, see *Pinholster* v. *Ayers*, 590 F. 3d 651, 688–691 (CA9 2009) (opinion of Kozinski, C. J.), I would hold that the federal-court hearing should not have been held because respondent did not diligently present his new evidence to the California courts. And I join all but Part II of the opinion of the Court, as I agree that the decision of the state court represented a reasonable application of clearly established Supreme Court precedent in light of the state-court record.

JUSTICE BREYER, concurring in part and dissenting in part.

I join Parts I and II of the Court's opinion. I do not join Part III, for I would send this case back to the Court of

Appeals so that it can apply the legal standards that Part II announces to the complex facts of this case. Compare *ante*, at 187–203 (majority opinion), with *post*, at 221–246 (SOTOMAYOR, J., dissenting).

Like the Court, I believe that its understanding of 28 U. S. C. § 2254(d)(1) does not leave AEDPA's hearing section, § 2254(e), without work to do. An offender who believes he is entitled to habeas relief must first present a claim (including his evidence) to the state courts. If the state courts reject the claim, then a federal habeas court may review that rejection on the basis of the materials considered by the state court. If the federal habeas court finds that the state-court decision fails (d)'s test (or if (d) does not apply), then an (e) hearing may be needed.

For example, if the state-court rejection assumed the habeas petitioner's facts (deciding that, *even if* those facts were true, federal law was not violated), then (after finding the state court wrong on a (d) ground) an (e) hearing might be needed to determine whether the facts alleged were indeed true. Or if the state-court rejection rested on a state ground, which a federal habeas court found inadequate, then an (e) hearing might be needed to consider the petitioner's (now unblocked) substantive federal claim. Or if the state-court rejection rested on only one of several related federal grounds (*e. g.*, that counsel's assistance was not "inadequate"), then, if the federal court found that the state court's decision in respect to the ground it decided violated (d), an (e) hearing might be needed to consider other related parts of the whole constitutional claim (*e. g.*, whether the counsel's "inadequate" assistance was also prejudicial). There may be other situations in which an (e) hearing is needed as well.

In this case, however, we cannot say whether an (e) hearing is needed until we know whether the state court, in rejecting Pinholster's claim on the basis presented to that state court, violated (d). (In my view, the lower courts' analysis in respect to this matter is inadequate.)

There is no role in (d) analysis for a habeas petitioner to introduce evidence that was not first presented to the state courts. But that does not mean that Pinholster is without recourse to present new evidence. He can always return to state court presenting new evidence not previously presented. If the state court again denies relief, he might be able to return to federal court to make claims related to the latest rejection, subject to AEDPA's limitations on successive petitions. See § 2244.

I am not trying to predict the future course of these proceedings. I point out only that, in my view, AEDPA is not designed to take necessary remedies from a habeas petitioner but to give the State a first opportunity to consider most matters and to insist that federal courts properly respect state-court determinations.

JUSTICE SOTOMAYOR, with whom JUSTICE GINSBURG and JUSTICE KAGAN join as to Part II, dissenting.

Some habeas petitioners are unable to develop the factual basis of their claims in state court through no fault of their own. Congress recognized as much when it enacted the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214, and permitted therein the introduction of new evidence in federal habeas proceedings in certain limited circumstances. See 28 U. S. C. § 2254(e)(2). Under the Court's novel interpretation of § 2254(d)(1), however, federal courts must turn a blind eye to new evidence in deciding whether a petitioner has satisfied § 2254(d)(1)'s threshold obstacle to federal habeas relief—even when it is clear that the petitioner would be entitled to relief in light of that evidence. In reading the statute to "compe[l]" this harsh result, *ante*, at 182, the Court ignores a key textual difference between §§ 2254(d)(1) and 2254(d)(2) and discards the previous understanding in our precedents that new evidence can, in fact, inform the § 2254(d)(1) inquiry. I therefore dissent from the Court's first holding.

I also disagree with the Court that, even if the § 2254(d)(1) analysis is limited to the state-court record, respondent Scott Pinholster failed to demonstrate that the California Supreme Court's decision denying his ineffective-assistance-of-counsel claim was an unreasonable application of *Strickland* v. *Washington*, 466 U. S. 668 (1984). There is no reason for the majority to decide whether the § 2254(d)(1) analysis is limited to the state-court record because Pinholster satisfied § 2254(d)(1) on either the state- or federal-court record.

I

The Court first holds that, in determining whether a state-court decision is an unreasonable application of Supreme Court precedent under § 2254(d)(1), "review . . . is limited to the record that was before the state court that adjudicated the claim on the merits." *Ante*, at 181. New evidence adduced at a federal evidentiary hearing is now irrelevant to determining whether a petitioner has satisfied § 2254(d)(1). This holding is unnecessary to promote AEDPA's purposes, and it is inconsistent with the provision's text, the structure of the statute, and our precedents.

A

To understand the significance of the majority's holding, it is important to view the issue in context. AEDPA's entire structure—which gives state courts the opportunity to decide factual and legal questions in the first instance—ensures that evidentiary hearings in federal habeas proceedings are very rare. See N. King, F. Cheesman, & B. Ostrom, Final Technical Report: Habeas Litigation in U. S. District Courts 35–36 (2007) (evidentiary hearings under AEDPA occur in 0.4 percent of noncapital cases and 9.5 percent of capital cases). Even absent the new restriction created by today's holding, AEDPA erects multiple hurdles to a state prisoner's ability to introduce new evidence in a federal habeas proceeding.

First, "[u]nder the exhaustion requirement, a habeas petitioner challenging a state conviction must first attempt to present his claim in state court." *Harrington* v. *Richter*, 562 U. S. 86, 103 (2011); see also § 2254(b)(1)(A). With certain narrow exceptions, federal courts cannot consider a claim at all, let alone accept new evidence relevant to the claim, if it has not been exhausted in state court.[1] The exhaustion requirement thus reserves to state courts the first opportunity to resolve factual disputes relevant to a state prisoner's claim. See *O'Sullivan* v. *Boerckel*, 526 U. S. 838, 845 (1999).

Second, the exhaustion requirement is "complement[ed]" by the standards set forth in § 2254(d). *Harrington*, 562 U. S., at 103. Under this provision, a federal court may not grant habeas relief on any "claim that was adjudicated on the merits in State court proceedings" unless the adjudication

> "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> "(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

These standards "control whether to grant habeas relief." *Schriro* v. *Landrigan*, 550 U. S. 465, 474 (2007). Accordingly, we have said, if the factual allegations a petitioner seeks to prove at an evidentiary hearing would not satisfy these standards, there is no reason for a hearing. See *id.*, at 481. In such a case, the district court may exercise its "discretion to deny an evidentiary hearing." *Ibid.;* see also *infra*, at 218–219. This approach makes eminent sense: If district courts held evidentiary hearings without first asking

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[1] Relatedly, a state prisoner must, as a general matter, properly exhaust his federal claims in state court to avoid having his claim defaulted on procedural grounds. See *Coleman* v. *Thompson*, 501 U. S. 722, 750 (1991).

whether the evidence the petitioner seeks to present would satisfy AEDPA's demanding standards, they would needlessly prolong federal habeas proceedings.

Third, even when a petitioner seeks to introduce new evidence that would entitle him to relief, AEDPA prohibits him from doing so, except in a narrow range of cases, unless he "made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court." *Williams* v. *Taylor*, 529 U. S. 420, 435 (2000) *(Michael Williams)*. Thus, § 2254(e)(2) provides:

> "If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—
>
> "(A) the claim relies on—
>
> "(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> "(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> "(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense."

In *Michael Williams*, we construed the opening clause of this provision—which triggers the bar on evidentiary hearings—to apply when "there is lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel."[2] *Id.*, at 432. AEDPA thus bars an evidentiary hearing for a nondiligent petitioner unless the petitioner can

[2] Section 2254(e)(2) also governs an attempt to obtain relief "based on new evidence without an evidentiary hearing." *Holland* v. *Jackson*, 542 U. S. 649, 653 (2004) *(per curiam)* (emphasis deleted).

satisfy both §§ 2254(e)(2)(A) and (B), which few petitioners can. Section 2254(e)(2) in this way incentivizes state petitioners to develop the factual basis of their claims in state court.

To the limited extent that federal evidentiary hearings are available under AEDPA, they ensure that petitioners who diligently developed the factual basis of their claims in state court, discovered new evidence after the state-court proceeding, and cannot return to state court retain the ability to access the Great Writ. See *ante*, at 203–204 (ALITO, J., concurring in part and concurring in judgment). "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.'" *Holland* v. *Florida*, 560 U. S. 631, 649 (2010) (quoting *Slack* v. *McDaniel*, 529 U. S. 473, 483 (2000)). Allowing a petitioner to introduce new evidence at a hearing in the limited circumstance permitted by § 2254(e)(2) does not upset the balance that Congress struck in AEDPA between the state and federal courts. By construing § 2254(d)(1) to do the work of other provisions in AEDPA, the majority has subverted Congress' careful balance of responsibilities. It has also created unnecessarily a brandnew set of procedural complexities that lower courts will have to confront.[3]

B

The majority's interpretation of § 2254(d)(1) finds no support in the provision's text or the statute's structure as a whole.

1

Section 2254(d)(1) requires district courts to ask whether a state-court adjudication on the merits "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by

[3] See, *e. g.*, nn. 5, 7, and 13, *infra.*

the Supreme Court of the United States." Because this provision uses "backward-looking language"—*i. e.*, past-tense verbs—the majority believes that it limits review to the state-court record. *Ante*, at 182. But both §§ 2254(d)(1) and 2254(d)(2) use "backward-looking language," and § 2254(d)(2)—unlike § 2254(d)(1)—expressly directs district courts to base their review on "the evidence presented in the State court proceeding." If use of the past tense were sufficient to indicate Congress' intent to restrict analysis to the state-court record, the phrase "in light of the evidence presented in the State court proceeding" in § 2254(d)(2) would be superfluous. The majority's construction of § 2254(d)(1) fails to give meaning to Congress' decision to include language referring to the evidence presented to the state court in § 2254(d)(2). Cf. *Bates* v. *United States*, 522 U. S. 23, 29–30 (1997) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion" (internal quotation marks and brackets omitted)).

Ignoring our usual "reluctan[ce] to treat statutory terms as surplusage in any setting," *TRW Inc.* v. *Andrews*, 534 U. S. 19, 31 (2001) (internal quotation marks omitted), the majority characterizes the phrase appearing in § 2254(d)(2) as mere "clarifying language," *ante*, at 185, n. 7. It speculates that "[t]he omission of clarifying language from § 2254(d)(1) just as likely reflects Congress' belief that such language was unnecessary as it does anything else." *Ibid.* The argument that this phrase is merely "clarifying" might have more force, however, had Congress included this phrase in § 2254(d)(1) but not in § 2254(d)(2). As between the two provisions, § 2254(d)(2)—which requires review of the state court's "determination of the facts"—more logically depends on the facts presented to the state court. Because this provision needs less clarification on this point than

§ 2254(d)(1), it is all the more telling that Congress included this phrase in § 2254(d)(2) but elected to exclude it from § 2254(d)(1).

Unlike my colleagues in the majority, I refuse to assume that Congress simply engaged in sloppy drafting. The inclusion of this phrase in § 2254(d)(2)—coupled with its omission from § 2254(d)(2)'s partner provision, § 2254(d)(1)—provides strong reason to think that Congress did not intend for the § 2254(d)(1) analysis to be limited categorically to "the evidence presented in the State court proceeding."

2

The " 'broader context of the statute as a whole,' " *ante*, at 182 (quoting *Robinson* v. *Shell Oil Co.*, 519 U. S. 337, 341 (1997)), reinforces this conclusion. In particular, Congress' decision to include in AEDPA a provision, § 2254(e)(2), that permits federal evidentiary hearings in certain circumstances provides further evidence that Congress did not intend to limit the § 2254(d)(1) inquiry to the state-court record in every case.

We have long recognized that some diligent habeas petitioners are unable to develop all of the facts supporting their claims in state court.[4] As discussed above, in enacting AEDPA, Congress generally barred evidentiary hearings for petitioners who did not "exercise diligence in pursuing their claims" in state court. *Michael Williams*, 529 U. S., at 436;

[4] See, *e. g.*, *Michael Williams*, 529 U. S. 420, 432 (2000) (noting that diligent efforts to develop the facts might be "thwarted, for example, by the conduct of another or by happenstance"); *id.*, at 434 (noting that the prosecution might have "concealed the facts" supporting "a claim which was pursued with diligence"); *Townsend* v. *Sain*, 372 U. S. 293, 313 (1963) (requiring federal courts to grant evidentiary hearings when, *inter alia*, "the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing" or "there is a substantial allegation of newly discovered evidence"), overruled in part on other grounds by *Keeney* v. *Tamayo-Reyes*, 504 U. S. 1, 5 (1992).

see also § 2254(e)(2). Importantly, it did not impose any express limit on evidentiary hearings for petitioners who had been diligent in state court. See *id.*, at 436 ("[T]he statute does not equate prisoners who exercise diligence in pursuing their claims with those who do not"). For those petitioners, Congress left the decision to hold a hearing "to the sound discretion of district courts." *Landrigan*, 550 U. S., at 473.

Faced with situations in which a diligent petitioner offers additional evidence in federal court, the courts of appeals have taken two approaches to applying § 2254(d)(1). Some courts have held that when a federal court admits new evidence supporting a claim adjudicated on the merits in state court, § 2254(d)(1) does not apply at all and the federal court may review the claim *de novo*. See *ante*, at 184; *Holland* v. *Jackson*, 542 U. S. 649, 653 (2004) *(per curiam);* see, *e. g.*, *Winston* v. *Kelly*, 592 F. 3d 535, 555–556 (CA4 2010). I agree with the majority's rejection of this approach. See *ante*, at 185. It would undermine the comity principles motivating AEDPA to decline to defer to a state-court adjudication of a claim because the state court, through no fault of its own, lacked all the relevant evidence.[5]

Other Courts of Appeals, including the court below, have struck a more considered balance. These courts have held that § 2254(d)(1) continues to apply but that new evidence properly presented in a federal hearing is relevant to the

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[5] Of course, § 2254(d)(1) only applies when a state court has adjudicated a claim on the merits. There may be situations in which new evidence supporting a claim adjudicated on the merits gives rise to an altogether different claim. See, *e. g.*, Reply Brief for Petitioner 10–11 (evidence withheld by the prosecutor relating to one claim may give rise to a separate claim under *Brady* v. *Maryland*, 373 U. S. 83 (1963)). The majority opinion does not foreclose this possibility.

I assume that the majority does not intend to suggest that review is limited to the state-court record when a petitioner's inability to develop the facts supporting his claim was the fault of the state court itself. See generally Tr. of Oral Arg. in *Bell* v. *Kelly*, O. T. 2008, No. 07–1223.

reasonableness of the state-court decision. See *Pinholster* v. *Ayers*, 590 F. 3d 651, 668 (CA9 2009) (en banc) ("If the evidence is admissible under *Michael Williams* or § 2254(e)(2), and if it does not render the petitioner's claims unexhausted . . . , then it is properly considered in evaluating whether the legal conclusion reached by the state habeas court was a reasonable application of Supreme Court law"); accord, *Wilson* v. *Mazzuca*, 570 F. 3d 490, 500 (CA2 2009); *Pecoraro* v. *Walls*, 286 F. 3d 439, 443 (CA7 2002); *Valdez* v. *Cockrell*, 274 F. 3d 941, 952 (CA5 2001). This approach accommodates the competing goals, reflected in §§ 2254(d) and 2254(e)(2), of according deference to reasonable state-court decisions and preserving the opportunity for diligent petitioners to present evidence to the federal court when they were unable to do so in state court.

The majority charts a third, novel course that, so far as I am aware, no court of appeals has adopted: Section 2254(d)(1) continues to apply when a petitioner has additional evidence that he was unable to present to the state court, but the district court cannot consider that evidence in deciding whether the petitioner has satisfied § 2254(d)(1). The problem with this approach is its potential to bar federal habeas relief for diligent habeas petitioners who cannot present new evidence to a state court.

Consider, for example, a petitioner who diligently attempted in state court to develop the factual basis of a claim that prosecutors withheld exculpatory witness statements in violation of *Brady* v. *Maryland*, 373 U. S. 83 (1963). The state court denied relief on the ground that the withheld evidence then known did not rise to the level of materiality required under *Brady*. Before the time for filing a federal habeas petition has expired, however, a state court orders the State to disclose additional documents the petitioner had timely requested under the State's public records Act. The disclosed documents reveal that the State withheld other exculpatory witness statements, but state law would not per-

mit the petitioner to present the new evidence in a successive petition.[6]

Under our precedent, if the petitioner had not presented his *Brady* claim to the state court at all, his claim would be deemed defaulted, and the petitioner could attempt to show cause and prejudice to overcome the default. See *Michael Williams*, 529 U. S., at 444; see also n. 1, *supra.* If, however, the new evidence merely bolsters a *Brady* claim that was adjudicated on the merits in state court, it is unclear how the petitioner can obtain federal habeas relief after today's holding. What may have been a reasonable decision on the state-court record may no longer be reasonable in light of the new evidence. See *Kyles* v. *Whitley*, 514 U. S. 419, 436 (1995) (materiality of *Brady* evidence is viewed "collectively, not item by item"). Because the state court adjudicated the petitioner's *Brady* claim on the merits, § 2254(d)(1) would still apply. Yet, under the majority's interpretation of § 2254(d)(1), a federal court is now prohibited from considering the new evidence in determining the reasonableness of the state-court decision.

The majority's interpretation of § 2254(d)(1) thus suggests the anomalous result that petitioners with new claims based on newly obtained evidence can obtain federal habeas relief if they can show cause and prejudice for their default but petitioners with newly obtained evidence supporting a claim adjudicated on the merits in state court cannot obtain federal habeas relief if they cannot first satisfy § 2254(d)(1) without the new evidence. That the majority's interpretation leads to this anomaly is good reason to conclude that its interpretation is wrong. See *Keeney* v. *Tamayo-Reyes*, 504 U. S. 1, 7–8 (1992) ("[I]t is . . . irrational to distinguish between failing to properly assert a federal claim in state court and failing in state court to properly develop such a claim").

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[6] See, *e. g., id.*, at 37–38 (statement by counsel for the respondent warden that Virginia law bars all successive habeas applications, even in cases where the petitioner has new evidence).

The majority responds to this anomaly by suggesting that my hypothetical petitioner "may well [have] a new claim."[7] *Ante*, at 186, n. 10. This suggestion is puzzling. New evidence does not usually give rise to a new claim; it merely provides additional proof of a claim already adjudicated on the merits.[8] The majority presumably means to suggest that the petitioner might be able to obtain federal-court review of his new evidence if he can show cause and prejudice for his failure to present the "new" claim to a state court. In that scenario, however, the federal court would review the purportedly "new" claim *de novo*. The majority's approach thus threatens to replace deferential review of new evidence under § 2254(d)(1) with *de novo* review of new evidence in the form of "new" claims.[9] Because it is unlikely that Congress intended *de novo* review—the result suggested by the majority's opinion—it must have intended for district courts to consider newly discovered evidence in conducting the § 2254(d)(1) analysis.

The majority's reading of § 2254(d)(1) appears ultimately to rest on its understanding that state courts must have the first opportunity to adjudicate habeas petitioners' claims. See *ante*, at 182 ("It would be contrary to [AEDPA's exhaustion requirement] to allow a petitioner to overcome an adverse state-court decision with new evidence introduced in a federal habeas court and reviewed by that court in

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[7] The majority declines, however, to provide any guidance to the lower courts on how to distinguish claims adjudicated on the merits from new claims.

[8] Even if it can fairly be argued that my hypothetical petitioner has a new claim, the majority fails to explain how a diligent petitioner with new evidence supporting an existing claim can present his new evidence to a federal court.

[9] In this vein, it is the majority's approach that "would not take seriously AEDPA's requirement that federal courts defer to state-court decisions." *Ante*, at 183, n. 3.

the first instance effectively *de novo*").[10] JUSTICE BREYER takes the same position. See *ante*, at 206 (opinion concurring in part and dissenting in part) (AEDPA is designed "to give the State a first opportunity to consider most matters"). I fully agree that habeas petitioners must attempt to present evidence to state courts in the first instance, as does JUSTICE ALITO, see *ante*, at 203–204. Where I disagree with the majority is in my understanding that § 2254(e)(2) already accomplishes this result. By reading § 2254(d)(1) to do the work of § 2254(e)(2), the majority gives § 2254(e)(2) an unnaturally cramped reading. As a result, the majority either has foreclosed habeas relief for diligent petitioners who, through no fault of their own, were unable to present exculpatory evidence to the state court that adjudicated their claims or has created a new set of procedural complexities for the lower courts to navigate to ensure the availability of the Great Writ for diligent petitioners.

3

These considerations lead me to agree with the Courts of Appeals that have concluded that a federal court should assess the reasonableness of a state court's application of clearly established federal law under § 2254(d)(1) in light of evidence properly admitted in a federal evidentiary hearing. There is nothing "strange" about this approach. *Ante*, at 182. Under § 2254(d)(1), federal courts routinely engage in analysis that the state court itself might never have conducted or did not conduct. For example, when a state court summarily denies a claim without explanation, as the California Supreme Court did here, district courts must deny habeas relief pursuant to § 2254(d)(1) so long as "there is any reasonable argument" supporting the denial of the petitioner's

[10] Under my reading of § 2254(d)(1), of course, the district court would review properly admitted new evidence through the deferential lens of § 2254(d)(1), not *de novo*.

claim. *Harrington*, 562 U. S., at 105. We likewise ask whether a state-court decision unreasonably applied clearly established federal law when the state court issued a reasoned decision but failed to cite federal law altogether. See *Early* v. *Packer*, 537 U. S. 3, 8 (2002) *(per curiam)*. Determining whether a state court could reasonably have denied a petitioner relief in light of newly discovered evidence is not so different than determining whether there is any reasonable basis for a state court's unreasoned decision.

Admittedly, the text of § 2254(d)(1), standing alone, does not compel either reading of that provision. But construing § 2254(d)(1) to permit consideration of evidence properly introduced in federal court best accords with the text of § 2254(d)(2) and AEDPA's structure as a whole. By interpreting § 2254(d)(1) to prevent *nondiligent* petitioners from gaming the system—the very purpose of § 2254(e)(2)—the majority potentially has put habeas relief out of reach for *diligent* petitioners with meritorious claims based on new evidence.

C

The majority claims that its holding is "consistent" with our case law. *Ante*, at 182. Quite the opposite is true: Our cases reflect our previous understanding that evidence properly admitted pursuant to § 2254(e)(2) is relevant to the § 2254(d)(1) analysis.

In *Landrigan*, JUSTICE THOMAS, the author of today's opinion, confirmed this understanding of the interplay between §§ 2254(d)(1) and 2254(e)(2). As noted above, we admonished district courts to consider whether a petitioner's allegations, if proved true, would satisfy § 2254(d) in determining whether to grant a hearing. After highlighting the deference owed to state courts under §§ 2254(d) and 2254(e)(1), we stated:

> "In deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing

> could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief. Because the deferential standards prescribed by § 2254 control whether to grant habeas relief, a federal court must take into account those standards in deciding whether an evidentiary hearing is appropriate." 550 U. S., at 474 (citation omitted).

By instructing district courts to consider the § 2254(d) standards in deciding whether to grant a hearing, we must have understood that the evidence admitted at a hearing could be considered in the § 2254(d)(1) analysis. See Brief for American Civil Liberties Union as *Amicus Curiae* 9 ("The whole point of *Landrigan*'s admonition that the court must decide whether to hold a hearing with an eye on § 2254(d)(1) is that some proffers of evidence will not justify federal fact-finding in view of § 2254(d)(1), but that other proffers of proof *will*").[11]

In *Michael Williams*, the warden argued that § 2254(e)(2) bars an evidentiary hearing whenever a petitioner was unable to develop the factual record in state court, "whether or not through his own fault or neglect." 529 U. S., at 430. Under the warden's argument, a petitioner who did not develop the record in state court, whatever the reason, would be barred from presenting evidence to the federal court. In rejecting that argument, we observed:

> "A prisoner who developed his claim in state court and can prove 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,' is not barred from obtaining relief

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[11] The majority overlooks this aspect of *Landrigan*. It quotes *Landrigan*'s observation that "if the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing," 550 U. S., at 474, but that statement has no bearing on the question decided by the Court today.

> by § 2254(d)(1). If the opening clause of § 2254(e)(2) covers a request for an evidentiary hearing on a claim which was pursued with diligence but remained undeveloped in state court because, for instance, the prosecution concealed the facts, a prisoner lacking clear and convincing evidence of innocence could be barred from a hearing on the claim *even if he could satisfy § 2254(d)*." *Id.*, at 434 (citation omitted; emphasis added).

A petitioner in the latter situation would almost certainly be unable to "satisfy § 2254(d)" without introducing the concealed facts in federal court. This passage thus reflects our understanding that, in some circumstances, a petitioner might need an evidentiary hearing in federal court to prove the facts necessary to satisfy § 2254(d). To avoid foreclosing habeas relief for such petitioners, we concluded that § 2254(e)(2) could not bear the warden's "harsh reading," which essentially would have held petitioners strictly at fault for their inability to develop the facts in state court. *Ibid.* The majority today gives an equally "harsh reading" to § 2254(d)(1) to achieve the result we rejected in *Michael Williams*.[12]

None of the other cases cited by the majority supports its result. In *Williams* v. *Taylor*, 529 U. S. 362 (2000) *(Terry Williams)*, we interpreted § 2254(d)(1) to ask whether the state-court decision "identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.*,

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[12] The majority claims that *Michael Williams* supports its reading of § 2254(d)(1). With respect to one claim asserted by the petitioner, we observed that "[t]he Court of Appeals rejected this claim on the merits under § 2254(d)(1), so it is unnecessary to reach the question whether § 2254(e)(2) would permit a hearing on the claim." 529 U. S., at 444. That statement merely reflects the fact that the Court of Appeals had rejected that claim under § 2254(d)(1) without considering whether the petitioner was entitled to a hearing because the petitioner had not requested a hearing on that claim. See *Williams* v. *Taylor*, 189 F. 3d 421, 425, 428–429 (CA4 1999).

at 413. However, we had no reason to decide whether the § 2254(d)(1) inquiry was limited to the state-court record, as the District Court did not hold an evidentiary hearing in that case. See *id.*, at 372.

In *Holland* v. *Jackson*, we stated that "we have made clear that whether a state court's decision was unreasonable must be assessed in light of the record the court had before it." 542 U. S., at 652. In the next sentence, however, we observed that the evidence at issue "could have been the subject of an evidentiary hearing by the District Court, but only if respondent was not at fault in failing to develop that evidence in state court." *Id.*, at 652–653. We proceeded to find that the evidence was not properly admitted under § 2254(e)(2) *before* concluding that the Court of Appeals had erred in its § 2254(d)(1) analysis. *Id.*, at 653; see also *Bradshaw* v. *Richey*, 546 U. S. 74, 79 (2005) *(per curiam)*.

In sum, our cases reflect our recognition that it is sometimes appropriate to consider new evidence in deciding whether a petitioner can satisfy § 2254(d)(1). In reading our precedent to require the opposite conclusion, the majority disregards the concerns that motivated our decision in *Michael Williams:* Some petitioners, even if diligent, may be unable to develop the factual record in state court through no fault of their own. We should not interpret § 2254(d)(1) to foreclose these diligent petitioners from accessing the Great Writ when the state court will not consider the new evidence and could not reasonably have reached the same conclusion with the new evidence before it.

II

I also disagree with the Court's conclusion that the Court of Appeals erred in holding that Pinholster had satisfied § 2254(d)(1) on the basis of the state-court record.[13]

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[13] I agree with the majority that the state-court record in this case consists of "the 'allegations of [the] habeas corpus petition . . . and . . . any matter of record pertaining to the case.' " *Ante*, at 188, n. 12 (quoting *In re*

A

The majority omits critical details relating to the performance of Pinholster's trial counsel, the mitigating evidence they failed to discover, and the history of these proceedings. I therefore highlight several aspects of the facts and history of this case.

1

After the jury returned a guilty verdict, the court instructed the jury to return six days later for the penalty phase. This prompted discussion at sidebar regarding whether the State had provided notice of its intent to offer aggravating evidence. Pinholster's court-appointed attorney, Wilbur Dettmar, argued that the State should be precluded from offering aggravating evidence:

> "I am not presently prepared to offer anything by way of mitigation. If I was going to proceed on mitigation, the people would have the right to rebuttal with or without notice.
>
> "I took the position, since the people had not given notice, *I had not prepared any evidence by way of mitigation.* I would submit it on that basis." 52 Reporter's Tr. 7250 (hereinafter Tr.) (emphasis added).

Hochberg, 2 Cal. 3d 870, 874, n. 2, 471 P. 2d 1, 3–4, n. 2 (1970); some internal quotation marks omitted).

The majority does not decide which of the two state-court decisions should be reviewed. See *ante*, at 187, n. 11. One *amicus* argues that Pinholster must prove that *both* state-court decisions involved an unreasonable application of law. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* 26. This argument is based on *amicus*' understanding that the California Supreme Court rejected the second petition as successive and, alternatively, on the merits. The State has not argued, however, that the second ruling rests on a procedural ground. See *ante*, at 178, n. 2. When a state court denies two petitions on the merits and the difference between the petitions is that the second petition contains additional evidence supporting the petitioner's claim, I see no reason why the petitioner must independently show that the first decision was unreasonable.

Undoubtedly anticipating that counsel might need additional time to prepare an adequate mitigation defense, the court asked Dettmar whether a continuance would be helpful in the event it ruled against him. He declined the offer on the spot, stating: "I think we would probably still go forward on Monday. Clearly the one person that comes to mind is the defendant's mother. How much beyond that I don't know. I don't think the pa[ss]age of time would make a great deal of difference." *Id.*, at 7257–7258. After hearing testimony, the court denied Pinholster's motion to preclude aggravating evidence.

At the penalty phase, defense counsel called only one witness: Pinholster's mother, Burnice Brashear. Brashear testified that Pinholster "never really wanted for anything at home too much" and "had everything normally materialwise that most people have." *Id.*, at 7395. She said that Pinholster was "different" from his siblings, whom she characterized as "basically very good children." *Id.*, at 7401–7402. Pinholster, she said, had a "friendly" relationship with his stepfather, although his stepfather "sometimes would lose his temper" with Pinholster, who "had a mind of his own." *Id.*, at 7392–7393; see also *id.*, at 7393 (stating that his stepfather was "at times" "abusive or near abusive").

Brashear provided brief testimony regarding Pinholster's childhood. She described two car accidents—one when she ran over him in the driveway and one when he went through the windshield. *Id.*, at 7389–7391. She stated that he started failing school in the first grade and that the school eventually "sent him to [an] educationally handicapped class." *Id.*, at 7393–7394. When Pinholster was 10, a psychologist recommended placing him in a mental institution, but she "didn't think he was that far gone." *Id.*, at 7395. A few years later, she testified, he spent six months in a state hospital for emotionally handicapped children. *Id.*, at 7402.

According to Brashear, Pinholster had suffered from epilepsy since age 18, when he was beaten in jail. *Id.*, at 7397.

She said that her family doctor, Dr. Dubin, had given him medication to treat the epilepsy. *Ibid.* Brashear also suggested that Pinholster did not have long to live, stating that he had "a chip in his head floating around" and that "they don't think—he won't be here very much longer anyway."[14] *Ibid.*

In closing argument, the prosecutor ridiculed Brashear's testimony. See 53 *id.*, at 7442 ("She said his stepfather disciplined him. So what? I am sure you have all disciplined your children. I was disciplined myself"); *ibid.* ("He was run over by a car when he was three years old. That's very unfortunate. There is no evidence of any brain damage. A lot of children get dropped, fall from their cribs or whatever"); *id.*, at 7444–7445 ("I submit to you that if this defendant truly had epilepsy, . . . a doctor would have been brought in to tell you that. Medical records, something"). The prosecutor also highlighted Brashear's testimony about Pinholster's stable home environment, arguing: "He came from a good home. You heard that he was not a deprived child. Had many things going for him, probably more than many children." *Id.*, at 7442.

Notwithstanding the meager mitigation case presented by Pinholster's counsel, it took the jury two days to reach a decision to sentence Pinholster to death. His counsel later moved to modify the sentence to life imprisonment. In denying the motion, the trial judge stated: "The evidence which the defense offered concerning the defendant's extenuation was merely some testimony from his mother that was not persuasive. His mother did not, in the court's opinion, present any evidence which the court would find to be a moral justification or extenuation for his conduct. No witnesses supplied such evidence." 54 *id.*, at 7514.

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[14] The judge instructed the jury to disregard this testimony upon motion by the prosecutor, but the prosecutor then discussed the testimony in her closing argument. See *infra*, at 237.

2

After his conviction and sentence were affirmed on appeal, Pinholster filed a habeas petition in the California Supreme Court alleging, among other things, that his counsel had "unreasonably failed to investigate, prepare and present available mitigating evidence during penalty phase." Record ER–103.

Pinholster's state-court petition included 121 exhibits. In a series of declarations, his trial attorney Harry Brainard (who had by then been disbarred) confirmed what Dettmar had forthrightly told the trial court: Brainard and Dettmar neither expected nor prepared to present mitigation evidence.[15] See *id.*, at ER–333 ("Mr. Dettmar and I did not prepare a case in mitigation. We felt there would be no penalty phase hearing inasmuch as we did not receive written notice of evidence in aggravation pursuant to Penal Code §190.3"). Brainard further confirmed what was apparent from the mitigation case they eventually put on: They conducted virtually no mitigation investigation. See *id.*, at ER–182 ("I have no recollection of Mr. Dettmar having secured or reviewed any of Scott's medical records, nor did I see any of Scott's medical records. So far as I recollect, neither Mr. Dettmar nor myself interviewed any of Scott's previous medical providers"); *id.*, at ER–183 ("I do not recall interviewing or attempting to interview Scott's family members or any other persons regarding penalty phase testimony, except Mrs. Brashears *[sic]*"); *ibid.* ("I have no recollection of seeing or attempting to secure Scott's school records, juvenile records, medical records, or records of prior placements"); *ibid.* ("I have no recollection of interviewing or attempting to interview Scott's former school teachers, counselors, or juvenile officers").[16]

[15] By the time of Pinholster's state-court habeas petition, Dettmar was deceased.

[16] Counsel's billing records, which were before the California Supreme Court as part of the trial record, confirmed Brainard's recollection.

Statements by relatives (none of whom trial counsel had attempted to interview regarding Pinholster's background) and documentary evidence revealed that the picture of Pinholster's family life painted by his mother at trial was false. Pinholster was "raised in chaos and poverty." *Id.*, at ER–312. A relative remembered seeing the children mix together flour and water in an attempt to get something to eat. Pinholster's stepfather beat him several times a week, including at least once with a two-by-four board. "There was so much violence in [the] home" that Pinholster's brother "dreaded coming home each day." *Id.*, at ER–313. Pinholster's half sister was removed from the home as a result of a beating by his stepfather.

Documentary evidence showed, directly contrary to Brashear's trial testimony, that Pinholster's siblings had very troubled pasts. Pinholster's elder brother was arrested for armed burglary, robbery, and forcible rape of a 14-year-old with a deadly weapon. While in custody, he was diagnosed as "catatonic-like" and "acutely psychotic, probably suffering some type of schizophrenia." *Id.*, at ER–219, ER–224. He later committed suicide.[17] Pinholster's half sister, a recovering alcoholic, had been made a ward of the juvenile court for prostitution and forcible sexual battery on a 14-year-old.

Pinholster's petition and exhibits described a long history of emotional disturbance and neurological problems. A former schoolteacher stated that, as a child, Pinholster "seemed incapable of relating either to his peers or to adults," that "[i]t was even hard to maintain eye contact with him," and that "[h]is hyperactivity was so extreme that [she] formed the opinion it probably had an organic base." *Id.*, at ER–231. School records revealed that he "talk[ed] to self continuously," had "many grimaces," fought in his sleep, and could

[17] According to Pinholster's half sister, "The death of our brother Alvin was a severe emotional blow to me and to Scott. I believed Scott's substance abuse (heroin) arose following and as a result of Alvin's death." Record ER–314.

"control self for only 1 hour per day." *Id.*, at ER–230, ER–233. He "show[ed] progressive deterioration each semester since Kindergarten." *Id.*, at ER–230. School officials recommended placement in a school for emotionally handicapped students and referral to a neurologist. At age 9, he had an abnormal EEG, revealing "an organic basis for his behavior." *Id.*, at ER–157, ER–234. Just months before the homicides, a doctor recommended placement in the Hope Psychiatric Institute, but this did not occur.

This and other evidence attached to the petition was summarized in a declaration by Dr. George Woods. Dr. Woods opined that Pinholster "suffer[ed] from severe and long standing seizure disorders," *id.*, at ER–156, that his childhood head traumas "may have been the precipitating factors for [his] seizure disorder," *id.*, at ER–157, and that he suffered from bipolar mood disorder. He pointed to trial testimony that immediately before the burglary on the night of the homicides, Pinholster announced that he "'ha[d] a message from God'"—which Dr. Woods believed to reflect "[a]uditory hallucinations" and "severe psychosis." *Id.*, at ER–169. He concluded that at the time of the homicides Pinholster "was suffering from bipolar mood disorder with psychotic ideation and was suffering a complex partial seizure." *Id.*, at ER–170. He also observed that Pinholster's "grossly dysfunctional family, the abuse he received as a child, his history of suffering from substantial seizure and mood disorders, his frequently untreated psychiatric and psychological disabilities and his educational handicaps were relevant circumstances which would extenuate the gravity of the crime." *Id.*, at ER–171.

On the basis of Pinholster's submission, the California Supreme Court denied Pinholster's ineffective-assistance-of-counsel claim.

Pinholster then filed a habeas petition in Federal District Court. He included an additional exhibit: a declaration by Dr. John Stalberg, a psychiatrist who had hastily examined

Pinholster and produced a two-page report in the middle of the original trial.[18] After reviewing the new material collected by Pinholster's habeas counsel, Dr. Stalberg stated that the available evidence showed a familial history of "severe psychiatric disorders," "a history of seizure disorders of unknown etiology," "repeated head traumas," "an abnormal EEG," and "evidence of mental disturbance during Mr. Pinholster's childhood and some degree of brain damage." *Id.*, at ER–493. He also opined that "there [was] voluminous mitigating evidence which includes a childhood of physical abuse, emotional neglect, and a family history of mental illness and criminal behavior." *Id.*, at ER–494.

The District Court stayed the federal proceedings while Pinholster sought state-court review of claims the District Court deemed unexhausted. Pinholster's second habeas submission to the California Supreme Court included Stalberg's declaration. That court summarily denied Pinholster's petition on the merits.

Pinholster returned to Federal District Court and filed an amended petition. After an evidentiary hearing, the District Court concluded that Pinholster had demonstrated deficient performance and prejudice under *Strickland*.[19] The Ninth Circuit, sitting en banc, affirmed. 590 F. 3d 651.

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[18] Counsel had arranged for Dr. Stalberg to examine Pinholster in the middle of his original trial. The only documents they provided to him were police reports relating to the case and a 1978 probation report. In a two-page report that focused primarily on Pinholster's mental state at the time of the offenses, Dr. Stalberg concluded that Pinholster had "psychopathic personality traits." *Id.*, at ER–187.

[19] The District Court based its decision on the evidence adduced at an evidentiary hearing. The District Court did not apply 28 U. S. C. § 2254(d) because it thought, erroneously, that the California Supreme Court had not adjudicated Pinholster's claim on the merits. App. to Pet. for Cert. 257. For the reasons I discuss, however, the District Court could have concluded that Pinholster had satisfied § 2254(d)(1) on the basis of the state-court record alone.

B

As the majority notes, Pinholster's claim arises under *Strickland* v. *Washington*. "The benchmark for judging any claim of ineffectiveness [under *Strickland*] must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." 466 U. S., at 686. To satisfy this benchmark, a defendant must show both that "counsel's performance was deficient" and that "the deficient performance prejudiced the defense." *Id.*, at 687.

When § 2254(d)(1) applies, the question is whether "'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington*, 562 U. S., at 101 (quoting *Yarborough* v. *Alvarado*, 541 U. S. 652, 664 (2004)). When the state court rejected a *Strickland* claim on the pleadings assuming the allegations to be true, as here, see *ante*, at 188, n. 12, the federal court must ask whether "there is any reasonable argument" supporting the state court's conclusion that the petitioner's allegations did not state a claim, *Harrington*, 562 U. S., at 105. This standard is "difficult," but not impossible, "to meet." *Id.*, at 102. This case is one in which fairminded jurists could not disagree that the state court erred.

C

Under *Strickland*, "the defendant must show that counsel's representation fell below an objective standard of reasonableness," measured according to "prevailing professional norms." 466 U. S., at 688. We "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.*, at 689. When § 2254(d) applies, federal-court review is "'doubly'" deferential. *Harrington*, 562 U. S., at 105 (quoting *Knowles* v. *Mirzayance*, 556 U. S. 111, 123 (2009)). In the present AEDPA posture, "[t]he question is whether there is any reasonable

argument that counsel satisfied *Strickland*'s deferential standard." *Harrington*, 562 U. S., at 105. Here, there is none.

The majority surmises that counsel decided on a strategy "to get the prosecution's aggravation witnesses excluded for lack of notice, and if that failed, to put on Pinholster's mother." *Ante*, at 191. This is the sort of "'*post hoc* rationalization' for counsel's decisionmaking that contradicts the available evidence of counsel's actions" that courts cannot indulge. *Harrington*, 562 U. S., at 109 (quoting *Wiggins* v. *Smith*, 539 U. S. 510, 526–527 (2003)). The majority's explanation for counsel's conduct contradicts the best available evidence of counsel's actions: Dettmar's frank, contemporaneous statement to the trial judge that he "had not prepared any evidence by way of mitigation." 52 Tr. 7250. The majority's conjecture that counsel had in fact prepared a mitigation defense, based primarily on isolated entries in counsel's billing records, requires it to assume that Dettmar was lying to the trial judge.[20]

In any event, even if Pinholster's counsel had a strategic reason for their actions, that would not automatically render their actions reasonable. For example, had counsel decided their best option was to move to exclude the aggravating

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[20] The majority misleadingly cites entries showing that counsel were preparing Brashear's penalty phase testimony *after* counsel learned that the State intended to present aggravation evidence. The cited entries predating that event show only that counsel conducted about one day's worth of investigation—consisting of talking to Brashear and researching epilepsy—two months before the penalty phase. See Clerk's Tr. 798 (1.5-hour phone call to Brashear on Jan. 13); *id.*, at 864, 869 (3-hour meeting with Brashear regarding "childhood problems" on Feb. 23); *id.*, at 869 (3.5 hours for "[r]esearch re; epilepsy and conf. with nurse" on Feb. 25). There is no evidence in the records that counsel actually planned to present mitigating evidence. Indeed, their complete failure to follow up on any of the information they learned in their minimal investigation only confirms that they were not planning to present mitigating evidence. See *infra*, at 234–235.

evidence, it would have been unreasonable to forgo a mitigation investigation on the hope that the motion would be granted. With a client's life at stake, it would "flou[t] prudence," *Rompilla* v. *Beard*, 545 U. S. 374, 389 (2005), for an attorney to rely on the possibility that the court might preclude aggravating evidence pursuant to a "legal technicality" without any backup plan in place in case the court denied the motion, *ante*, at 191. No reasonable attorney would pursue such a risky strategy. I do not understand the majority to suggest otherwise.

Instead, I understand the majority's conclusion that counsel's actions were reasonable to rest on its belief that they did have a backup plan: a family-sympathy defense. In reaching this conclusion, the majority commits the same *Strickland* error that we corrected, applying § 2254(d)(1), in *Wiggins:* It holds a purportedly "tactical judgment" to be reasonable without assessing "the adequacy of the investigatio[n] supporting [that] judgmen[t]," 539 U. S., at 521. As we stated in *Strickland:*

> "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." 466 U. S., at 690–691.

We have repeatedly applied this principle since *Strickland*. See *Sears* v. *Upton*, 561 U. S. 945, 953 (2010) *(per curiam); Porter* v. *McCollum*, 558 U. S. 30, 39–40 (2009) *(per curiam);*

Wiggins, 539 U. S., at 527; *Terry Williams*, 529 U. S., at 396.[21]

As these cases make clear, the prevailing professional norms at the time of Pinholster's trial required his attorneys to "conduct a thorough investigation of the defendant's background," *ibid.* (citing 1 ABA Standards for Criminal Justice 4–4.1, commentary, p. 4–55 (2d ed. 1980) (hereinafter ABA Standards)), or "to make a reasonable decision that makes particular investigations unnecessary," *Strickland*, 466 U. S., at 691.[22] "In judging the defense's investigation, as in applying *Strickland* generally, hindsight is discounted by pegging adequacy to 'counsel's perspective at the time' investigative decisions are made, and by giving a 'heavy measure of deference to counsel's judgments.'" *Rompilla*, 545 U. S., at 381 (quoting *Strickland*, 466 U. S., at 689, 691; citation omitted). In some cases, "reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste." *Rompilla*, 545 U. S., at 383; see, *e. g.*, *Bobby* v. *Van Hook*, 558 U. S. 4, 11–12 (2009) *(per curiam); Burger* v. *Kemp*, 483 U. S. 776, 794–795 (1987). In other cases, however, *Strickland* requires further investigation.

Wiggins is illustrative of the competence we have required of counsel in a capital case. There, counsel's investigation

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[21] I do not doubt that a decision to present a family-sympathy mitigation defense might be consistent "with the standard of professional competence in capital cases that prevailed in Los Angeles in 1984" in some cases. *Ante*, at 196. My point is that even if counsel made a strategic decision to proceed with such a defense, that decision was unreasonable because it was based on an unreasonably incomplete investigation.

[22] See also 1 ABA Standards 4–4.1, commentary, at 4–55 ("Information concerning the defendant's background, education, employment record, mental and emotional stability, family relationships, and the like, will be relevant, as will mitigating circumstances surrounding the commission of the offense itself"). As we recognized in *Strickland*, the ABA Standards, though not dispositive, "are guides to determining what is reasonable." 466 U. S., at 688; see also *Wiggins* v. *Smith*, 539 U. S. 510, 524 (2003).

was limited to three sources: psychological testing, a presentencing report, and Baltimore City Department of Social Services records. 539 U. S., at 523–524. The records revealed that the petitioner's mother was an alcoholic, that he displayed emotional difficulties in foster care, that he was frequently absent from school, and that on one occasion, his mother left him alone for days without food. *Id.*, at 525. In these circumstances, we concluded, "any reasonably competent attorney would have realized that pursuing these leads was necessary to making an informed choice among possible defenses." *Ibid.* Accordingly, we held, the state court's assumption that counsel's investigation was adequate was an unreasonable application of *Strickland.* 539 U. S., at 528.[23]

This case is remarkably similar to *Wiggins.* As the majority reads the record, counsel's mitigation investigation consisted of talking to Pinholster's mother, consulting with Dr. Stalberg, and researching epilepsy.[24] *Ante*, at 192. What little information counsel gleaned from this "rudimentary" investigation, *Wiggins*, 539 U. S., at 524, would have led any reasonable attorney "to investigate further," *id.*, at 527. Counsel learned from Pinholster's mother that he attended a class for educationally handicapped children, that a psychologist had recommended placing him in a mental institution, and that he spent time in a state hospital for emotionally handicapped children. They knew that Pinholster had been diagnosed with epilepsy.

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[23] As the majority notes, see *ante*, at 196, Wiggins' trial counsel acknowledged that the investigation he conducted was inconsistent with standard practice in Maryland. See 539 U. S., at 524. We independently concluded, however, that the investigation "was *also* unreasonable in light of what counsel actually discovered in the . . . records." *Id.*, at 525 (emphasis added).

[24] The majority also posits that Brainard likely spent time preparing Pinholster's brother Terry. However, Terry averred in a declaration that Pinholster's attorneys "never asked [him] any questions relating to Scott's background or [their] family history." Record ER–313.

"[A]ny reasonably competent attorney would have realized that pursuing" the leads suggested by this information "was necessary to making an informed choice among possible defenses." *Id.*, at 525; see also *Penry* v. *Lynaugh*, 492 U. S. 302, 319 (1989) ("[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse" (internal quotation marks omitted)). Yet counsel made no effort to obtain the readily available evidence suggested by the information they learned, such as Pinholster's schooling or medical records, or to contact Pinholster's school authorities. They did not contact Dr. Dubin or the many other healthcare providers who had treated Pinholster. Put simply, counsel "failed to act while potentially powerful mitigating evidence stared them in the face." *Bobby*, 558 U. S., at 11 (citing *Wiggins*, 539 U. S., at 525).

The "impediments" facing counsel, *ante*, at 193, did not justify their minimal investigation. It is true that Pinholster was "an unsympathetic client." *Ibid.* But this fact compounds, rather than excuses, counsel's deficiency in ignoring the glaring avenues of investigation that could explain why Pinholster was the way he was. See *Sears*, 561 U. S., at 951 ("This evidence might not have made Sears any more likable to the jury, but it might well have helped the jury understand Sears, and his horrendous acts—especially in light of his purportedly stable upbringing"). Nor can Dr. Stalberg's two-page report, which was based on a very limited record and focused primarily on Pinholster's mental state at the time of the homicides, excuse counsel's failure to investigate the broader range of potential mitigating circumstances.

"The record of the actual sentencing proceedings underscores the unreasonableness of counsel's conduct by suggest-

ing that their failure to investigate thoroughly resulted from inattention, not reasoned strategic judgment." *Wiggins*, 539 U. S., at 526. Dettmar told the trial judge that he was unprepared to present any mitigation evidence. The mitigation case that counsel eventually put on can be described, at best, as "halfhearted." *Ibid.* Counsel made no effort to bolster Brashear's self-interested testimony with school or medical records, as the prosecutor effectively emphasized in closing argument. And because they did not pursue obvious leads, they failed to recognize that Brashear's testimony painting Pinholster as the bad apple in a normal, nondeprived family was false.

In denying Pinholster's claim, the California Supreme Court necessarily overlooked *Strickland*'s clearly established admonition that "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations." 466 U. S., at 690–691. As in *Wiggins*, in light of the information available to Pinholster's counsel, it is plain that "reasonable professional judgments" could not have supported their woefully inadequate investigation.[25] 466 U. S., at 691. Accordingly, the California Supreme Court could not reasonably have concluded that Pinholster had failed to allege that his counsel's investigation was inadequate under *Strickland*.

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[25] The majority chastises the Court of Appeals for "attributing strict rules to this Court's recent case law." *Ante*, at 196. I agree that courts should not interpret our cases to prescribe strict rules regarding the required scope of mitigation investigations. See *Rompilla* v. *Beard*, 545 U. S. 374, 394 (2005) (O'Connor, J., concurring) (noting "our longstanding case-by-case approach to determining whether an attorney's performance was unconstitutionally deficient under *Strickland*"). The Ninth Circuit, however, did no such thing. It appropriately gave thoughtful consideration to the guideposts contained in these cases, just as we have previously done. See, *e. g.*, *Bobby* v. *Van Hook*, 558 U. S. 4, 11–12 (2009) *(per curiam)*.

D

The majority also concludes that the California Supreme Court could reasonably have concluded that Pinholster did not state a claim of prejudice. This conclusion, in light of the overwhelming mitigating evidence that was not before the jury, is wrong. To establish prejudice, "[t]he 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." *Id.*, at 694. When a habeas petitioner challenges a death sentence, "the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.*, at 695. This inquiry requires evaluating "the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding—in reweighing it against the evidence in aggravation." *Terry Williams*, 529 U. S., at 397–398. The ultimate question in this case is whether, taking into account all the mitigating and aggravating evidence, "there is a reasonable probability that at least one juror would have struck a different balance." *Wiggins*, 539 U. S., at 537; see Cal. Penal Code Ann. § 190.4(b) (West 2008) (requiring a unanimous jury verdict to impose a death sentence).

1

Like the majority, I first consider the aggravating and mitigating evidence presented at trial. By virtue of its verdict in the guilt phase, the jury had already concluded that Pinholster had stabbed and killed the victims. As the majority states, the jury saw Pinholster "revel" in his history of burglaries during the guilt phase. *Ante*, at 198. The jury heard evidence of Pinholster's violent tendencies: He had kidnaped someone with a knife, cut a person in the arm with a razor, and had a history of hitting and kicking people. He threat-

ened to kill the State's lead witness. And he had an extensive disciplinary record in jail.

Brashear offered brief testimony that was apparently intended to be mitigating. See *supra*, at 224; see also *ante*, at 199–200.[26] However, as the prosecutor argued, Brashear was not a neutral witness. See 53 Tr. 7441 ("A mother clearly loves her son, ladies and gentlemen. Clearly not the most unbiased witness in the world"). Notwithstanding Brashear's obvious self-interest, counsel failed to offer readily available, objective evidence that would have substantiated and expanded on her testimony. Their failure to do so allowed the prosecutor to belittle her testimony in closing argument. See *supra*, at 224. And Brashear's statement that Pinholster would not be alive much longer because he had "a chip in his head floating around," 52 Tr. 7397, could only have undermined her credibility, as the prosecutor urged, see 53 *id.*, at 7447 ("Does she want you to believe sometime before he got to county jail some doctor looked in a crystal ball and said, 'In three years you are going to die'? That's ridiculous"). The trial judge was thoroughly unimpressed with Brashear's testimony. See *supra*, at 224.

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[26] The majority mischaracterizes several aspects of Brashear's testimony. Although Brashear testified that the family "didn't have lots of money," she followed up that comment by stating that Pinholster did not bring friends to the house because "it was too nice a house." 52 Tr. 7404. The prosecutor did not understand Brashear to have testified that Pinholster's childhood was deprived. See 53 *id.*, at 7442 ("You heard that he was not a deprived child"). Nor did the California Supreme Court on direct appeal. *People* v. *Pinholster*, 1 Cal. 4th 865, 910, 824 P. 2d 571, 587 (1992).

Brashear did testify that Pinholster's stepfather tried to "discipline" him and that he was "at times" "abusive or near abusive." 52 Tr. 7392–7393. She suggested, however, that Pinholster deserved the "discipline" he received. See, *e. g.*, *id.*, at 7392 ("Scott was always—he had a mind of his own"). It is unlikely the jury understood Brashear to be suggesting that her husband routinely beat Pinholster. The prosecutor did not come away with this understanding. See 53 *id.*, at 7442.

Moreover, the evidence presented in Pinholster's state-court petition revealed that Brashear distorted facts in her testimony in ways that undermined Pinholster's mitigation case. As in *Sears*, 561 U. S., at 947–948, the prosecutor used Brashear's testimony that Pinholster came from a good family against him. See 53 Tr. 7442.

In sum, counsel presented little in the way of mitigating evidence, and the prosecutor effectively used their half-hearted attempt to present a mitigation case to advocate for the death penalty. The jury nonetheless took two days to reach a decision to impose a death sentence.

2

The additional mitigating evidence presented to the California Supreme Court "adds up to a mitigation case that bears no relation" to Brashear's unsubstantiated testimony. *Rompilla*, 545 U. S., at 393.

Assuming the evidence presented to the California Supreme Court to be true, as that court was required to do, the new mitigating evidence presented to that court would have shown that Pinholster was raised in "chaos and poverty." Record ER–312. The family home was filled with violence. Pinholster's siblings had extremely troubled pasts. There was substantial evidence of "mental disturbance during Mr. Pinholster's childhood and some degree of brain damage." *Id.*, at ER–493.

Dr. Woods concluded that Pinholster's aggressive conduct resulted from bipolar mood disorder. Just months before the murders, a doctor had recommended that Pinholster be sent to a psychiatric institute. Dr. Woods also explained that Pinholster's bizarre behavior before the murders reflected "[a]uditory hallucinations" and "severe psychosis." *Id.*, at ER–169. The available records confirmed that Pinholster suffered from longstanding seizure disorders, which may have been caused by his childhood head injuries.

On this record, I do not see how it can be said that "[t]he 'new' evidence largely duplicated the mitigation evidence at trial." *Ante,* at 200; see *Arizona* v. *Fulminante,* 499 U. S. 279, 298–299 (1991) (evidence is not "merely cumulative" if it corroborates other evidence that is "unbelievable" on its own). Brashear's self-interested testimony was not confirmed with objective evidence, as the prosecutor highlighted. The new evidence would have "destroyed the [relatively] benign conception of [Pinholster's] upbringing" presented by his mother. *Rompilla,* 545 U. S., at 391. The jury heard no testimony at all that Pinholster likely suffered from brain damage or bipolar mood disorder, and counsel offered no evidence to help the jury understand the likely effect of Pinholster's head injuries or his bizarre behavior on the night of the homicides. The jury heard no testimony recounting the substantial evidence of Pinholster's likely neurological problems. And it heard no medical evidence that Pinholster suffered from epilepsy.

The majority responds that "much" of Pinholster's new mitigating evidence "is of questionable mitigating value." *Ante,* at 201. By presenting psychiatric testimony, it contends, "Pinholster would have opened the door to rebuttal by a state expert." *Ibid.* But, because the California Supreme Court denied Pinholster's petition on the pleadings, it had no reason to know what a state expert might have said. Moreover, given the record evidence, it is reasonably probable that at least one juror would have credited his expert. In any event, even if a rebuttal expert testified that Pinholster suffered from antisocial personality disorder, this would hardly have come as a surprise to the jury. See *ante,* at 194 (describing Pinholster as a "psychotic client whose performance at trial hardly endeared him to the jury"). It is for this reason that it was especially important for counsel to present the available evidence to help the jury understand Pinholster. See *Sears,* 561 U. S., at 951.

Had counsel conducted an adequate investigation, the judge and jury would have heard credible evidence showing that Pinholster's criminal acts and aggressive tendencies were "attributable to a disadvantaged background, or to emotional and mental problems." *Penry*, 492 U. S., at 319 (internal quotation marks omitted). They would have learned that Pinholster had the "'kind of troubled history we have declared relevant to assessing a defendant's moral culpability.'" *Porter*, 558 U. S., at 41 (quoting *Wiggins*, 539 U. S., at 535). Applying *Strickland*, we have repeatedly found "a reasonable probability," 466 U. S., at 694, that the sentencer would have reached a different result had counsel presented similar evidence. See, *e. g.*, *Porter*, 558 U. S., at 41–42 (evidence of the defendant's childhood history of physical abuse, brain abnormality, limited schooling, and heroic military service); *Rompilla*, 545 U. S., at 392 (evidence of severe abuse and neglect as a child, as well as brain damage); *Wiggins*, 539 U. S., at 535 (evidence of the defendant's "severe privation and abuse" as a child, homelessness, and "diminished mental capacities"); *Terry Williams*, 529 U. S., at 398 (evidence of childhood mistreatment and neglect, head injuries, possible organic mental impairments, and borderline mental retardation).

The majority does not dispute the similarity between this case and the cited cases. However, it criticizes the Court of Appeals for relying on *Rompilla* and *Terry Williams* on the ground that we reviewed the prejudice question *de novo* in those cases. See *ante*, at 202. I do not read *Terry Williams* to review the prejudice question *de novo*.[27] More fundamentally, however, I cannot agree with the premise that "[t]hose cases . . . offer no guidance with respect to whether a state

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[27] *Terry Williams* held that the state court's decision was "unreasonable in at least two respects": (1) It applied the wrong legal standard, see 529 U. S., at 397, and (2) it "failed to accord appropriate weight to the body of mitigation evidence available to trial counsel," *id.*, at 398. We did not purport to conduct *de novo* review.

court has unreasonably determined that prejudice is lacking." *Ante*, at 202 (emphasis deleted). In each of these cases, we did not purport to create new law; we simply applied the same clearly established precedent, *Strickland*, to a different set of facts. Because these cases illuminate the kinds of mitigation evidence that suffice to establish prejudice under *Strickland*, they provide useful, but not dispositive, guidance for courts to consider when determining whether a state court has unreasonably applied *Strickland*.

In many cases, a state court presented with additional mitigation evidence will reasonably conclude that there is no "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U. S., at 694. This is not such a case. Admittedly, Pinholster unjustifiably stabbed and killed two people, and his history of violent outbursts and burglaries surely did not endear him to the jury. But the homicides did not appear premeditated. And the State's aggravation case was no stronger than in *Rompilla* and *Terry Williams*. See 545 U. S., at 378, 383 (the defendant committed murder by torture and had a significant history of violent felonies, including a rape); 529 U. S., at 418 (Rehnquist, C. J., concurring in part and dissenting in part) (the defendant had a lifetime of crime, and after the murder he "savagely beat an elderly woman," set a home on fire, and stabbed a man (internal quotation marks omitted)). Even on the trial record, it took the jury two days to decide on a penalty. The contrast between the "not persuasive" mitigation case put on by Pinholster's counsel, 54 Tr. 7514, and the substantial mitigation evidence at their fingertips was stark. Given these considerations, it is not a foregone conclusion, as the majority deems it, that a juror familiar with his troubled background and psychiatric issues would have reached the same conclusion regarding Pinholster's culpability. Fairminded jurists could not doubt that, on the record before the California Supreme Court, "there [was] a reasonable probability that at

least one juror would have struck a different balance." *Wiggins*, 539 U. S., at 537.

III

The state-court record on its own was more than adequate to support the Court of Appeals' conclusion that the California Supreme Court could not reasonably have rejected Pinholster's *Strickland* claim. The additional evidence presented in the federal evidentiary hearing only confirms that conclusion.

A

At the hearing, Pinholster offered many of the same documents that were before the state habeas court. He also offered his trial attorneys' billing records, which were before the state habeas court as part of the trial record. Of the seven lay witnesses who testified at the hearing, six had previously executed declarations in support of Pinholster's state-court petition. (The seventh, Pinholster's uncle, provided testimony cumulative of other testimony.)

Two experts testified on Pinholster's behalf; neither had presented declarations to the state habeas court. The first was Dr. Donald Olson, assistant professor of neurology and neurological sciences and director of the Pediatric Epilepsy Program at Stanford University Medical Center. It appears that Pinholster retained Dr. Olson to rebut the testimony of the expert disclosed by the State in the federal proceeding. See Decl. of Michael D. Abzug in Support of Stipulated *Ex Parte* Application To Continue Evidentiary Hearing and Discovery Cut-Off and To Substitute Counsel in *Pinholster* v. *Calderon*, No. CV 95–6240–GLT (CD Cal.), p. 2. Relying in part on Pinholster's abnormal EEG, Dr. Olson opined that Pinholster's childhood accidents "likely result[ed] in brain injury" and that these injuries "conferred a risk of epilepsy." Record ER–699 to ER–700. He concluded that it was reasonably probable that Pinholster had suffered from partial

epilepsy since at least 1968 and had suffered from brain injury since at least 1964. *Id.*, at ER–701.

Pinholster's second expert was Dr. Sophia Vinogradov, associate professor of psychiatry at the University of California, San Francisco. Dr. Vinogradov's testimony was based on essentially the same facts as Dr. Woods' and Dr. Stalberg's state-court declarations. She highlighted Pinholster's childhood head traumas, history of epilepsy, abusive and neglected upbringing, history of substance abuse, and bizarre behavior on the night of the homicides. She opined that his aggressive behavior resulted from childhood head traumas:

> "All data indicates that there were severe effects of the two serious head injuries sustained at age 2 and age 3, with evidence for behavioral changes related to dysfunction of frontal cortex: severe attentional and learning problems in childhood, hyperactivity, aggressivity, impulsivity, social-emotional impairment, seizure disorder, and explosive dyscontrol." *Id.*, at ER–731.

She also opined that, right before the homicides, Pinholster was in an "apparently hallucinatory state [that] was likely the result of his intoxication with multiple substances." *Id.*, at ER–707.

The State presented two experts: Dr. Stalberg, the psychiatrist who had examined Pinholster in the middle of trial,[28] and Dr. David Rudnick. Although Dr. Stalberg maintained

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[28] Before the hearing, Dr. Stalberg had opined that Pinholster was "substantially impaired by a bipolar mood disorder operating synergistically with intoxication and a seizure disorder at the time the crime was committed." Record ER–587. At a prehearing deposition, however, Dr. Stalberg revised his opinion and stated that he continued to believe that Pinholster suffered from psychopathic personality traits. After the deposition, Pinholster elected to proceed with a different expert, presumably in light of Dr. Stalberg's unexpected change in position. The State then retained Dr. Stalberg as its own expert.

that Pinholster suffered from antisocial personality disorder, which was his original diagnosis in the middle of trial, he again emphasized that there was "voluminous" and "compelling" mitigation evidence that had not previously been made available to him or presented to the jury. *Id.*, at ER–926, ER–953. He stated that conversations with Pinholster's family revealed that he and his siblings were "raised like animals, wild animals," *id.*, at ER–948, and he opined that Pinholster's upbringing was a risk factor for antisocial personality disorder. See *ibid.* (Pinholster's upbringing "would speak volumes, looking at it from a mitigation point of view"). And he agreed that the mitigation evidence presented at trial was "profoundly misleading." *Id.*, at ER–966. Dr. Rudnick testified that Pinholster suffered from antisocial personality disorder.

The State also introduced into evidence the 1978 probation report that Pinholster's counsel had in their possession at the time of his trial. The report demonstrated that counsel were aware that Pinholster was in classes for educationally handicapped children, that he was committed to a state hospital for emotionally handicapped children, and that he suffered two "severe head injuries." *Id.*, at SER–243.

B

Much of the evidence presented at the federal hearing was duplicative of the evidence submitted to the California Supreme Court. The additional evidence presented at the hearing only confirmed that the California Supreme Court could not reasonably have rejected Pinholster's claim.[29]

[29] The State argues that the District Court was not entitled to rely on the evidence adduced at the hearing because Pinholster was not diligent in developing his claims in state court and the hearing was therefore barred by 28 U. S. C. § 2254(e)(2). This argument is somewhat imprecise. Pinholster's allegations in his amended federal petition were "identical" to the allegations he presented to the California Supreme Court, *ante*, at 179, and he diligently requested a hearing in state court. The State presumably means to argue that Pinholster's new expert testimony changed

For example, the probation report presented by the State confirmed that counsel had in their possession information that would have led any reasonable attorney "to investigate further." *Wiggins*, 539 U. S., at 527. Counsel nevertheless took no action to investigate these leads.

Pinholster's experts opined that his childhood head traumas likely resulted in brain injury and conferred a risk of epilepsy. Although the State presented testimony that Pinholster had antisocial personality disorder, it was not clear error for the District Court to conclude that jurors could have credited Pinholster's experts. Even the State's own expert, Dr. Stalberg, testified to the "voluminous" mitigation evidence in Pinholster's case. Record ER–926.

In sum, the evidence confirmed what was already apparent from the state-court record: Pinholster's counsel failed to conduct an adequate mitigation investigation, and there was a reasonable probability that at least one juror confronted with the "voluminous" mitigating evidence counsel should have discovered would have voted to spare Pinholster's life. *Ibid.* Accordingly, whether on the basis of the state- or federal-court record, the courts below correctly concluded that Pinholster had shown that the California Supreme

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"the factual basis" of his claim such that, by the time of the evidentiary hearing, he no longer satisfied § 2254(e)(2). However, at oral argument, the State suggested that Pinholster was presenting an altogether new claim in the federal court. See Tr. of Oral Arg. 18. If that is the case, § 2254(d)(1) does not apply at all, and the State should be arguing lack of exhaustion or procedural default. I do not understand Pinholster to have presented a new claim to the District Court.

In any event, Pinholster satisfied § 2254(e)(2) in this case. He made "a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court." *Michael Williams*, 529 U. S., at 435. His experts relied on the very same facts and evidence. I cannot read § 2254(e)(2) to impose a strict requirement that petitioners must use the same experts they presented to the state court. This rule would result in numerous practical problems, for example, in the case of the unanticipated death of an expert.

Court's decision reflected an unreasonable application of *Strickland*.[30]

* * *

I cannot agree with either aspect of the Court's ruling. I fear the consequences of the Court's novel interpretation of § 2254(d)(1) for diligent state habeas petitioners with compelling evidence supporting their claims who were unable, through no fault of their own, to present that evidence to the state court that adjudicated their claims. And the Court's conclusion that the California Supreme Court reasonably denied Pinholster's ineffective-assistance-of-counsel claim overlooks counsel's failure to investigate obvious avenues of mitigation and the contrast between the woefully inadequate mitigation case they presented and the evidence they should and would have discovered. I respectfully dissent.

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[30] The State's challenge in this Court is limited to the questions whether the Federal District Court was entitled to consider the additional evidence in the § 2254(d)(1) analysis and whether Pinholster satisfied § 2254(d)(1) on the basis of the state-court record. It has not challenged the District Court's ultimate conclusion that Pinholster had proved that he was "in custody in violation of the Constitution or laws or treaties of the United States." § 2254(a).

Syllabus

VIRGINIA OFFICE FOR PROTECTION AND ADVOCACY *v.* STEWART, COMMISSIONER, VIRGINIA DEPARTMENT OF BEHAVIORAL HEALTH AND DEVELOPMENTAL SERVICES, ET AL.

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

No. 09–529. Argued December 1, 2010—Decided April 19, 2011

Together, the Developmental Disabilities Assistance and Bill of Rights Act of 2000 (DD Act) and the Protection and Advocacy for Individuals with Mental Illness Act (PAIMI Act) offer States federal money to improve, *inter alia*, medical care for persons with developmental disabilities or mental illness. As a condition of funding, a State must establish a protection and advocacy (P&A) system "to protect and advocate [those individuals'] rights." 42 U. S. C. § 15043(a)(1). A participating State may appoint either a state agency or a private nonprofit entity as its P&A system, but if a state agency it must have authority to litigate and freedom from the control of other state agencies or officers. Virginia has appointed an independent state agency, petitioner Virginia Office for Protection and Advocacy (VOPA), authorizing it to litigate to secure disabled individuals' rights, free of executive-branch oversight; to operate independently of Virginia's attorney general; and to employ its own lawyers to sue on its behalf.

While investigating patient deaths and injuries at state mental hospitals, VOPA asked respondents—state officials in charge of those hospitals—to produce relevant patient records. Respondents refused, asserting that a state-law privilege shielded the records from disclosure. VOPA then filed suit in Federal District Court, seeking a declaration that respondents' refusal to produce the records violated the DD and PAIMI Acts and an injunction requiring respondents to produce the records and refrain in the future from interfering with VOPA's right of access. Respondents moved to dismiss on the ground that they are immune from suit under the Eleventh Amendment, but the court held that the suit was permitted by the doctrine of *Ex parte Young*, 209 U. S. 123, which normally allows federal courts to award prospective relief against state officials for violations of federal law. The Fourth Circuit reversed, finding that *Ex parte Young* did not apply because the suit was brought by a state agency.

Held: Ex parte Young allows a federal court to hear a lawsuit for prospective relief against state officials brought by another agency of the same State. Pp. 253–261.

(a) Absent a waiver of sovereign immunity by a State itself or a valid abrogation by Congress, federal courts may not entertain a private person's suit against a State. Pp. 253–254

(b) The doctrine of *Ex parte Young*, which establishes an important limitation on the sovereign-immunity principle, is accepted as necessary to "permit the federal courts to vindicate federal rights." *Pennhurst State School and Hospital* v. *Halderman*, 465 U. S. 89. It rests on the premise that when a federal court commands a state official to do nothing more than refrain from violating federal law, he is not the State for sovereign-immunity purposes. It does not apply "when 'the state is the . . . party in interest.'" *Id.*, at 101. Pp. 254–255.

(c) Entertaining VOPA's action is consistent with precedent and does not offend the distinctive interests protected by sovereign immunity. Pp. 255–261.

(1) *Verizon Md. Inc.* v. *Public Serv. Comm'n of Md.*, 535 U. S. 635, held that, in determining the *Ex parte Young* doctrine's applicability, "a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" *Id.*, at 645. VOPA's suit satisfies that inquiry. Respondents concede that the action would be proper were VOPA a private organization rather than a state agency. The "general criterion for determining when a suit is in fact against the sovereign is the *effect* of the relief sought," *Pennhurst*, *supra*, at 107, not who is bringing the lawsuit. This Court applied that criterion in *Idaho* v. *Coeur d'Alene Tribe of Idaho*, 521 U. S. 261, which held that an Indian Tribe could not invoke *Ex parte Young* to bring what was essentially a quiet title suit that would "extinguish [Idaho's] control over . . . lands and waters long deemed . . . an integral part of its territory." *Id.*, at 282. Respondents have advanced no argument that the relief sought here threatens a similar invasion of Virginia's sovereignty. Pp. 255–257.

(2) Respondents claim that a State's dignity is diminished when a federal court adjudicates a dispute between its components. But a State's stature is not diminished to any greater degree when its own agency sues to enforce its officers' compliance with federal law than when a private person does so. Moreover, VOPA's power to sue state officials is a consequence of Virginia's own decision to establish a public P&A system. Not every offense to a State's dignity constitutes a denial of sovereign immunity. The specific indignity against which sovereign immunity protects is the insult to a State of being haled into court without its consent; that does not occur just because a suit happens to be brought by another state agency. Pp. 257–260.

(3) The apparent novelty of this suit is not likely a consequence of past constitutional doubts. In order to invoke the *Ex parte Young*

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exception, a state agency needs both a federal right that it possesses against its parent State and authority to sue state officials to enforce that right, free from any internal state-government veto; such conditions rarely coincide. In any event, the principles undergirding the *Ex parte Young* doctrine support its extension to actions of this kind. Pp. 260–261.

568 F. 3d 110, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which KENNEDY, THOMAS, GINSBURG, BREYER, and SOTOMAYOR, JJ., joined. KENNEDY, J., filed a concurring opinion, in which THOMAS, J., joined, *post*, p. 262. ROBERTS, C. J., filed a dissenting opinion, in which ALITO, J., joined, *post*, p. 266. KAGAN, J., took no part in the consideration or decision of the case.

Seth M. Galanter argued the cause for petitioner. With him on the briefs were *Deanne E. Maynard*, *Brian R. Matsui*, and *Paul J. Buckley*.

Ginger D. Anders argued the cause for the United States as *amicus curiae* in support of petitioner. With her on the brief were *Acting Solicitor General Katyal*, *Deputy Assistant Attorney General Ravel*, *Deputy Solicitor General Kneedler*, *Mark B. Stern*, and *Alisa B. Klein*.

E. Duncan Getchell, Jr., Solicitor General of Virginia, argued the cause for respondents. With him on the brief were *Kenneth T. Cuccinelli II*, Attorney General, *Charles E. James, Jr.*, Chief Deputy Attorney General, *Wesley G. Russell, Jr.*, Deputy Attorney General, *Stephen R. McCullough*, and *William E. Thro*.*

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*Briefs of *amici curiae* urging reversal were filed for AARP et al. by *Rochelle Bobroff*, *Kenneth W. Zeller*, *Kelly Bagby*, and *Michael Schuster;* for Law Professors by *Stephen I. Vladeck*, *pro se*, *Charles S. Sims*, and *Anna G. Kaminska;* for the National Disability Rights Network by *Susan J. Kohlmann* and *Marc A. Goldman;* and for the Rhode Island Office of the Child Advocate by *Joseph J. Mueller* and *Sydenham B. Alexander III*.

A brief of *amicus curiae* urging affirmance was filed for the State of Indiana et al. by *Gregory F. Zoeller*, Attorney General of Indiana, *Thomas M. Fisher*, Solicitor General, and *Heather L. Hagan* and *Ashley Tatman Harwel*, Deputy Attorneys General, and by the Attorneys General for their respective States as follows: *Troy King* of Alabama, *Bill McCollum* of Florida, *Mark J. Bennett* of Hawaii, *James D. "Buddy" Caldwell* of

JUSTICE SCALIA delivered the opinion of the Court.

We consider whether *Ex parte Young*, 209 U. S. 123 (1908), allows a federal court to hear a lawsuit for prospective relief against state officials brought by another agency of the same State.

I

A

The Developmental Disabilities Assistance and Bill of Rights Act of 2000 (DD Act), 114 Stat. 1677, 42 U. S. C. § 15001 *et seq.*, offers States federal money to improve community services, such as medical care and job training, for individuals with developmental disabilities. See §§ 15023(a), 15024. As a condition of that funding, a State must establish a protection and advocacy (P&A) system "to protect and advocate the rights of individuals with developmental disabilities." § 15043(a)(1). The P&A system receives separate federal funds, paid to it directly. § 15042(a) and (b). A second federal law, the Protection and Advocacy for Individuals with Mental Illness Act (PAIMI Act), 100 Stat. 478, 42 U. S. C. § 10801 *et seq.*, increases that separate funding and extends the mission of P&A systems to include the mentally ill. §§ 10802(2), 10803, 10827. At present, every State accepts funds under these statutes.

Under the DD and PAIMI Acts, a P&A system must have certain powers. The system "shall . . . have the authority to investigate incidents of abuse and neglect . . . if the incidents are reported to the system or if there is probable cause to believe that the incidents occurred." § 15043(a)(2)(B); § 10805(a)(1)(A). Subject to certain statutory requirements, it must be given access to "all records" of individuals who

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Louisiana, *Janet T. Mills* of Maine, *Michael A. Cox* of Michigan, *Michael A. Delaney* of New Hampshire, *Paula Dow* of New Jersey, *Thomas W. Corbett, Jr.*, of Pennsylvania, *Henry D. McMaster* of South Carolina, *Mark L. Shurtleff* of Utah, and *Robert M. McKenna* of Washington.

may have been abused, see § 15043(a)(2)(I)(iii)(II); § 10805(a)(4)(B)(iii), as well as "other records that are relevant to conducting an investigation," § 15043(a)(2)(J)(i). The Acts also require that a P&A system have authority to "pursue legal, administrative, and other appropriate remedies or approaches to ensure the protection of" its charges. § 15043(a)(2)(A)(i); see § 10805(a)(1)(B). And in addition to pressing its own rights, a P&A system may "pursue administrative, legal, and other remedies on behalf of" those it protects. § 10805(a)(1)(C); see § 15044(b).

A participating State is free to appoint either a state agency or a private nonprofit entity as its P&A system. § 15044(a); § 10805(c)(1)(B). But in either case, the designated entity must have certain structural features that ensure its independence from the State's government. The DD Act prohibits the Governor from appointing more than one-third of the members of the system's governing board, § 15044(a)(2), and restricts the State's ability to impose hiring freezes or other measures that would impair the system's ability to carry out its mission, § 15043(a)(2)(K). Once a State designates an entity as its P&A system, it may not change its selection without "good cause." § 15043(a)(4)(A).

Virginia is one of just eight States that have designated a government entity as their P&A system. The Virginia Office for Protection and Advocacy (VOPA) is an "independent state agency." Va. Code Ann. § 51.5–39.2(A) (Lexis 2009). Its board consists of eleven "nonlegislative citizen members," of whom only three are appointed by the Governor. § 51.5–39.2(B). The remaining eight are appointed by components of the legislature: five by the Speaker of the House of Delegates, and three by the Senate Committee on Rules. *Ibid.* VOPA itself nominates candidates for consideration, and the statute instructs the appointing officials that they "shall seriously consider the persons nominated and appoint such persons whenever feasible." *Ibid.* Board members serve for fixed terms and are removable only by a court and only for

specified reasons. See § 51.5–39.2(C) and (F); § 24.2–233 and 234 (Lexis 2006).

VOPA enjoys authority to litigate free of executive-branch oversight. It operates independently of the Attorney General of Virginia and employs its own lawyers, who are statutorily authorized to sue on VOPA's behalf. § 51.5–39.2(A); § 2.2–510(5) (Lexis 2008). And Virginia law specifically empowers VOPA to "initiate any proceedings to secure the rights" of disabled individuals. § 51.5–39.2(A).

B

In 2006, VOPA opened an investigation into the deaths of two patients and injuries to a third at state-run mental hospitals. It asked respondents—state officials in charge of those institutions—to produce any records related to risk-management or mortality reviews conducted by the hospitals with respect to those patients. Respondents refused, asserting that the records were protected by a state-law privilege shielding medical peer-review materials from disclosure.

VOPA then brought this action in the United States District Court for the Eastern District of Virginia, alleging that the DD and PAIMI Acts entitled it to the peer-review records, notwithstanding any state-law privilege that might apply. It sought a declaration that respondents' refusal to produce the records violated the DD and PAIMI Acts, along with an injunction requiring respondents to provide access to the records and refrain in the future from interfering with VOPA's right of access to them. Respondents moved to dismiss the action on the grounds that they are immune from suit under the Eleventh Amendment. The District Court denied the motion. In its view, the suit was permitted by the doctrine of *Ex parte Young*, which normally allows federal courts to award prospective relief against state officials for violations of federal law. *Virginia* v. *Reinhard*, 2008 WL 2795940, *6 (ED Va., July 18, 2008).

The Court of Appeals reversed. *Virginia* v. *Reinhard*, 568 F. 3d 110 (CA4 2009). Believing VOPA's lawsuit to be an "intramural contest" that "encroaches more severely on the dignity and sovereignty of the states than an *Ex parte Young* action brought by a private plaintiff," the Court of Appeals concluded it was not authorized by that case. *Id.*, at 119–120 (internal quotation marks omitted).

We granted certiorari. 561 U. S. 1005 (2010).

II

A

Sovereign immunity is the privilege of the sovereign not to be sued without its consent. The language of the Eleventh Amendment [1] only eliminates the basis for our judgment in the famous case of *Chisholm* v. *Georgia*, 2 Dall. 419 (1793), which involved a suit against a State by a noncitizen of the State. Since *Hans* v. *Louisiana*, 134 U. S. 1 (1890), however, we have understood the Eleventh Amendment to confirm the structural understanding that States entered the Union with their sovereign immunity intact, unlimited by Article III's jurisdictional grant. *Blatchford* v. *Native Village of Noatak*, 501 U. S. 775, 779 (1991); see *Pennhurst State School and Hospital* v. *Halderman*, 465 U. S. 89, 98 (1984). Our cases hold that the States have retained their traditional immunity from suit, "except as altered by the plan of the Convention or certain constitutional amendments." *Alden* v. *Maine*, 527 U. S. 706, 713 (1999). A State may waive its sovereign immunity at its pleasure, *College Savings Bank* v. *Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U. S. 666, 675–676 (1999), and in some circumstances Congress

[1] The Eleventh Amendment reads as follows:

"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."

may abrogate it by appropriate legislation.[2] But absent waiver or valid abrogation, federal courts may not entertain a private person's suit against a State.

B

In *Ex parte Young*, 209 U. S. 123, we established an important limit on the sovereign-immunity principle. That case involved a challenge to a Minnesota law reducing the freight rates that railroads could charge. A railroad shareholder claimed that the new rates were unconstitutionally confiscatory, and obtained a federal injunction against Edward Young, the Attorney General of Minnesota, forbidding him in his official capacity to enforce the state law. *Perkins* v. *Northern Pacific R. Co.*, 155 F. 445 (CC Minn. 1907). When Young violated the injunction by initiating an enforcement action in state court, the Circuit Court held him in contempt and committed him to federal custody. In his habeas corpus application in this Court, Young challenged his confinement by arguing that Minnesota's sovereign immunity deprived the federal court of jurisdiction to enjoin him from performing his official duties.

We disagreed. We explained that because an unconstitutional legislative enactment is "void," a state official who enforces that law "comes into conflict with the superior authority of [the] Constitution," and therefore is "stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States." 209 U. S., at 159–160.

This doctrine has existed alongside our sovereign-immunity jurisprudence for more than a century, accepted as

[2] We have recognized that Congress may abrogate a State's immunity when it acts under § 5 of the Fourteenth Amendment, *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44, 59 (1996), but not when it acts under its original Article I authority to regulate commerce, *id.*, at 65–66.

necessary to "permit the federal courts to vindicate federal rights." *Pennhurst*, 465 U. S., at 105. It rests on the premise—less delicately called a "fiction," *id.*, at 114, n. 25—that when a federal court commands a state official to do nothing more than refrain from violating federal law, he is not the State for sovereign-immunity purposes. The doctrine is limited to that precise situation, and does not apply "when 'the state is the real, substantial party in interest,'" *id.*, at 101 (quoting *Ford Motor Co.* v. *Department of Treasury of Ind.*, 323 U. S. 459, 464 (1945)), as when the "'judgment sought would expend itself on the public treasury or domain, or interfere with public administration,'" 465 U. S., at 101, n. 11 (quoting *Dugan* v. *Rank*, 372 U. S. 609, 620 (1963)).

C

This case requires us to decide how to apply the *Ex parte Young* doctrine to a suit brought by an independent state agency claiming to possess federal rights. Although we have never encountered such a suit before, we are satisfied that entertaining VOPA's action is consistent with our precedents and does not offend the distinctive interests protected by sovereign immunity.

1

In *Verizon Md. Inc.* v. *Public Serv. Comm'n of Md.*, 535 U. S. 635 (2002), we held that "[i]n determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" *Id.*, at 645 (quoting *Idaho* v. *Coeur d'Alene Tribe of Idaho*, 521 U. S. 261, 296 (1997) (O'Connor, J., concurring in part and concurring in judgment)). There is no doubt VOPA's suit satisfies that straightforward inquiry. It alleges that respondents' refusal to produce the requested medical records violates federal law; and it seeks an injunction requiring the production of the records, which would

prospectively abate the alleged violation. Respondents concede that were VOPA a private organization rather than a state agency, the doctrine would permit this action to proceed.[3]

We see no reason for a different result here. Although respondents argue that VOPA's status as a state agency changes the calculus, there is no warrant in our cases for making the validity of an *Ex parte Young* action turn on the identity of the plaintiff. To be sure, we have been willing to police abuses of the doctrine that threaten to evade sovereign immunity. To do otherwise "would be to adhere to an empty formalism." *Coeur d'Alene Tribe, supra,* at 270. But (as the dissent concedes, *post,* at 273 (opinion of ROBERTS, C. J.)) the limits we have recognized reflect the principle that the "general criterion for determining when a suit is in fact against the sovereign is the *effect* of the relief sought," *Pennhurst, supra,* at 107, not who is bringing the lawsuit. Thus, *Ex parte Young* cannot be used to obtain an injunction requiring the payment of funds from the State's

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[3] The dissent is mistaken when it claims that applying the *Verizon Maryland* test would mean two of our cases were "wrongly decided." *Post,* at 269 (opinion of ROBERTS, C. J.). We discuss the first of those cases, *Coeur d'Alene Tribe,* below. *Infra,* at 257. As for the second, *Seminole Tribe, supra,* it is inapposite. The reason we refused to permit suit to proceed in that case was that the Indian Gaming Regulatory Act created an alternative remedial scheme that would be undermined by permitting *Ex parte Young* suits; *Congress,* we said, had foreclosed recourse to the doctrine. See *Seminole Tribe, supra,* at 73–76.

Respondents now argue—for the first time in this litigation—that the DD and PAIMI Acts have the same effect here. We reject that suggestion. The fact that the Federal Government can exercise oversight of a federal spending program and even withhold or withdraw funds—which are the chief statutory features respondents point to—does not demonstrate that Congress has "displayed an intent not to provide the 'more complete and more immediate relief' that would otherwise be available under *Ex parte Young.*" *Verizon Maryland,* 535 U. S., at 647 (quoting *Seminole Tribe, supra,* at 75).

treasury, see *Edelman* v. *Jordan*, 415 U. S. 651, 666 (1974); or an order for specific performance of a State's contract, see *id.*, at 666–667; *In re Ayers*, 123 U. S. 443 (1887).

Coeur d'Alene Tribe, on which respondents heavily rely, is an application of this principle. There we refused to allow an Indian Tribe to use *Ex parte Young* to obtain injunctive and declaratory relief establishing its exclusive right to the use and enjoyment of certain submerged lands in Idaho and the invalidity of all state statutes and regulations governing that land. 521 U. S., at 265. We determined that the suit was "the functional equivalent of" "a quiet title suit against Idaho," would "extinguish . . . the State's control over a vast reach of lands and waters long deemed by the State to be an integral part of its territory," and thus was barred by sovereign immunity. *Id.*, at 281, 282.

Respondents have advanced no argument that the relief sought in this case threatens any similar invasion of Virginia's sovereignty. Indeed, they concede that the very injunction VOPA requests could properly be awarded by a federal court at the instance of a private P&A system.

2

Respondents and the dissent argue that entertaining VOPA's lawsuit in a federal forum would nevertheless infringe Virginia's sovereign interests because it diminishes the dignity of a State for a federal court to adjudicate a dispute between its components. See Brief for Respondents 23–26; *post*, at 269–273 (arguing that "'special sovereignty interests'" bar VOPA's lawsuit (quoting *Coeur d'Alene Tribe*, *supra*, at 281)). We disagree. As an initial matter, we do not understand how a State's stature could be diminished to any greater degree when *its own agency* polices its officers' compliance with their federal obligations, than when *a private person* hales those officers into federal court for

that same purpose—something everyone agrees is proper.[4] And in this case, of course, VOPA's power to sue state officials is a consequence of Virginia's own decision to establish a public, rather than a private, P&A system. We fail to perceive what Eleventh Amendment indignity is visited on the Commonwealth when, by operation of its own laws, VOPA is admitted to federal court as a plaintiff.[5]

But even if it were true that the State's dignity were offended in some way by the maintenance of this action in federal court, that would not prove respondents' case. Denial of sovereign immunity, to be sure, offends the dignity of a State; but not every offense to the dignity of a State constitutes a denial of sovereign immunity. The specific indignity against which sovereign immunity protects is the insult to a State of being haled into court without its consent. That effectively occurs, our cases reasonably conclude, when (for example) the object of the suit against a state officer is to reach funds in the state treasury or acquire state lands; it

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[4] The dissent compares VOPA's lawsuit to such indignities as "cannibalism" and "patricide," since it is a greater "affront to someone's dignity to be sued by a brother than to be sued by a stranger." *Post*, at 274. We think the dissent's principle of familial affront less than universally applicable, even with respect to real families, never mind governmental siblings. Most of us would probably prefer contesting a testamentary disposition with a relative to contesting it with a stranger. And confining one's child to his room is called grounding, while confining a stranger's child is called kidnaping. Jurisdiction over this case does not depend on which is the most apt comparison.

[5] The dissent accuses us of circular reasoning, because we "wrongly assum[e] [that] Virginia knew in advance the answer to the question presented in this case." *Ibid.* That would be true if we were relying on the Commonwealth's waiver of sovereign immunity. We are not. We rely upon *Ex parte Young*. We say that Virginia has only itself to blame for the position in which it finds itself, not because it consented to suit, but because it created a state entity to sue, instead of leaving the task to a private entity. It did not have to *know* that this would allow suit in federal court. Know or not know, *Ex parte Young* produces that result.

does not occur just because the suit happens to be brought by another state agency. Respondents' asserted dignitary harm is simply unconnected to the sovereign-immunity interest.

The dissent complains that applying *Ex parte Young* to this lawsuit divides Virginia against itself, since the opposing parties are both creatures of the Commonwealth. *Post,* at 271–272. Even if that were a distinctive consequence of letting this suit proceed in federal court, it would have nothing to do with the concern of sovereign immunity—whether the suit is against an unconsenting State, rather than against its officers. But it is *not* a consequence of the federal nature of the forum. The same result will follow if the federal claim is sued upon in state court, as the dissent would require. There also, "[w]hatever the decision in the litigation, . . . [t]he Commonwealth will win[, a]nd the Commonwealth will lose." *Post,* at 272. Nor would sending the matter to state court even avoid the prospect that "a federal judge will resolve which part of the Commonwealth will prevail," *ibid.*, since the state-court loser could always ask *this* Court to review the matter by certiorari. (Or is that appeal also to be disallowed on grounds of sovereign immunity? But see *Cohens* v. *Virginia,* 6 Wheat. 264 (1821).)[6] And of course precisely the same thing would happen if respondents specifically waived their sovereign immunity objections *in this very case.* Yet no one would contend that despite the waiver, sovereign immunity forbade the suit. So also here: If, by reason of *Ex parte Young,* there has been no violation of

[6] The dissent agrees that because of the "'constitutional plan,'" *post,* at 272, n. 3 (quoting *McKesson Corp.* v. *Division of Alcoholic Beverages and Tobacco, Fla. Dept. of Business Regulation,* 496 U. S. 18, 30 (1990)), this Court can adjudicate disputes between state agencies without offending sovereign immunity. But explaining away exceptions to its theory does not advance the ball. It has not demonstrated that sovereign immunity has anything *at all* to say about federal courts' adjudicating interagency disputes.

sovereign immunity, the prospect of a federal judge's resolving VOPA's dispute with respondents does not make it so.

We do not doubt, of course, that there are limits on the Federal Government's power to affect the internal operations of a State. See, *e. g.*, *Printz* v. *United States*, 521 U. S. 898 (1997) (Congress may not commandeer state officers); *Coyle* v. *Smith*, 221 U. S. 559, 579 (1911) (Congress may not dictate a State's capital). But those limits must be found in some textual provision or structural premise of the Constitution. Additional limits cannot be smuggled in under the Eleventh Amendment by barring a suit in federal court that does not violate the State's sovereign immunity.[7]

3

A weightier objection, perhaps, is the relative novelty of this lawsuit. Respondents rightly observe that federal courts have not often encountered lawsuits brought by state agencies against other state officials. That does give us pause. Lack of historical precedent can indicate a constitutional infirmity, see, *e. g.*, *Free Enterprise Fund* v. *Public Company Accounting Oversight Bd.*, 561 U. S. 477, 505–506 (2010), and our sovereign-immunity decisions have traditionally warned against " 'anomalous and unheard-of proceedings or suits,' " *Alden*, 527 U. S., at 727 (quoting *Hans*, 134 U. S., at 18).

Novelty, however, is often the consequence of past constitutional doubts, but we have no reason to believe that is the case here. In order to invoke the *Ex parte Young* exception to sovereign immunity, a state agency needs two things: first, a federal right that it possesses against its parent State; and second, authority to sue other state officials to enforce that

[7] We have no occasion to pass on other questions of federalism lurking in this case, such as whether the DD or PAIMI Acts are a proper exercise of Congress's enumerated powers. As JUSTICE KENNEDY observes, whether the Acts run afoul of some *other* constitutional provision (*i. e.*, besides the Eleventh Amendment) "cannot be permitted to distort the antecedent question of jurisdiction." *Post*, at 265 (concurring opinion).

right, free from any internal veto wielded by the state government. These conditions will rarely coincide—and at least the latter of them cannot exist without the consent of the State that created the agency and defined its powers. See *post*, at 264 (KENNEDY, J., concurring). We are unaware that the necessary conditions have ever presented themselves except in connection with the DD and PAIMI Acts, and the parties have referred us to no examples.[8] Thus, the apparent novelty of this sort of suit does not at all suggest its unconstitutionality. In any event, we are satisfied, for the reasons we have explained, that—novelty notwithstanding—the principles undergirding the *Ex parte Young* doctrine support its application to actions of this kind.

* * *

Like the Court of Appeals, we are mindful of the central role autonomous States play in our federal system, and wary of approving new encroachments on their sovereignty. But we conclude no such encroachment is occasioned by straightforwardly applying *Ex parte Young* to allow this suit. It was Virginia law that created VOPA and gave it the power to sue state officials. In that circumstance, the Eleventh Amendment presents no obstacle to VOPA's ability to invoke federal jurisdiction on the same terms as any other litigant.

We reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

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

[8] We think greatly exaggerated the dissent's concern that, "[g]iven the number of state agencies across the country that enjoy independent litigating authority," today's decision "could potentially lead to all sorts of litigation in federal courts addressing internal state government disputes." *Post*, at 275. Such litigation cannot occur unless the state agency has been given a federal right of its own to vindicate (as VOPA alleges it has been given under the highly unusual statute at issue here).

JUSTICE KENNEDY, with whom JUSTICE THOMAS joins, concurring.

Ex parte Young, 209 U. S. 123 (1908), recognized a narrow limitation on state sovereign immunity, permitting railroad stockholders to enjoin enforcement of unconstitutional rate regulations. That negative injunction was nothing more than the pre-emptive assertion in equity of a defense that would otherwise have been available in the State's enforcement proceedings at law. *Id.*, at 165–166; see also Harrison, Ex Parte *Young*, 60 Stan. L. Rev. 989, 997–999 (2008).

The Court has expanded the *Young* exception far beyond its original office in order "to vindicate the federal interest in assuring the supremacy of [federal] law," *Green* v. *Mansour*, 474 U. S. 64, 68 (1985), but not without careful attention in each case to the sovereign interests of the State. See *Verizon Md. Inc.* v. *Public Serv. Comm'n of Md.*, 535 U. S. 635, 649 (2002) (KENNEDY, J., concurring). In *Edelman* v. *Jordan*, 415 U. S. 651 (1974), for example, the Court applied the exception to an affirmative prospective order but not to equitable restitution, for the latter was too similar to an award of damages against the State. *Id.*, at 668; see *Pennhurst State School and Hospital* v. *Halderman*, 465 U. S. 89, 103 (1984) ("Under the theory of *Young*, such a suit [for restitution] would not be one against the State since the federal-law allegation would strip the state officer of his official authority. Nevertheless, retroactive relief was barred by the Eleventh Amendment"). And *Pennhurst* declined to extend *Young* to suits alleging a state-law violation, for without the need to ensure the supremacy of federal law there was no justification for restricting state sovereignty. 465 U. S., at 105–106.

The "straightforward inquiry" of *Verizon Md.* derives from *Edelman* and *Pennhurst*, both of which defined important limits on *Young* in order to respect state sovereignty while still adhering to principles necessary to implement the Supremacy Clause. As a result, *Verizon Md.* incorporates

the very balancing it might at first seem to reject. *Verizon Md.* itself was an easy case, for it involved the same kind of preenforcement assertion of a defense that was at issue in *Young.* But when *Young*'s application is explored in novel contexts, as in *Idaho* v. *Coeur d'Alene Tribe of Idaho*, 521 U. S. 261 (1997), and also in this case, the inquiry "proves more complex," *Verizon Md.*, *supra*, at 648 (KENNEDY, J., concurring).

In this case, in my view, the Virginia Office for Protection and Advocacy (VOPA) may rely on *Young*, despite the somewhat striking novelty of permitting a state agency to sue officials of the same State in federal court. In the posture of the case as it comes before the Court, it must be assumed that VOPA has a federal right to the records it seeks, and so the extension of *Young* would vindicate the Supremacy Clause. To be balanced against this important interest is the need to preserve "the dignity and respect afforded a State, which the immunity is designed to protect." *Coeur d'Alene*, *supra*, at 268. Permitting a state agency like VOPA to sue officials of the same State does implicate the State's important sovereign interest in using its own courts to control the distribution of power among its own agents. But the affront to the State's dignity is diminished to some extent when it is noted that if the State had elected the alternative course of designating a private protection and advocacy system it then would have avoided any risk of internal conflict while still participating in the federal program. The availability of that alternative course does not, in my view, weigh much in favor of the validity of the underlying federal scheme, but the only question here is the reach of the *Young* exception.

Virginia's concern that the holding here upsets the federal balance is further mitigated by the various protections built into the structure of federal litigation to ensure that state officials do not too often call upon the federal courts to resolve their intramural disputes.

First, and most important, state law must authorize an agency or official to sue another arm of the State. If States do not wish to see their internal conflicts aired in federal court, they need not empower their officers or agencies to sue one another in a federal forum. And if state officers are not by state law empowered to sue, they may invoke federal jurisdiction only in their personal capacities.

Second, to the extent there is some doubt under state law as to an officer's or agency's power to sue, or any other state-law issue that may be dispositive, federal courts should abstain under *Railroad Comm'n of Tex.* v. *Pullman Co.*, 312 U. S. 496 (1941). *Pullman* recognizes the importance of state sovereignty by limiting federal judicial intervention in state affairs to cases where intervention is necessary. If an open question of state law would resolve a dispute, then federal courts may wait for the resolution of the state-law issue before adjudicating the merits. Likewise, certification of questions of state law to the state courts may pretermit an otherwise sensitive federal controversy. *Lehman Brothers* v. *Schein*, 416 U. S. 386, 391 (1974) (Certification "helps build a cooperative judicial federalism").

Finally, federal law does not often create rights for state officials or agencies to assert against other arms of the State. True, officials may assert that their personal federal rights are violated by unlawful state action, for example where the State engages in discriminatory employment practices. But the statutory framework in the case now before the Court is unusual in that it vests a state agency itself with federal rights against the State. Statutes tend to protect the rights of individuals, not officers or agencies, and the Constitution's rights-creating Clauses protect persons rather than officers. Because the *Young* exception is available only to those who assert federal violations, the paucity of federal rights vested in government officials makes the scope of the holding here a narrow one.

All this is simply to underscore that the program at issue may present constitutional questions but that the parties do not raise them in this litigation. Virginia does not argue, for example, that Congress exceeded its spending power under Article I, §8, by forcing a state that wishes to designate a public agency as its advocacy system to allow intramural suits like the instant one or by requiring that the agency be structured as Congress directs. *E. g.*, 42 U. S. C. §15043(a)(2)(G) (system must "be independent of any agency that provides treatment, services, or habilitation to individuals with developmental disabilities"); §15044(a)(2) ("[N]ot more than 1/3 of the members of the governing board may be appointed by the chief executive officer of the State"). *Young*—a court-made doctrine based on convenience, fiction, or both—neither implicates nor subsumes these more fundamental concerns regarding the excessive exercise of federal power. The Court should be most cautious before deciding cases that might later lead to a general principle that the National Government can condition receipt of funds on the State's agreement to make far-reaching changes with respect to its governmental structure or its basic policies of governance in matters within its special competence. Assuming, as the Court must, that the statutes here are constitutional, the narrow question is whether VOPA may rely on *Young* to avoid the sovereign immunity bar.

One might doubt whether the constitutional question may be so severed from the *Young* analysis. The Court wields *Young* in the name of the Supremacy Clause only to vindicate important federal rights. Perhaps this Court should not extend the fiction in the name of claims that may rest on unconstitutional foundations. This concern is misplaced. The canon of constitutional avoidance directs courts to prefer the interpretation of a statute that preserves its validity, but the specter of a statute's unconstitutionality cannot be permitted to distort the antecedent question of jurisdiction. Courts

interpret and evaluate a statute only after confirming their authority to adjudicate the case before them. To decline to adjudicate a federal right for fear of its potential unconstitutionality is in effect to invalidate the right in the quest to save it. The Court should not permit the commission of acts that violate a federal right on the mere suspicion that Congress acted beyond its authority. Because the suit must be assumed to vindicate the Supremacy Clause and poses no serious affront to state sovereignty in light of the options available to the State under the program, it may proceed.

With these observations, I join the Court's opinion.

CHIEF JUSTICE ROBERTS, with whom JUSTICE ALITO joins, dissenting.

Today the Court holds that a state agency may sue officials acting on behalf of the State in federal court. This has never happened before. In order to reach this unsettling result, the Court extends the fiction of *Ex parte Young*—what we have called an "empty formalism"—well beyond the circumstances of that case. Because I cannot subscribe to such a substantial and novel expansion of what we have also called "a narrow exception" to a State's sovereign immunity, I respectfully dissent.

I

A

"The federal system established by our Constitution preserves the sovereign status of the States." *Alden* v. *Maine*, 527 U. S. 706, 714 (1999). As confirmed by the Eleventh Amendment, "[a]n integral component of that residuary and inviolable sovereignty" is the States' "immunity from private suits." *Federal Maritime Comm'n* v. *South Carolina Ports Authority*, 535 U. S. 743, 751–753 (2002) (internal quotation marks omitted); *Hans* v. *Louisiana*, 134 U. S. 1, 13 (1890) ("'It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*'" (quoting The Federalist No. 81 (A. Hamilton))). "The preeminent

purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities." *Federal Maritime Comm'n*, *supra*, at 760. Accordingly, any time a State is haled into federal court against its will, "the dignity and respect afforded [that] State, which [sovereign] immunity is designed to protect, are placed in jeopardy." *Idaho* v. *Coeur d'Alene Tribe of Idaho*, 521 U. S. 261, 268 (1997). The immunity does not turn on whether relief will be awarded; "[t]he 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). See *Federal Maritime Comm'n*, *supra*, at 769 ("the primary function of sovereign immunity is not to protect state treasuries, but to afford the States the dignity and respect due sovereign entities" (citation omitted)).

Because of the key role state sovereign immunity plays in our federal system, the Court has recognized only a few exceptions to that immunity. The sole one relevant here is the "narrow exception," *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44, 76 (1996), established by our decision in *Ex parte Young*, 209 U. S. 123 (1908). In *Ex parte Young*, the Court held that private litigants could seek an injunction in federal court against a state official, prohibiting him from enforcing a state law claimed to violate the Federal Constitution. See *id.*, at 159–168. As we have often observed, *Ex parte Young* rests on the "obvious fiction," *Coeur d'Alene Tribe*, *supra*, at 270, that such a suit is not really against the State, but rather against an individual who has been "stripped of his official or representative character" because of his unlawful conduct, *Ex parte Young*, *supra*, at 159–160.[1]

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[1] *Ex parte Young* also rests on the "well-recognized irony that an official's unconstitutional conduct constitutes state action under the Fourteenth Amendment but not the Eleventh Amendment." *Pennhurst State School and Hospital* v. *Halderman*, 465 U. S. 89, 105 (1984) (internal quotation marks omitted).

While we have consistently acknowledged the important role *Ex parte Young* plays in "promot[ing] the vindication of federal rights," we have been cautious not to give that decision "an expansive interpretation." *Pennhurst State School and Hospital* v. *Halderman*, 465 U. S. 89, 105, 102 (1984). Indeed, the history of our *Ex parte Young* jurisprudence has largely been focused on ensuring that this narrow exception is "narrowly construed," 465 U. S., at 114, n. 25. We have, for example, held that the fiction of *Ex parte Young* does not extend to suits where the plaintiff seeks retroactive relief, *Edelman* v. *Jordan*, 415 U. S. 651, 678 (1974); where the claimed violations are based on state law, *Pennhurst*, *supra*, at 106; where the federal-law violation is no longer "ongoing," *Green* v. *Mansour*, 474 U. S. 64, 71 (1985); "where Congress has prescribed a detailed remedial scheme for the enforcement against a State" of the claimed federal right, *Seminole Tribe*, *supra*, at 74; and where "special sovereignty interests" are implicated, *Coeur d'Alene Tribe*, *supra*, at 281.

We recently stated that when "determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md. Inc.* v. *Public Serv. Comm'n of Md.*, 535 U. S. 635, 645 (2002) (internal quotation marks omitted). But not every plaintiff who complies with these prerequisites will be able to bring suit under *Ex parte Young*. Indeed, in *Verizon* itself the Court went beyond its so-called straightforward inquiry in considering whether *Ex parte Young* applied. After deciding the plaintiffs "clearly satisfie[d]" the "straightforward inquiry," the Court went on to examine whether Congress had created a detailed remedial scheme like the one in *Seminole Tribe*. 535 U. S., at 645, 647–648 (internal quotation marks omitted). Only after determining that Congress had not done so did the Court conclude that the suit could go forward under *Ex parte Young*.

If *Verizon*'s formulation set forth the only requirements for bringing an action under *Ex parte Young*, two of our recent precedents were wrongly decided. In *Seminole Tribe*, the Court acknowledged that it had often "found federal jurisdiction over a suit against a state official when that suit seeks only prospective injunctive relief in order to end a continuing violation of federal law." 517 U. S., at 73 (internal quotation marks omitted). The Court held, however, that the "situation presented" there was "sufficiently different from that giving rise to the traditional *Ex parte Young* action so as to preclude the availability of that doctrine." *Ibid.*[2]

In *Coeur d'Alene Tribe*, the Court recognized that an "allegation of an ongoing violation of federal law where the requested relief is prospective is *ordinarily* sufficient to invoke the *Young* fiction." 521 U. S., at 281 (emphasis added). The Court held, however, that the action could not proceed under *Ex parte Young* because it implicated "special sovereignty interests"—in that case, the State's property rights in certain submerged lands. 521 U. S., at 281–283.

As we explained in *Papasan* v. *Allain*, 478 U. S. 265 (1986), there are "certain types of cases that formally meet the *Young* requirements of a state official acting inconsistently with federal law but that stretch that case too far and would upset the balance of federal and state interests that it embodies." *Id.*, at 277. This is one of those cases.

In refusing to extend *Ex parte Young* to claims that involve "special sovereignty interests," the Court in *Coeur*

[2] While I agree that in *Seminole Tribe* "we refused to permit suit to proceed" under *Ex parte Young* because Congress "had foreclosed recourse to the doctrine," *ante*, at 256, n. 3, that simply confirms my point that the availability of *Young* depends on more than just whether *Verizon*'s prescribed inquiry is satisfied. In short, *Seminole Tribe* makes clear that a plaintiff who files a "complaint alleg[ing] an ongoing violation of federal law and seeks relief properly characterized as prospective," *Verizon*, 535 U. S., at 645 (internal quotation marks omitted), may nonetheless be barred from pursuing an action under *Young*.

d'Alene Tribe warned against a rote application of the *Ex parte Young* fiction:

> "To interpret *Young* to permit a federal-court action to proceed in every case where prospective declaratory and injunctive relief is sought against an officer, named in his individual capacity, would be to adhere to an empty formalism and to undermine the principle . . . that Eleventh Amendment immunity represents a real limitation on a federal court's federal-question jurisdiction. The real interests served by the Eleventh Amendment are not to be sacrificed to elementary mechanics of captions and pleading. Application of the *Young* exception must reflect a proper understanding of its role in our federal system and respect for state courts instead of a reflexive reliance on an obvious fiction." 521 U. S., at 270.

B

It is undisputed that petitioner's complaint alleges an ongoing violation of federal law by a state official and seeks only prospective relief. If this were a "traditional *Ex parte Young* action," *Seminole Tribe*, *supra*, at 73, petitioner might very well be able to pursue its claims under that case. This, however, is anything but a traditional case—and petitioner is anything but a typical *Ex parte Young* plaintiff.

Unlike the plaintiffs in *Ex parte Young*—and, for that matter, unlike any other plaintiff that has ever sought to invoke *Ex parte Young* before this Court—petitioner is a state agency seeking to sue officials of the same State in federal court. The Court is troubled by this novelty, *ante*, at 260–261, but not enough. See *Free Enterprise Fund* v. *Public Company Accounting Oversight Bd.*, 561 U. S. 477, 505 (2010) ("Perhaps the most telling indication of [a] severe constitutional problem . . . is the lack of historical precedent" (internal quotation marks omitted)); cf. *Alden*, 527 U. S., at

743–745; *Printz* v. *United States*, 521 U. S. 898, 905–910, 918, 925 (1997). This is especially true in light of the "presumption" we articulated more than 120 years ago in *Hans* v. *Louisiana*, that States are immune from suits that would have been "anomalous and unheard of when the Constitution was adopted." 134 U. S., at 18; see also *Alden*, *supra*, at 727 (invoking presumption).

Accordingly, when determining whether to lift the bar of sovereign immunity, we have "attribute[d] great significance" to the absence of analogous suits "at the time of the founding or for many years thereafter." *Federal Maritime Comm'n*, 535 U. S., at 755. This sort of suit was not only anomalous and unheard of at the time of the founding; it was anomalous and unheard of yesterday. The *Hans* presumption applies here with full force.

The Court speculates that these suits have not previously arisen because the necessary conditions—state agencies pursuing a federal right free of internal state veto—are themselves novel. See *ante*, at 260–261; see also *ante*, at 264 (KENNEDY, J., concurring). Even if true, that simply highlights the fact that this case is not suitable for mere rote application of *Ex parte Young*.

In addition to its novel character, petitioner's complaint "conflicts directly with the principles of federalism that underlie the Eleventh Amendment." *Pennhurst*, 465 U. S., at 106. In *Alden*, we held that state sovereign immunity prohibited Congress from authorizing "private suits against nonconsenting States in their own courts." 527 U. S., at 749. We explained that such power would permit one branch of state government, the "State's own courts," "to coerce the other branches of the State" and "to turn the State against itself." *Ibid.*

Here the Court goes further: This suit features a state agency on one side, and state executive officials on the other. The objection in *Alden* was that the Federal Government could force the State to defend itself before itself. Here ex-

tending *Young* forces the State to defend itself *against* itself in federal court.

Both sides in this case exercise the sovereign power of the Commonwealth of Virginia. Petitioner claims the title of "The Commonwealth of Virginia" in its complaint, App. 10; respondents are state officials acting in an official capacity. Whatever the decision in the litigation, one thing is clear: The Commonwealth will win. And the Commonwealth will lose. Because of today's holding, a federal judge will resolve which part of the Commonwealth will prevail.

Virginia has not consented to such a suit in federal court; rather, petitioner has unilaterally determined that this intramural dispute should be resolved in that forum. This is precisely what sovereign immunity is supposed to guard against. See *ante*, at 258 ("The specific indignity against which sovereign immunity protects is the insult to a State of being haled into court without its consent"). That indignity is compounded when the State is haled into federal court so that a federal judge can decide an internal state dispute.

The Court is wrong to suggest that Virginia has no sovereign interest in determining *where* such disputes will be resolved. See *ante*, at 259, and n. 6. It is one thing for a State to decide that its components may sue one another in its own courts (as Virginia did here); it is quite another thing for such a dispute to be resolved in federal court against the State's wishes. For this reason, the Court's examples of other suits pitting state entities against one another are inapposite. In each of those hypotheticals, the State consented to having a particular forum resolve its internal conflict. That is not true here.[3]

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[3] Sovereign immunity principles would of course not prohibit this Court from reviewing the federal questions presented by this suit if it had been filed in state court. See *ante*, at 259. We have held that "it is inherent in the constitutional plan that when a state court takes cognizance of a case, the State assents to appellate review by this Court of the federal issues raised in the case whoever may be the parties to the original suit, whether

In sum, the "special sovereignty interests" implicated here make this case "sufficiently different from that giving rise to the traditional *Ex parte Young* action so as to preclude the availability of that doctrine." *Seminole Tribe*, 517 U. S., at 73. I would cling to reality and not extend the fiction of *Ex parte Young* to cover petitioner's suit.

II

The Court offers several justifications for its expansion of *Ex parte Young*. None is persuasive.

The Court first contends that whether the *Ex parte Young* fiction should be applied turns only on the "relief sought" in a case. *Ante*, at 256 (internal quotation marks omitted). The Court is correct that several of our prior cases have focused on the nature of the relief requested. See, *e. g.*, *Edelman*, 415 U. S., at 664–671. That may well be because "the difference between the type of relief barred by the Eleventh Amendment and that permitted under *Ex parte Young* will not in many instances be that between day and night." *Id.*, at 667. But the Court is wrong to draw a negative implication from those cases and categorically conclude that there can be no other basis for determining whether to extend *Ex parte Young*'s fiction.

The thrust of the Court's argument appears to be that, because the relief sought here is no different from that which could be sought in a suit by a private protection and advocacy system, the doctrine of *Ex parte Young* should also apply to a suit brought by a state system. *Ante*, at 255–257. But private entities are different from public ones: They are private. When private litigants are involved, the State is not turned against itself.

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private persons, or the state itself." *McKesson Corp.* v. *Division of Alcoholic Beverages and Tobacco, Fla. Dept. of Business Regulation*, 496 U. S. 18, 30 (1990) (internal quotation marks and citation omitted). By contrast, there is nothing "inherent in the constitutional plan" that warrants lower federal courts handling intrastate disputes absent a State's consent.

Contrary to the Court's suggestion, see *ante*, at 257–258, there is indeed a real difference between a suit against the State brought by a private party and one brought by a state agency. It is the difference between eating and cannibalism; between murder and patricide. While the ultimate results may be the same—a full stomach and a dead body—it is the means of getting there that attracts notice. I would think it more an affront to someone's dignity to be sued by a brother than to be sued by a stranger. While neither may be welcomed, that does not mean they would be equally received.

The Court also contends that petitioner's ability to sue state officials in federal court "is a consequence of Virginia's own decision to establish a public [protection and advocacy] system." *Ante*, at 258. This cannot mean that Virginia has consented to an infringement on its sovereignty. That argument was rejected below, and petitioner did not seek certiorari on that issue. See *Virginia* v. *Reinhard*, 568 F. 3d 110, 116–118 (CA4 2009); Pet. for Cert. i.

Instead the Court claims that "Virginia has only itself to blame"—if it wanted to avoid its current predicament, it could have chosen to establish a private entity instead. *Ante*, at 258, and n. 5; see also *ante*, at 262 (KENNEDY, J., concurring). But I am aware of no doctrine to the effect that an unconstitutional establishment is insulated from challenge simply because a constitutional alternative is available. And here the public and private systems are not interchangeable alternatives in any event. The Court's analysis is also circular; it wrongly assumes Virginia knew in advance the answer to the question presented in this case. Only *after* concluding that *Ex parte Young* applies to this arrangement—that for the first time in history a state agency may sue an unwilling State in federal court—can the Court suggest that Virginia knowingly exposed its officers to suit in federal court.

In a similar vein, the Court asserts that because Virginia law authorizes petitioner to exercise independent litigating

authority, petitioner should be treated the same "as any other litigant." *Ante*, at 261. But petitioner is not like any other litigant. While it is true petitioner enjoys some independence from the Commonwealth's executive branch, that does not mean petitioner is independent *from the Commonwealth.* As noted, petitioner certainly views itself as "The Commonwealth of Virginia," App. 10, and would presumably invoke sovereign immunity itself if sued. As a matter of sovereign immunity law, it should make no difference how a State chooses to allocate its governmental powers among different state agencies or officials.

The Court is wrong to suggest that simply because petitioner possesses independent litigating authority, it may sue state officials in federal court. See *ante*, at 261 ("the Eleventh Amendment presents no obstacle" since it "was Virginia law that created [petitioner] and gave it the power to sue state officials"). There is more to this case than merely whether petitioner needs the approval of the attorney general to sue, and the Virginia Code provisions cited by the Court say nothing about actions against the Commonwealth in federal court.

If independent litigating authority is all that it takes, then scores of state entities now "suddenly possess the authority to pursue *Ex parte Young* actions against other state officials" in federal court. *Reinhard*, *supra*, at 124. There would be no Eleventh Amendment impediment to such suits. Given the number of state agencies across the country that enjoy independent litigating authority, see, *e. g.*, Brief for State of Indiana et al. as *Amici Curiae* 11–13, the Court's decision today could potentially lead to all sorts of litigation in federal courts addressing internal state government disputes.

And there is also no reason to think that the Court's holding is limited to state *agency* plaintiffs. According to the Court's basic rationale, state officials who enjoy some level of independence could as a matter of federal law bring suit against other state officials in federal court. Disputes that

were formerly resolved in state cabinet rooms may now appear on the dockets of federal courts.

* * *

No one questions the continued vitality or importance of the doctrine announced in *Ex parte Young*. But *Ex parte Young* was about affording relief to a private party against unconstitutional state action. It was not about resolving a dispute between two different state actors. That is a matter for the Commonwealth to sort out, not a federal judge.

Our decision in *Chisholm* v. *Georgia*, 2 Dall. 419 (1793)—permitting States to be sued by private parties in federal court—"created such a shock of surprise" throughout the country "that the Eleventh Amendment was at once proposed and adopted." *Principality of Monaco* v. *Mississippi*, 292 U. S. 313, 325 (1934). It is fair to say that today's decision will probably not trigger a similar response. But however much their practical functions and prominence may have changed in the past 218 years, the States remain a vital element of our political structure. Sovereign immunity ensures that States retain a stature commensurate with their role under the Constitution. Allowing one part of the State to sue another in federal court, so that a federal judge decides an important dispute between state officials, undermines state sovereignty in an unprecedented and direct way. The fiction of *Ex parte Young* should not be extended to permit so real an intrusion.

Because I believe the Court's novel expansion of *Ex parte Young* is inconsistent with the federal system established by our Constitution, I respectfully dissent.

Syllabus

SOSSAMON *v.* TEXAS ET AL.

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

No. 08–1438. Argued November 2, 2010—Decided April 20, 2011

After this Court held that the Religious Freedom Restoration Act of 1993 was unconstitutional as applied to state and local governments because it exceeded Congress' power under § 5 of the Fourteenth Amendment, see *City of Boerne* v. *Flores*, 521 U. S. 507, Congress passed the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) pursuant to its Spending Clause and Commerce Clause authority. RLUIPA targets two areas of state and local action: land-use regulation, RLUIPA § 2, 42 U. S. C. § 2000cc, and restrictions on the religious exercise of institutionalized persons, RLUIPA § 3, § 2000cc–1. It also provides an express private cause of action for "appropriate relief against a government," § 2000cc–2(a), including, *inter alia*, States, their instrumentalities and officers, and persons acting under color of state law, § 2000cc–5(4)(A).

Petitioner Sossamon, a Texas prison inmate, sued respondents, the State and prison officials, seeking injunctive and monetary relief under RLUIPA for prison policies that prevented inmates from attending religious services while on cell restriction for disciplinary infractions and that barred use of the prison chapel for religious worship. Granting respondents summary judgment, the District Court held that sovereign immunity barred Sossamon's claims for monetary relief. The Fifth Circuit affirmed, holding that the statutory phrase "appropriate relief against a government" did not unambiguously notify Texas that its acceptance of federal funds was conditioned on a waiver of sovereign immunity to claims for monetary relief.

Held: States, in accepting federal funding, do not consent to waive their sovereign immunity to private suits for money damages under RLUIPA. Pp. 283–293.

(a) Sovereign immunity principles enforce an important constitutional limitation on the power of the federal courts. See *Pennhurst State School and Hospital* v. *Halderman*, 465 U. S. 89, 98. This Court has consistently made clear that "federal jurisdiction over suits against unconsenting States 'was not contemplated by the Constitution when establishing the judicial power of the United States.'" *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44, 54. A State, however, may choose to waive its immunity. *Clark* v. *Barnard*, 108 U. S. 436, 447–448. The "'test for determining whether [it has done so] is a stringent one.'"

Syllabus

College Savings Bank v. *Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U. S. 666, 675. The State's consent to suit must be "unequivocally expressed" in the relevant statute's text. *Pennhurst*, *supra*, at 99. A waiver "will be strictly construed, in terms of its scope, in favor of the sovereign." *Lane* v. *Peña*, 518 U. S. 187, 192. Pp. 283–285.

(b) RLUIPA's authorization of "appropriate relief against a government" is not an unequivocal expression of state consent. Pp. 285–289.

(1) "Appropriate relief" is open-ended and ambiguous about the relief it includes. "Appropriate" is inherently context dependent. And the context here—where the defendant is a sovereign—suggests, if anything, that monetary damages are not "suitable" or "proper." See *Federal Maritime Comm'n* v. *South Carolina Ports Authority*, 535 U. S. 743, 765. Further, where a statute is susceptible of multiple plausible interpretations, including one preserving immunity, this Court will not consider a State to have waived its sovereign immunity. Sossamon's and Texas' conflicting plausible arguments about whether immunity is preserved here demonstrate that "appropriate relief" in RLUIPA is not so free from ambiguity that the Court may conclude that the States, by receiving federal funds, have unequivocally expressed intent to waive their immunity. Pp. 286–288.

(2) The Court's use of the phrase "appropriate relief" in *Franklin* v. *Gwinnett County Public Schools*, 503 U. S. 60, and *Barnes* v. *Gorman*, 536 U. S. 181, does not compel a contrary conclusion. In those cases, where there was no express congressional intent to limit remedies available against municipal entities under an implied right of action, the Court presumed that compensatory damages were available. *Franklin*, *supra*, at 73. But that presumption is irrelevant to construing the scope of an express waiver of sovereign immunity, where the question is not whether Congress has given clear direction that it intends to exclude a damages remedy, but whether it has given clear direction that it intends to include a damages remedy. Pp. 288–289.

(c) Sossamon mistakenly contends that Congress' enactment of RLUIPA §3 pursuant to the Spending Clause put the States on notice that they would be liable for damages because Spending Clause legislation operates as a contract and damages are always available for a breach of contract. While acknowledging the contract-law analogy, this Court has been clear "not [to] imply . . . that suits under Spending Clause legislation are suits in contract, or that contract-law principles apply to all issues that they raise," *Barnes*, *supra*, at 189, n. 2, or to rely on that analogy to expand liability beyond what would exist under nonspending statutes, much less to extend monetary liability against the States. Applying ordinary contract principles here would also make little sense because contracts with a sovereign are unique: They do not

traditionally confer a right of action for damages to enforce compliance. More fundamentally, Sossamon's implied-contract remedy cannot be squared with the rule that a sovereign immunity waiver must be expressly and unequivocally stated in the relevant statute's text. Pp. 289–291.

(d) Sossamon also errs in arguing that Texas was put on notice that it could be sued for damages under RLUIPA by § 1003 of the Rehabilitation Act Amendments of 1986, which expressly waives state sovereign immunity for violations of "section 504 of the Rehabilitation Act of 1973, title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, title VI of the Civil Rights Act of 1964, or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance," 42 U. S. C. § 2000d–7(a)(1). Even if such a residual clause could constitute an unequivocal textual waiver, RLUIPA § 3—which prohibits "substantia[l] burden[s]" on religious exercise—is not unequivocally a "statute prohibiting discrimination" within § 1003's meaning. All the statutory provisions enumerated in § 1003 explicitly prohibit discrimination; a State might reasonably conclude that the residual clause, strictly construed, covers only provisions using the term "discrimination." Pp. 291–292.

560 F. 3d 316, affirmed.

THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, GINSBURG, and ALITO, JJ., joined. SOTOMAYOR, J., filed a dissenting opinion, in which BREYER, J., joined, *post*, p. 293. KAGAN, J., took no part in the consideration or decision of the case.

Kevin K. Russell argued the cause for petitioner. With him on the briefs were *Amy Howe*, *Patricia A. Millett*, *Thomas C. Goldstein*, *Pamela S. Karlan*, and *Jeffrey L. Fisher*.

Sarah E. Harrington argued the cause for the United States as *amicus curiae* urging reversal. With her on the brief were *Acting Solicitor General Katyal*, *Assistant Attorney General Perez*, *Deputy Assistant Attorney General Bagenstos*, and *Jessica Dunsay Silver*.

James C. Ho, Solicitor General of Texas, argued the cause for respondents. With him on the brief were *Greg Abbott*, Attorney General, *Daniel T. Hodge*, First Assistant Attorney General, *David S. Morales*, Deputy First Assistant Attorney General, *Bill Cobb*, Deputy Attorney General, and

Daniel L. Geyser and *James P. Sullivan,* Assistant Solicitors General.*

JUSTICE THOMAS delivered the opinion of the Court.

This case presents the question whether the States, by accepting federal funds, consent to waive their sovereign immunity to suits for money damages under the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 114 Stat. 803, 42 U. S. C. § 2000cc *et seq.* We hold that they do not. Sovereign immunity therefore bars this suit for damages against the State of Texas.

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*Briefs of *amici curiae* urging reversal were filed for the American Civil Liberties Union et al. by *Gene C. Schaerr, Steffen N. Johnson, Linda T. Coberly, Daniel Mach, David C. Fathi, David M. Shapiro, Ayesha N. Khan, K. Hollyn Hollman, James T. Gibson, Marc Stern,* and *Richard Foltin;* for the Becket Fund for Religious Liberty by *Kevin J. Hasson, Eric C. Rassbach, Hannah C. Smith,* and *Luke W. Goodrich;* for the National Association of Evangelicals by *Kelly J. Shackelford* and *Hiram S. Sasser III;* and for Charles E. Sisney by *Kathryn M. Davis, Peter R. Afrasiabi,* and *Richard L. Johnson.*

Briefs of *amici curiae* urging affirmance were filed for the State of Florida et al. by *Bill McCollum,* Attorney General of Florida, *Scott D. Makar,* Solicitor General, and *Courtney Brewer,* Deputy Solicitor General, and by the Attorneys General for their respective States as follows: *Troy King* of Alabama, *Daniel S. Sullivan* of Alaska, *Terry Goddard* of Arizona, *Edmund G. Brown, Jr.,* of California, *John W. Suthers* of Colorado, *Thurbert E. Baker* of Georgia, *Mark J. Bennett* of Hawaii, *Lawrence G. Wasden* of Idaho, *Lisa Madigan* of Illinois, *Gregory F. Zoeller* of Indiana, *Janet T. Mills* of Maine, *Douglas F. Gansler* of Maryland, *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, *Wayne Stenehjem* of North Dakota, *Richard Cordray* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *Thomas W. Corbett, Jr.,* of Pennsylvania, *Patrick C. Lynch* of Rhode Island, *Henry D. McMaster* of South Carolina, *Marty J. Jackley* of South Dakota, *Mark Shurtleff* of Utah, *Kenneth T. Cuccinelli II* of Virginia, *J. B. Van Hollen* of Wisconsin, and *Bruce A. Salzburg* of Wyoming.

Briefs of *amici curiae* were filed for the Christian Legal Society et al. by *James K. Lehman, William C. Wood, Jr., Jay T. Thompson,* and *Kimberlee Wood Colby;* and for The Rutherford Institute by *John W. Whitehead* and *Mitchell A. Karlan.*

I

A

RLUIPA is Congress' second attempt to accord heightened statutory protection to religious exercise in the wake of this Court's decision in *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872 (1990). Congress first enacted the Religious Freedom Restoration Act of 1993 (RFRA), 107 Stat. 1488, 42 U. S. C. § 2000bb *et seq.*, with which it intended to "restore the compelling interest test as set forth in *Sherbert* v. *Verner*, 374 U. S. 398 (1963) and *Wisconsin* v. *Yoder*, 406 U. S. 205 (1972) . . . in all cases where free exercise of religion is substantially burdened." § 2000bb(b)(1). See generally *Gonzales* v. *O Centro Espírita Beneficente União do Vegetal*, 546 U. S. 418, 424 (2006). We held RFRA unconstitutional as applied to state and local governments because it exceeded Congress' power under § 5 of the Fourteenth Amendment. See *City of Boerne* v. *Flores*, 521 U. S. 507 (1997).

Congress responded by enacting RLUIPA pursuant to its Spending Clause and Commerce Clause authority. RLUIPA borrows important elements from RFRA—which continues to apply to the Federal Government—but RLUIPA is less sweeping in scope. See *Cutter* v. *Wilkinson*, 544 U. S. 709, 715 (2005). It targets two areas of state and local action: land-use regulation, 42 U. S. C. § 2000cc (RLUIPA § 2), and restrictions on the religious exercise of institutionalized persons, § 2000cc–1 (RLUIPA § 3).

Section 3 of RLUIPA provides that "[n]o government shall impose a substantial burden on the religious exercise" of an institutionalized person unless, as in RFRA, the government demonstrates that the burden "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering" that interest. § 2000cc–1(a); cf. §§ 2000bb–1(a), (b). As relevant here, § 3 applies "in any case" in which "the substantial burden is imposed in a pro-

gram or activity that receives Federal financial assistance."[1] §2000cc–1(b)(1).

RLUIPA also includes an express private cause of action that is taken from RFRA: "A person may assert a violation of [RLUIPA] as a claim or defense in a judicial proceeding and obtain appropriate relief against a government." §2000cc–2(a); cf. §2000bb–1(c). For purposes of this provision, "government" includes, *inter alia*, States, counties, municipalities, their instrumentalities and officers, and persons acting under color of state law. §2000cc–5(4)(A).

B

Petitioner Harvey Leroy Sossamon III is an inmate in the Robertson Unit of the Texas Department of Criminal Justice, Correctional Institutions Division. In 2006, Sossamon sued the State of Texas and various prison officials in their official capacities under RLUIPA's private cause of action, seeking injunctive and monetary relief. Sossamon alleged that two prison policies violated RLUIPA: (1) a policy preventing inmates from attending religious services while on cell restriction for disciplinary infractions; and (2) a policy barring use of the prison chapel for religious worship. The District Court granted summary judgment in favor of respondents and held, as relevant here, that sovereign immunity barred Sossamon's claims for monetary relief.[2] See 713 F. Supp. 2d 657, 662–663 (WD Tex. 2007).

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[1] No party contends that the Commerce Clause permitted Congress to address the alleged burden on religious exercise at issue in this case. See 42 U. S. C. §2000cc–1(b)(2). Nor is Congress' authority to enact RLUIPA under the Spending Clause challenged here. We therefore do not address those issues.

[2] The District Court also denied injunctive relief. 713 F. Supp. 2d 657, 668 (WD Tex. 2007). The Court of Appeals subsequently held that Sossamon's claim for injunctive relief with respect to the cell-restriction policy was moot because the State had abandoned that policy after Sossamon filed a prison grievance. 560 F. 3d 316, 326 (CA5 2009). The Court of Appeals reversed the District Court with respect to Sossamon's chapel-use

The Court of Appeals for the Fifth Circuit affirmed. 560 F. 3d 316, 329 (2009). Acknowledging that Congress enacted RLUIPA pursuant to the Spending Clause, the court determined that Texas had not waived its sovereign immunity by accepting federal funds. The Court of Appeals strictly construed the text of RLUIPA's cause of action in favor of the State and concluded that the statutory phrase "appropriate relief against a government" did not "unambiguously notif[y]" Texas that its acceptance of funds was conditioned on a waiver of immunity from claims for money damages. *Id.*, at 330–331. We granted certiorari to resolve a division of authority among the Courts of Appeals on this question.[3] 560 U. S. 923 (2010).

II

"Dual sovereignty is a defining feature of our Nation's constitutional blueprint." *Federal Maritime Comm'n* v. *South Carolina Ports Authority*, 535 U. S. 743, 751 (2002). Upon ratification of the Constitution, the States entered the Union "with their sovereignty intact." *Ibid.* (internal quotation marks omitted).

Immunity from private suits has long been considered "central to sovereign dignity." *Alden* v. *Maine*, 527 U. S. 706, 715 (1999). As was widely understood at the time the Constitution was drafted:

> "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent.*

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policy claim, *id.*, at 331–335, although the Robertson Unit later amended that policy also and now permits inmates to attend scheduled worship services in the chapel subject to certain safety precautions.

[3] Compare *Madison* v. *Virginia*, 474 F. 3d 118, 131 (CA4 2006); 560 F. 3d, at 331 (case below); *Cardinal* v. *Metrish*, 564 F. 3d 794, 801 (CA6 2009); *Nelson* v. *Miller*, 570 F. 3d 868, 885 (CA7 2009); *Van Wyhe* v. *Reisch*, 581 F. 3d 639, 655 (CA8 2009); and *Holley* v. *California Dept. of Corrections*, 599 F. 3d 1108, 1112 (CA9 2010), with *Smith* v. *Allen*, 502 F. 3d 1255, 1276, n. 12 (CA11 2007) (citing *Benning* v. *Georgia*, 391 F. 3d 1299, 1305–1306 (CA11 2004)).

> This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union." The Federalist No. 81, p. 511 (B. Wright ed. 1961) (A. Hamilton).

Indeed, when this Court threatened state immunity from private suits early in our Nation's history, the people responded swiftly to reiterate that fundamental principle. See *Hans* v. *Louisiana*, 134 U. S. 1, 11 (1890) (discussing *Chisholm* v. *Georgia*, 2 Dall. 419 (1793), and the Eleventh Amendment).

Sovereign immunity principles enforce an important constitutional limitation on the power of the federal courts. See *Pennhurst State School and Hospital* v. *Halderman*, 465 U. S. 89, 98 (1984). For over a century now, this Court has consistently made clear that "federal jurisdiction over suits against unconsenting States 'was not contemplated by the Constitution when establishing the judicial power of the United States.'" *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44, 54 (1996) (quoting *Hans*, *supra*, at 15); see *Seminole Tribe*, *supra*, at 54–55, n. 7 (collecting cases). A State, however, may choose to waive its immunity in federal court at its pleasure. *Clark* v. *Barnard*, 108 U. S. 436, 447–448 (1883).

Accordingly, "our test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one." *College Savings Bank* v. *Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U. S. 666, 675 (1999) (internal quotation marks omitted). A State's consent to suit must be "unequivocally expressed" in the text of the relevant statute. *Pennhurst State School and Hospital*, *supra*, at 99; see *Atascadero State Hospital* v. *Scanlon*, 473 U. S. 234, 238, n. 1, 239–240 (1985). Only by requiring this "clear declaration" by the State can we be "certain that the State in fact consents to suit." *College Savings Bank*, 527 U. S., at 680. Waiver may not be implied. *Id.*, at 682.

For these reasons, a waiver of sovereign immunity "will be strictly construed, in terms of its scope, in favor of the sovereign." *Lane* v. *Peña*, 518 U. S. 187, 192 (1996).[4] So, for example, a State's consent to suit in its own courts is not a waiver of its immunity from suit in federal court. *College Savings Bank*, *supra*, at 676. Similarly, a waiver of sovereign immunity to other types of relief does not waive immunity to damages: "[T]he waiver of sovereign immunity must extend unambiguously to such monetary claims." *Lane*, *supra*, at 192; cf. *United States* v. *Nordic Village*, *Inc.*, 503 U. S. 30, 34 (1992) (construing an ambiguous waiver of sovereign immunity to permit equitable but not monetary claims); *Hoffman* v. *Connecticut Dept. of Income Maintenance*, 492 U. S. 96, 101–102 (1989) (plurality opinion) (construing a statute to authorize injunctive relief but not "monetary recovery from the States" because intent to abrogate immunity to monetary recovery was not "'unmistakably clear in the language of the statute'" (quoting *Atascadero*, *supra*, at 242)).

III

A

RLUIPA's authorization of "appropriate relief against a government," § 2000cc–2(a), is not the unequivocal expression of state consent that our precedents require. "[A]ppropriate relief" does not so clearly and unambiguously waive sovereign immunity to private suits for damages that we can

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[4] Although *Lane* concerned the Federal Government, the strict construction principle, which flows logically from the requirement that consent be "unequivocally expressed," applies to the sovereign immunity of the States as well. Cf. *United States* v. *Nordic Village*, *Inc.*, 503 U. S. 30, 37 (1992) (equating the "unequivocal expression" principle from "the Eleventh Amendment context" with the principle applicable to federal sovereign immunity); *College Savings Bank* v. *Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U. S. 666, 682 (1999) (noting the "clos[e] analogy" between federal and state sovereign immunity); *Belknap* v. *Schild*, 161 U. S. 10, 18 (1896) ("[A] State . . . is as exempt as the United States [is] from private suit").

"be certain that the State in fact consents" to such a suit. *College Savings Bank*, *supra*, at 680.

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"[A]ppropriate relief" is open-ended and ambiguous about what types of relief it includes, as many lower courts have recognized. See, *e. g.*, 560 F. 3d, at 330–331.[5] Far from clearly identifying money damages, the word "appropriate" is inherently context dependent. See Webster's Third New International Dictionary 106 (1993) (defining "appropriate" as "specially suitable: FIT, PROPER"). The context here—where the defendant is a sovereign—suggests, if anything, that monetary damages are not "suitable" or "proper." See *Federal Maritime Comm'n*, 535 U. S., at 765 ("[S]tate sovereign immunity serves the important function of shielding state treasuries . . . ").

Indeed, both the Court and dissent appeared to agree in *West* v. *Gibson*, 527 U. S. 212 (1999), that "appropriate" relief, by itself, does not unambiguously include damages against a sovereign. The question was whether the Equal Employment Opportunity Commission, which has authority to enforce Title VII of the Civil Rights Act against the Federal Government "through appropriate remedies," could require the Federal Government to pay damages. 42 U. S. C. § 2000e–16(b). The dissent argued that the phrase "appropriate remedies" did not authorize damages "in express and unequivocal terms." *Gibson*, 527 U. S., at 226 (opinion of KENNEDY, J.). The Court apparently did not disagree but reasoned that "appropriate remedies" had a flexible meaning that had expanded to include money damages after a related statute was amended to explicitly allow damages in actions under Title VII. See *id.*, at 217–218.

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[5] See also *Holley*, 599 F. 3d, at 1112; *Nelson*, 570 F. 3d, at 884; *Van Wyhe*, 581 F. 3d, at 654; *Cardinal*, 564 F. 3d, at 801; *Madison*, 474 F. 3d, at 131–132; cf. *Webman* v. *Federal Bur. of Prisons*, 441 F. 3d 1022, 1023 (CADC 2006) (interpreting the "appropriate relief" provision of RFRA).

Further, where a statute is susceptible of multiple plausible interpretations, including one preserving immunity, we will not consider a State to have waived its sovereign immunity. See *Dellmuth* v. *Muth*, 491 U. S. 223, 232 (1989) (holding that "a permissible inference" is not the necessary "unequivocal declaration" that States were intended to be subject to damages actions); *Nordic Village*, *supra*, at 37 (holding that the existence of "plausible" interpretations that would not permit recovery "is enough to establish that a reading imposing monetary liability on the Government is not 'unambiguous' and therefore should not be adopted"). That is the case here.

Sossamon argues that, because RLUIPA expressly limits the United States to "injunctive or declaratory relief" to enforce the statute, the phrase "appropriate relief" in the private cause of action necessarily must be broader. 42 U. S. C. § 2000cc–2(f). Texas responds that, because the State has no immunity defense to a suit brought by the Federal Government, Congress needed to exclude damages affirmatively in that context but not in the context of private suits. Further, the private cause of action provides that a person may assert a violation of the statute "as a claim *or defense*." § 2000cc–2(a) (emphasis added). Because an injunction or declaratory judgment is not "appropriate relief" for a successful defense, Texas explains, explicitly limiting the private cause of action to those forms of relief would make no sense.

Sossamon also emphasizes that the statute requires that it be "construed in favor of a broad protection of religious exercise." § 2000cc–3(g). Texas responds that this provision is best read as addressing the substantive standards in the statute, not the scope of "appropriate relief." Texas also highlights Congress' choice of the word "relief," which it argues primarily connotes equitable relief. See Black's Law Dictionary 1293 (7th ed. 1999) (defining "relief" as "[t]he re-

dress or benefit, esp. equitable in nature . . . , that a party asks of a court").

These plausible arguments demonstrate that the phrase "appropriate relief" in RLUIPA is not so free from ambiguity that we may conclude that the States, by receiving federal funds, have unequivocally expressed intent to waive their sovereign immunity to suits for damages. Strictly construing that phrase in favor of the sovereign—as we must, see *Lane*, 518 U. S., at 192—we conclude that it does not include suits for damages against a State.

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The Court's use of the phrase "appropriate relief" in *Franklin* v. *Gwinnett County Public Schools*, 503 U. S. 60 (1992), and *Barnes* v. *Gorman*, 536 U. S. 181 (2002), does not compel a contrary conclusion. In those cases, the Court addressed what remedies are available against municipal entities under the *implied* right of action to enforce Title IX of the Education Amendments of 1972, § 202 of the Americans with Disabilities Act of 1990, and § 504 of the Rehabilitation Act of 1973. With no statutory text to interpret, the Court "presume[d] the availability of all appropriate remedies unless Congress ha[d] expressly indicated otherwise." *Franklin*, 503 U. S., at 66. The Court described the presumption as "[t]he general rule" that "the federal courts have the power to award any *appropriate relief* in a cognizable cause of action brought pursuant to a federal statute." *Id.*, at 70–71 (emphasis added); see *Barnes*, *supra*, at 185 (quoting *Franklin*, *supra*, at 73). Finding no express congressional intent to limit the remedies available under the implied right of action, the Court held that compensatory damages were available. *Franklin*, *supra*, at 73.

The presumption in *Franklin* and *Barnes* is irrelevant to construing the scope of an express waiver of sovereign immunity. See *Lane*, *supra*, at 196 ("[R]eliance on *Franklin* . . . is misplaced" in determining whether damages are avail-

able against the Federal Government). The question here is not whether Congress has given clear direction that it intends to *exclude* a damages remedy, see *Franklin*, *supra*, at 70–71, but whether Congress has given clear direction that it intends to *include* a damages remedy. The text must "establish unambiguously that the waiver extends to monetary claims." *Nordic Village*, 503 U. S., at 34. In *Franklin* and *Barnes*, congressional silence had an entirely different implication than it does here. Whatever "appropriate relief" might have meant in those cases does not translate to this context.[6]

B

Sossamon contends that, because Congress enacted § 3 of RLUIPA pursuant to the Spending Clause, the States were necessarily on notice that they would be liable for damages. He argues that Spending Clause legislation operates as a contract and damages are always available relief for a breach of contract, whether the contract explicitly includes a damages remedy or not. Relying on *Barnes* and *Franklin*, he asserts that all recipients of federal funding are "'generally on notice that [they are] subject . . . to those remedies traditionally available in suits for breach of contract,'" including compensatory damages. Brief for Petitioner 27 (quoting *Barnes*, 536 U. S., at 187; emphasis deleted).

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[6] Nor can it be said that this Court's use of the phrase "appropriate relief" in *Franklin* and *Barnes* somehow put the States on notice that the same phrase in RLUIPA subjected them to suits for monetary relief. Those cases did not involve sovereign defendants, so the Court had no occasion to consider sovereign immunity. Liability against nonsovereigns could not put the States on notice that they would be liable in the same manner, absent an unequivocal textual waiver. Moreover, the same phrase in RFRA had been interpreted not to include damages relief against the Federal Government or the States and so could have signaled to the States that damages are *not* "appropriate relief" under RLUIPA. See, *e. g.*, *Tinsley* v. *Pittari*, 952 F. Supp. 384, 389 (ND Tex. 1996); *Commack Self-Service Kosher Meats Inc.* v. *New York*, 954 F. Supp. 65, 69 (EDNY 1997).

We have acknowledged the contract-law analogy, but we have been clear "not [to] imply . . . that suits under Spending Clause legislation are suits in contract, or that contract-law principles apply to all issues that they raise." *Id.*, at 189, n. 2. We have not relied on the Spending Clause contract analogy to expand liability beyond what would exist under nonspending statutes, much less to extend monetary liability against the States, as Sossamon would have us do. In fact, in *Barnes* and *Franklin*, the Court discussed the Spending Clause context only as a potential *limitation* on liability. See *Barnes*, *supra*, at 187–188; *Franklin*, *supra*, at 74–75.

In any event, applying ordinary contract principles here would make little sense because contracts with a sovereign are unique. They do not traditionally confer a right of action for damages to enforce compliance: "'The contracts between a Nation and an individual are only binding on the conscience of the sovereign and have no pretensions to compulsive force. They confer no right of action independent of the sovereign will.'" *Lynch* v. *United States*, 292 U. S. 571, 580–581 (1934) (quoting The Federalist, No. 81, at 511 (A. Hamilton)).[7]

More fundamentally, Sossamon's implied-contract-remedies proposal cannot be squared with our longstanding rule that a waiver of sovereign immunity must be expressly and unequivocally stated in the text of the relevant statute. It would be bizarre to create an "unequivocal statement" rule and then find that every Spending Clause enactment, no matter what its text, satisfies that rule because it includes unexpressed, implied remedies against the States. The requirement of a clear statement in the text of the statute ensures that Congress has specifically considered state sovereign immunity and has intentionally legislated on the matter. Cf. *Spector* v. *Norwegian Cruise Line Ltd.*, 545 U. S.

[7] Of course, the Federal Government has, by statute, waived its sovereign immunity to damages for breach of contract in certain contexts. See, *e. g.*, 28 U. S. C. § 1491(a)(1).

119, 139 (2005) (plurality opinion) ("[C]lear statement rules ensure Congress does not, by broad or general language, legislate on a sensitive topic inadvertently or without due deliberation"). Without such a clear statement from Congress and notice to the States, federal courts may not step in and abrogate state sovereign immunity.[8]

IV

Sossamon also argues that § 1003 of the Rehabilitation Act Amendments of 1986, 42 U. S. C. § 2000d–7, independently put the State on notice that it could be sued for damages under RLUIPA. That provision expressly waives state sovereign immunity for violations of "section 504 of the Rehabilitation Act of 1973, title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, title VI of the Civil Rights Act of 1964, *or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.*" § 2000d–7(a)(1) (emphasis added). Section 1003 makes "remedies (including remedies both at law and in equity) . . . available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State." § 2000d–7(a)(2). Sossamon contends that § 3 of RLUIPA falls within the residual clause of § 1003 and therefore § 1003 waives Texas' sovereign immunity to RLUIPA suits for damages.

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[8] The dissent finds our decision "difficult to understand," *post*, at 298 (opinion of SOTOMAYOR, J.), but it follows naturally from this Court's precedents regarding waiver of sovereign immunity, which the dissent gives astonishingly short shrift. The dissent instead concerns itself primarily with "general remedies principles." *Post*, at 293. The essence of sovereign immunity, however, is that remedies against the government differ from "general remedies principles" applicable to private litigants. See, *e. g.*, *Lane* v. *Peña*, 518 U. S. 187, 196 (1996) (calling it a "crucial point that, when it comes to an award of money damages, sovereign immunity places the . . . Government on an entirely different footing than private parties").

Even assuming that a residual clause like the one in § 1003 could constitute an unequivocal textual waiver, § 3 is not unequivocally a "statute prohibiting discrimination" within the meaning of § 1003.[9] The text of § 3 does not prohibit "discrimination"; rather, it prohibits "substantia[l] burden[s]" on religious exercise. This distinction is especially conspicuous in light of § 2 of RLUIPA, in which Congress expressly prohibited "land use regulation[s] that discriminat[e] . . . on the basis of religion." § 2000cc(b)(2). A waiver of sovereign immunity must be "strictly construed, in terms of its scope, in favor of the sovereign." *Lane*, 518 U. S., at 192. We cannot say that the residual clause clearly extends to § 3; a State might reasonably conclude that the clause covers only provisions using the term "discrimination."

The statutory provisions specifically listed in § 1003 confirm that § 3 does not unequivocally come within the scope of the residual clause. "[G]eneral words," such as the residual clause here, "are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Washington State Dept. of Social and Health Servs.* v. *Guardianship Estate of Keffeler*, 537 U. S. 371, 384 (2003) (internal quotation marks omitted); see also *Jarecki* v. *G. D. Searle & Co.*, 367 U. S. 303, 307 (1961) (noting that this maxim "is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress"). Unlike § 3, each of the statutes specifically enumerated in § 1003 explicitly prohibits "discrimination." See 29 U. S. C. § 794(a); 20 U. S. C. § 1681(a); 42 U. S. C. §§ 6101, 6102, 2000d.[10]

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[9] Every Court of Appeals to consider the question has so held. See *Holley*, 599 F. 3d, at 1113–1114; *Van Wyhe*, 581 F. 3d, at 654–655; *Madison*, 474 F. 3d, at 132–133.

[10] Sossamon argues that § 3 resembles § 504 of the Rehabilitation Act, one of the statutes listed in § 1003, because both require special accommodations for particular people or activities. By Sossamon's reasoning, every Spending Clause statute that arguably provides a benefit to a class

* * *

We conclude that States, in accepting federal funding, do not consent to waive their sovereign immunity to private suits for money damages under RLUIPA because no statute expressly and unequivocally includes such a waiver. The judgment of the United States Court of Appeals for the Fifth Circuit is affirmed.

It is so ordered.

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

JUSTICE SOTOMAYOR, with whom JUSTICE BREYER joins, dissenting.

The Court holds that the term "appropriate relief" is too ambiguous to provide States with clear notice that they will be liable for monetary damages under the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 114 Stat. 803, 42 U. S. C. §2000cc *et seq.* I disagree. No one disputes that, in accepting federal funds, the States consent to suit for violations of RLUIPA's substantive provisions; the only question is what relief is available to plaintiffs asserting injury from such violations. That monetary damages are "appropriate relief" is, in my view, self-evident. Under general remedies principles, the usual remedy for a violation of a legal right is damages. Consistent with these principles, our precedents make clear that the phrase "appropriate relief" includes monetary relief. By adopting a contrary reading of the term, the majority severely undermines the "broad protection of religious exercise" Congress intended the statute to provide. §2000cc–3(g). For these reasons, I respectfully dissent.

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of people or activities would become a federal statute "prohibiting discrimination," thereby waiving sovereign immunity. Such an interpretation cannot be squared with the foundational rule that waiver of sovereign immunity must be unequivocally expressed and strictly construed.

I

A

As the Court acknowledges, the proposition that "States may waive their sovereign immunity" is an "unremarkable" one. *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44, 65 (1996); see also *Alden* v. *Maine*, 527 U. S. 706, 737 (1999) ("[W]e have not questioned the general proposition that a State may waive its sovereign immunity and consent to suit"); *Atascadero State Hospital* v. *Scanlon*, 473 U. S. 234, 238 (1985) (noting the "well-established" principle that "if a State waives its immunity and consents to suit in federal court, the Eleventh Amendment does not bar the action"); *Petty* v. *Tennessee-Missouri Bridge Comm'n*, 359 U. S. 275, 276 (1959) (noting that a State may waive sovereign immunity "at its pleasure").

Neither the majority nor respondents (hereinafter Texas) dispute that, pursuant to its power under the Spending Clause, U. S. Const., Art. I, § 8, cl. 1, Congress may secure a State's consent to suit as a condition of the State's receipt of federal funding.[1] See *College Savings Bank* v. *Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U. S. 666, 686 (1999) ("Congress may, in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take, and . . . acceptance of the funds entails an agreement to the actions"); *Atascadero*, 473 U. S., at 247 (suggesting that a federal statute can "condition participation in the programs funded under the [statute] on a State's consent to waive its constitutional immunity"). As with all waivers of sovereign immunity, the question is whether the State has unequivo-

[1] Though the Court reserves the general question whether RLUIPA is a valid exercise of Congress' power under the Spending Clause, see *ante*, at 282, n. 1, there is apparently no disagreement among the Federal Courts of Appeals, see 560 F. 3d 316, 328, n. 34 (CA5 2009) ("Every circuit to consider whether RLUIPA is Spending Clause legislation has concluded that it is constitutional under at least that power").

cally consented to suit in federal court. See *College Savings Bank*, 527 U. S., at 680; *Atascadero*, 473 U. S., at 238, n. 1.

Thus, in order to attach a waiver of sovereign immunity to federal funds, Congress "must do so unambiguously," so as to "enable the States to exercise their choice knowingly." *Pennhurst State School and Hospital* v. *Halderman*, 451 U. S. 1, 17 (1981). In other words, the State must have notice of the condition it is accepting. See *Arlington Central School Dist. Bd. of Ed.* v. *Murphy*, 548 U. S. 291, 298 (2006) ("[C]lear notice . . . is required under the Spending Clause"). The reason for requiring notice is simple: "States cannot knowingly accept conditions of which they are 'unaware' or which they are 'unable to ascertain.' " *Id.*, at 296 (quoting *Pennhurst*, 451 U. S., at 17). In assessing whether a federal statute provides clear notice of the conditions attached, "we must view the [statute] from the perspective of a state official who is engaged in the process of deciding whether the State should accept [federal] funds and the obligations that go with those funds." *Arlington Central*, 548 U. S., at 296.

There is also no dispute that RLUIPA clearly conditions a State's receipt of federal funding on its consent to suit for violations of the statute's substantive provisions. The statute states that "program[s] or activit[ies] that receiv[e] Federal financial assistance" may not impose a "substantial burden on the religious exercise of a person residing in or confined to an institution." §2000cc–1. When such a burden has been imposed, the victim "may assert a violation of [RLUIPA] as a claim . . . in a judicial proceeding and obtain appropriate relief against a government," §2000cc–2(a), which the statute defines, as relevant, as "a State, county, municipality, or other governmental entity created under the authority of a State," §2000cc–5(4)(A)(i). Accordingly, it is evident that Texas had notice that, in accepting federal funds, it waived its sovereign immunity to suit by institutionalized persons upon whom it has imposed an unlawful substantial burden. See *Madison* v. *Virginia*, 474 F. 3d 118,

130 (CA4 2006) ("On its face, RLUIPA . . . creates a private cause of action against the State, and Virginia cannot be heard to claim that it was unaware of this condition" (citation omitted)); *Benning* v. *Georgia*, 391 F. 3d 1299, 1305 (CA11 2004) ("Congress unambiguously required states to waive their sovereign immunity from suits filed by prisoners to enforce RLUIPA").

B

The Court holds that the phrase "appropriate relief" does not provide state officials clear notice that *monetary relief* will be available against the States, meaning that they could not have waived their immunity with respect to that particular type of liability. This holding is contrary to general remedies principles and our precedents.

RLUIPA straightforwardly provides a private right of action to "obtain appropriate relief against a government." § 2000cc–2(a). Under "our traditional approach to deciding what remedies are available for violation of a federal right," damages are the default—and equitable relief the exception—for "it is axiomatic that a court should determine the adequacy of a remedy in law before resorting to equitable relief." *Franklin* v. *Gwinnett County Public Schools*, 503 U. S. 60, 75–76 (1992); see also *Weinberger* v. *Romero-Barcelo*, 456 U. S. 305, 312 (1982) ("The Court has repeatedly held that the basis for injunctive relief in the federal courts has always been . . . the inadequacy of legal remedies"); *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388, 395 (1971) ("Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty"); cf. *Monsanto Co.* v. *Geertson Seed Farms*, 561 U. S. 139, 165 (2010) ("An injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course"). It is unsurprising, therefore, that on more than one occasion Congress has felt it necessary to clarify in the text of a statute that it meant the terms "relief" and "appropriate relief" to *exclude* damages. See 5 U. S. C. § 702 (providing that,

under the Administrative Procedure Act, "relief other than money damages" is available against a federal agency to remedy a "legal wrong"); see also 42 U. S. C. § 6395(e)(1) (providing a cause of action for "appropriate relief," but specifying that "[n]othing in this subsection shall authorize any person to recover damages"); 15 U. S. C. § 797(b)(5) (similar).

If, despite the clarity of this background principle, state officials reading RLUIPA were somehow still uncertain as to whether the phrase "appropriate relief" encompasses monetary damages, our precedents would relieve any doubt. In *Franklin* we made clear that, "absent clear direction to the contrary by Congress," federal statutes providing a private right of action authorize all "appropriate relief," including damages, against violators of its substantive terms. 503 U. S., at 70–71, 75–76. We reiterated this principle in *Barnes* v. *Gorman*, 536 U. S. 181, 185, 187 (2002), affirming that "the scope of 'appropriate relief' " includes compensatory damages.[2] The holdings in these cases are fully consistent with the general principle that monetary relief is available for violations of the substantive conditions Congress attaches, through Spending Clause legislation, to the acceptance of federal funding. See *Davis* v. *Monroe County Bd. of Ed.*, 526 U. S. 629, 640 (1999) ("[P]ursuant to Congress'

[2] The majority suggests that our use of the phrase "appropriate relief" in *Franklin* and *Barnes* did not "put the States on notice that the same phrase in RLUIPA subjected them to suits for monetary relief," because "[t]hose cases did not involve sovereign defendants." *Ante*, at 289, n. 6. The majority misperceives the point. *Franklin* and *Barnes* simply confirmed what otherwise would have been already apparent to any informed reader of RLUIPA—when it comes to remedying injuries to legal rights, monetary damages are "appropriate relief." Moreover, as noted in the text, see *supra*, at 296 and this page, the Administrative Procedure Act expressly excludes "money damages" from the "relief" available against the United States, suggesting that Congress understands the term normally to encompass monetary relief even when the defendant enjoys sovereign immunity. See 5 U. S. C. § 702; *Bowen* v. *Massachusetts*, 487 U. S. 879, 891–892 (1988) (noting that § 702 waives the United States' sovereign immunity to suit).

authority under the Spending Clause . . . private damages actions are available"); *Gebser* v. *Lago Vista Independent School Dist.*, 524 U. S. 274, 287 (1998) (noting that "[w]hen Congress attaches conditions to the award of federal funds under its spending power . . . private actions holding the recipient liable in monetary damages" are permissible). It would be an odd derogation of the normal rules of statutory construction for state officials reading RLUIPA to assume that Congress drafted the statute in ignorance of these unambiguous precedents. See *Merck & Co.* v. *Reynolds*, 559 U. S. 633, 648 (2010) ("We normally assume that, when Congress enacts statutes, it is aware of relevant judicial precedent").[3]

C

Accordingly, it is difficult to understand the basis for the Court's position that the phrase "appropriate relief" in § 2000cc–2(a) fails to provide state officials with clear notice that waiving sovereign immunity to monetary relief is a condition of accepting federal funds. In arguing that "a waiver of sovereign immunity *to other types of relief* does not waive immunity to damages," *ante*, at 285 (emphasis added), the majority appears to accept that equitable relief is available to RLUIPA plaintiffs. See *Madison*, 474 F. 3d, at 131 (holding that an RLUIPA plaintiff's "claims for equitable relief are

[3] Curiously, the majority appears to believe that it would be appropriate for state officials to read the statutory phrase "appropriate relief" without reference to general remedies principles. See *ante*, at 291, n. 8. It is well established, however, that "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 there can be no doubt that general legal principles necessarily inform judicial determinations as to what remedies are available to civil plaintiffs, see, *e. g.*, *Atlantic Sounding Co.* v. *Townsend*, 557 U. S. 404, 421 (2009) (concluding that, in light of "general principles of maritime tort law," punitive damages were a remedy available to the plaintiff (internal quotation marks omitted)). Why Texas' sovereign immunity defense renders this approach improper is a mystery the majority opinion leaves unsolved.

not barred by the Eleventh Amendment"); cf. 560 F. 3d 316, 331, 336 (CA5 2009) (reversing the District Court's grant of summary judgment to Texas on one of petitioner's RLUIPA claims for declaratory and injunctive relief). The explanation for the majority's implicit acceptance of suits for injunctive and declaratory relief is obvious enough: It would be a particularly curious reading of the statute to conclude that Congress' express provision of a private right of action to seek "appropriate relief" against "a State" nonetheless left plaintiffs suing for state violations of RLUIPA with *no* available relief.

It is not apparent, however, why the phrase "appropriate relief" is too ambiguous to secure a waiver of state sovereign immunity with respect to damages but is clear enough as to injunctive and other forms of equitable relief. The majority appears to believe that equitable relief is a "suitable" or "proper" remedy for a state violation of RLUIPA's substantive provisions but monetary relief is not; therefore, a state official reading the "open-ended and ambiguous" phrase "appropriate relief" will be unaware that it includes damages but fully apprised that it makes equitable relief available. See *ante*, at 286. But sovereign immunity is not simply a defense against certain classes of remedies—it is a defense against being sued at all. See, *e. g.*, *Federal Maritime Comm'n* v. *South Carolina Ports Authority*, 535 U. S. 743, 766 (2002). As a result, there is no inherent reason why the phrase "appropriate relief" would provide adequate notice as to equitable remedies but not as to monetary ones. In fact, as discussed earlier, in light of general remedies principles the presumption arguably should be the reverse. See *supra*, at 296–298.

The majority suggests that equitable relief is the sole "appropriate relief" for statutory violations "where the defendant is a sovereign." *Ante*, at 286. There can be little doubt, however, that the "appropriateness" of relief to be afforded a civil plaintiff is generally determined by the na-

ture of the injury to his legal rights. See *Franklin*, 503 U. S., at 76 (concluding that monetary damages were "appropriate" because equitable relief offered no redress for the injury suffered); see also *Milliken* v. *Bradley*, 433 U. S. 267, 280 (1977) ("[T]he nature of the . . . remedy is to be determined by the nature and scope of the . . . violation"); *Bell* v. *Hood*, 327 U. S. 678, 684 (1946) ("[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief"). In support of its proposition the majority cites only to a case in which we expressly *rejected* the argument that state sovereign immunity operates differently according to what type of relief is sought. See *Federal Maritime*, 535 U. S., at 765 ("[S]overeign immunity applies regardless of whether a private plaintiff's suit is for monetary damages or some other type of relief"); cf. *id.*, at 769 ("[T]he primary function of sovereign immunity is not to protect state treasuries, but to afford the States the dignity and respect due sovereign entities" (citation omitted)). Nor is the basis for the majority's view apparent from the other cases that it cites.[4]

The majority's additional arguments in support of its holding also fail to persuade. The majority contends that the use of a "context dependent" word like "appropriate" necessarily renders the provision ambiguous. *Ante*, at 286. But the fact that the precise relief afforded by a court may vary depending on the particular injury to be addressed in a given

[4] In *Lane* v. *Peña*, 518 U. S. 187 (1996), *United States* v. *Nordic Village, Inc.*, 503 U. S. 30 (1992), and *Hoffman* v. *Connecticut Dept. of Income Maintenance*, 492 U. S. 96 (1989), we simply reaffirmed the principle that a sovereign's liability for damages must be unambiguously expressed in the statute purporting to waive immunity; as demonstrated above, RLUIPA satisfies this requirement. The majority tellingly relies on the *dissent's* assertion in *West* v. *Gibson*, 527 U. S. 212 (1999), that the phrase "appropriate remedies" was too ambiguous to waive sovereign immunity to monetary relief. See *id.*, at 226 (opinion of KENNEDY, J.). Accordingly, the cases the majority cites do not mandate the conclusion it draws today.

case does not render § 2000cc–2(a) ambiguous; it simply means that Congress meant for that provision to be comprehensive. See *Pennsylvania Dept. of Corrections* v. *Yeskey*, 524 U. S. 206, 212 (1998) ("[T]he fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth" (internal quotation marks omitted)); cf. *West* v. *Gibson*, 527 U. S. 212, 217–218 (1999) (holding that the phrase "appropriate remedies" in 42 U. S. C. § 2000e–16(b) includes remedies not expressly enumerated).

Next, the majority repeats Texas' dictionary-based contention that in using the word "relief" Congress meant to "connot[e] equitable relief." *Ante*, at 287. This proposition suffers from three flaws. First, it is not established by the dictionary to which the majority cites. See Black's Law Dictionary 1293 (7th ed. 1999) ("relief . . . Also termed *remedy*"); *id.*, at 1296 ("remedy . . . The means of enforcing a right or preventing or redressing a wrong; *legal or equitable relief*" (emphasis added)). Second, it is inconsistent with our precedent. See *Barnes*, 536 U. S., at 185–187 (noting that "appropriate relief" includes monetary and injunctive relief). Third, it is undermined by the fact that, on numerous occasions, Congress has deemed it necessary to specify that "relief" *includes* injunctive and other equitable relief. See 16 U. S. C. § 973i(e) (authorizing the Attorney General to "commence a civil action for appropriate relief, including permanent or temporary injunction"); see also 2 U. S. C. § 437g(a)(6)(A); 8 U. S. C. § 1324a(f)(2); 12 U. S. C. § 1715z–4a(b); 15 U. S. C. § 6309(a). If the term "relief" already connotes equitable relief—and *only* equitable relief—additional explication is redundant.

Finally, the majority asserts that because the parties to this case advance opposing "plausible arguments" regarding the correct interpretation of RLUIPA's text, we must conclude that the statute is ambiguous. *Ante*, at 288. This view of how we adjudicate cases is incorrect as a descriptive

matter. See, *e. g.*, *Carcieri* v. *Salazar*, 555 U. S. 379, 390 (2009) (reviewing the parties' conflicting textual interpretations of a statute but concluding that it was unambiguous nonetheless). Moreover, I cannot agree with the majority that our capacity to interpret authoritatively the text of a federal statute is held hostage to the litigants' strategic arguments. If this were true, there would be few cases in which we would be able to decide that a statute was unambiguous.

In sum, the majority's conclusion that States accepting federal funds have not consented to suit for monetary relief cannot be reconciled with the fact that the availability of such relief is evident in light of RLUIPA's plain terms and the principles animating our relevant precedents. In so holding, the majority discovers ambiguity where none is to be found.

II

There is another reason to question the soundness of today's decision. The Court's reading of § 2000cc–2(a) severely undermines Congress' unmistakably stated intent in passing the statute: to afford "broad protection of religious exercise, to the maximum extent permitted by the terms of [the statute] and the Constitution." § 2000cc–3(g). I find it improbable that, in light of this express statutory purpose and the history of "long-running congressional efforts to accord religious exercise heightened protection from government-imposed burdens," *Cutter* v. *Wilkinson*, 544 U. S. 709, 714 (2005), state officials would read RLUIPA's relief provision in the same limited manner the majority does.[5]

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[5] I agree with the majority's conclusion that, because § 3 of RLUIPA, addressing the rights of institutionalized persons, is not a "provisio[n] of [a] . . . Federal statute prohibiting discrimination" within the meaning of the Rehabilitation Act Amendments of 1986, 42 U. S. C. § 2000d–7(a)(1), the latter statute's waiver provision does not put the States on notice that they can be sued for damages under RLUIPA. See *ante*, at 291–292. It bears noting, however, that § 2 of RLUIPA explicitly prohibits discrimina-

As the majority acknowledges, RLUIPA was Congress' second attempt to guarantee by statute the "broad protection" of religious exercise that we found to be unwarranted as a constitutional matter in *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872 (1990). As we have previously recognized, in passing RLUIPA Congress was clearly concerned that state institutions regularly imposed "frivolous or arbitrary barriers imped[ing] institutionalized persons' religious exercise." *Cutter*, 544 U. S., at 716 (internal quotation marks omitted); see also 146 Cong. Rec. 16698, 16699 (2000) (joint statement of Sen. Hatch and Sen. Kennedy on RLUIPA) ("Whether from indifference, ignorance, bigotry, or lack of resources, some institutions restrict religious liberty in egregious and unnecessary ways"); *ibid.* ("Institutional residents' right to practice their faith is at the mercy of those running the institution . . . "). It is difficult to believe that Congress would have devoted such care and effort to establishing significant statutory protections for religious exercise and specifically extended those protections to persons in state institutions, yet withheld from plaintiffs a crucial tool for securing the rights the statute guarantees.

By depriving prisoners of a damages remedy for violations of their statutory rights, the majority ensures that plaintiffs suing state defendants under RLUIPA will be forced to seek enforcement of those rights with one hand tied behind their backs. Most obviously, the majority's categorical denial of monetary relief means that a plaintiff who prevails on the merits of his claim that a State has substantially burdened

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tion in land-use regulation. See §2000cc(b)(2) ("No government shall impose or implement a land use regulation that discriminates . . . on the basis of religion or religious denomination"). As a result, the majority's decision in this case means that some RLUIPA plaintiffs will be able to seek monetary damages against a State and others will not, even though RLUIPA's provision of "appropriate relief" applies equally to suits for violations of the terms of both §2 and §3.

his religious exercise will often be denied redress for the injury he has suffered, because in many instances "prospective relief accords . . . no remedy at all." *Franklin*, 503 U. S., at 76; see H. R. Rep. No. 102–40, pt. 2, p. 25 (1991) (Report of Committee on the Judiciary on the Civil Rights Act of 1991) ("The limitation of relief under Title VII to equitable remedies often means that victims . . . may not recover for the very real effects of the [statutory violation]"). Injunctive relief from a federal court may address a violation going forward, but this fact will be of cold comfort to the victims of serious, nonrecurring violations for which equitable relief may be inappropriate.

In addition, the unavailability of monetary relief will effectively shield unlawful policies and practices from judicial review in many cases. Under state law, discretion to transfer prisoners "in a wide variety of circumstances is vested in prison officials." *Meachum* v. *Fano*, 427 U. S. 215, 227 (1976). A number of RLUIPA suits seeking injunctive relief have been dismissed as moot because the plaintiff was transferred from the institution where the alleged violation took place prior to adjudication on the merits. See, *e. g.*, *Colvin* v. *Caruso*, 605 F. 3d 282, 287, 289 (CA6 2010); *Simmons* v. *Herrera*, No. C 09–0318 JSW (PR), 2010 WL 1233815, *3 (ND Cal., Mar. 26, 2010); see generally Brief for American Civil Liberties Union et al. as *Amici Curiae* 8–11. Absent a damages remedy, longstanding RLUIPA challenges may well be dismissed for lack of a case or controversy conferring Article III jurisdiction on the federal court. Cf. *Moussazadeh* v. *Texas Dept. of Crim. Justice*, Civ. Action No. G–07–574, 2009 WL 819497, *9 (SD Tex., Mar. 26, 2009) (dismissing as moot plaintiff's RLUIPA claim because he had been transferred to a facility that provided kosher food), remanded, 364 Fed. Appx. 110 (CA5 2010); Opening Brief for Plaintiff-Appellant in *Moussazadeh* v. *Texas Dept. of Crim. Justice*, No. 09–40400 (CA5), p. 11 (noting that transfer to a special facility took place 19 months after the plaintiff filed

suit and just before discovery—which had been stayed 12 months for negotiation—was scheduled to recommence). Or, as happened in this case, officials may change the policy while litigation is pending. The fact of "voluntary cessation" may allow some of these claims to go forward, but many will nonetheless be dismissed as moot (as happened in this case).[6]

Of course, under the rule the majority announces, Congress can revise RLUIPA to provide specifically for monetary relief against the States, perhaps by inserting the phrase "including monetary relief" into the text of § 2000cc–2(a). But we have never demanded that a waiver be presented in a particular formulation to be effective; we only require that it be clear. See, *e. g.*, *Edelman* v. *Jordan*, 415 U. S. 651, 673 (1974) (holding that waiver may be found in "express language" or by "overwhelming implications from the text" (internal quotation marks omitted)). In holding to the contrary, the majority erects a formalistic barrier to the vindication of statutory rights deliberately provided for by Congress.

More problematically, because there is no apparent reason why the term "appropriate relief" is sufficiently clear as to

[6] See *Parents Involved in Community Schools* v. *Seattle School Dist. No. 1*, 551 U. S. 701, 719 (2007) ("Voluntary cessation does not moot a case or controversy unless subsequent events make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur" (internal quotation marks and alteration omitted)). The Fifth Circuit declined to apply the "voluntary cessation" doctrine in this case and instead granted Texas' motion that the court dismiss as moot petitioner's claim for injunctive relief with respect to the prison's cell-restriction policy. Because the prison director averred that the policy was no longer in force, and "absent evidence that the voluntary cessation [wa]s a sham," the court held that the "good faith nature" of Texas' change in policy rendered moot petitioner's claim for injunctive relief. See 560 F. 3d, at 324–326; see also *Nelson* v. *Miller*, 570 F. 3d 868, 882–883 (CA7 2009) (affirming the District Court's dismissal as moot of an RLUIPA claim because there was no evidence that the prison intended to revoke the plaintiff's religious diet); *El* v. *Evans*, 694 F. Supp. 2d 1009, 1012–1013 (SD Ill. 2010) (similar).

equitable relief but not as to monetary relief, we are left with the very real possibility that, in order to secure a waiver of immunity under the majority's new rule, Congress must now itemize in the statutory text every type of relief meant to be available against sovereign defendants. I, for one, do not relish the prospect of federal courts being presented with endless state challenges to all manner of federal statutes, on the ground that Congress failed to predict that a laundry list of terms must be included to waive sovereign immunity to all forms of relief. I would avoid the problems the majority's decision invites and hold instead that, as is the case here, when a general statutory term like "appropriate relief" is used, clear notice has been provided and a State's acceptance of federal funds constitutes a waiver of sovereign immunity to all relief, equitable and monetary.

As explained above, nothing in our precedent demands the result the majority reaches today. The conclusion that RLUIPA fails to provide States with sufficient notice that they are liable for monetary relief cannot be squared with the straightforward terms of the statute and the general principles evident in our prior cases. For these reasons, and because the majority's decision significantly undermines Congress' ability to provide needed redress for violations of individuals' rights under federal law, I respectfully dissent.

Syllabus

UNITED STATES *v.* TOHONO O'ODHAM NATION

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

No. 09–846. Argued November 1, 2010—Decided April 26, 2011

Respondent Tohono O'odham Nation (Nation) filed suit in Federal District Court against federal officials who managed tribal assets held in trust by the Federal Government, alleging violations of fiduciary duty and requesting equitable relief. The next day, the Nation filed this action against the United States in the Court of Federal Claims (CFC), alleging almost identical violations and requesting money damages. The CFC case was dismissed under 28 U. S. C. § 1500, which bars CFC jurisdiction over a claim if the plaintiff has another suit "for or in respect to" that claim pending against the United States or its agents in another court. The Federal Circuit reversed, finding that the two suits were not for or in respect to the same claim because, although they shared operative facts, they did not seek overlapping relief.

Held:

1. Two suits are for or in respect to the same claim, precluding CFC jurisdiction, if they are based on substantially the same operative facts, regardless of the relief sought in each suit. Pp. 310–317.

(a) Since 1868, Congress has restricted the jurisdiction of the CFC and its predecessors when related actions are pending elsewhere. *Keene Corp.* v. *United States*, 508 U. S. 200, 212, held that two suits are for or in respect to the same claim when they are "based on substantially the same operative facts . . . , at least if there [is] some overlap in the relief requested," but it reserved the question whether the jurisdictional bar operates if suits based on the same operative facts do not seek overlapping relief. The rule now codified in § 1500 was first enacted to curb duplicate lawsuits by residents of the Confederacy who, in seeking to recover for cotton taken by the Federal Government, sued the Government in the Court of Claims and, at the same time, sued federal officials in other courts, seeking tort relief for the same actions. Section 1500's robust response to this problem bars CFC jurisdiction not only if the plaintiff sues on an identical claim elsewhere, but also if the other action is related but not identical. The phrase "in respect to" does not resolve all doubt as to the bar's scope, but it suggests a broad prohibition, regardless of whether "claim" carries a special or limited meaning. Pp. 310–312.

Syllabus

(b) *Keene* permits two constructions of "for or in respect to" the same claim, one based on facts alone and the other on factual plus remedial overlap. The former is the more reasonable interpretation in light of the statute's use of a similar phrase in a way consistent only with factual overlap. The CFC bar applies where the other action is against a "person who, . . . when the cause of action . . . arose, was, in respect thereto, acting" under color of federal law. But at the time that a cause of action arose, the person could not act in respect to the relief requested, for no complaint was yet filed. Although the phrase at issue involves a "claim" rather than a cause of action, there is reason to think that both phrases refer to facts alone and not to relief. As *Keene* explained, "'claim' is used here synonymously with 'cause of action,'" 508 U. S., at 210. And if the phrase that uses "cause of action," the more technical term, does not embrace the concept of remedy, it is reasonable to conclude that neither phrase does. Pp. 312–313.

(c) This reading also makes sense in light of the CFC's unique remedial powers. Because the CFC is the only judicial forum for most nontort requests for significant monetary relief against the United States and because it has no general power to provide equitable relief against the Government or its officers, a statute aimed at precluding duplicate CFC suits would be unlikely to require remedial overlap. Remedial overlap was even more unusual when § 1500's rule was first enacted in 1868. The Federal Circuit could identify no purpose the statute served in light of that court's precedent. But courts should not render statutes nugatory through construction. The statute's purpose is clear from its origins—the need to save the Government from redundant litigation—and the conclusion that two suits are for or in respect to the same claim when they share substantially the same operative facts allows the statute to achieve that aim. Concentrating on operative facts is also consistent with the doctrine of claim preclusion, or res judicata. The Nation errs in arguing that this Court's interpretation unjustly forces plaintiffs to choose between partial remedies available in different courts. The Nation could have recovered any losses in the CFC alone. Even if some hardship were shown, this Court "enjoy[s] no 'liberty to add an exception . . . to remove apparent hardship.'" *Keene*, *supra*, at 217–218. Pp. 313–317.

2. The substantial overlap in operative facts between the Nation's District Court and CFC suits precludes jurisdiction in the CFC. Both actions allege that the United States holds the same assets in trust for the Nation's benefit, and they describe almost identical breaches of fiduciary duty. Pp. 317–318.

559 F. 3d 1284, 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 an opinion concurring in the judgment, in which BREYER, J., joined, *post*, p. 318. GINSBURG, J., filed a dissenting opinion, *post*, p. 330. KAGAN, J., took no part in the consideration or decision of the case.

Anthony A. Yang argued the cause for the United States. With him on the briefs were *Acting Solicitor General Katyal*, *Assistant Attorney General Moreno*, *Deputy Solicitor General Kneedler*, and *Aaron P. Avila*.

Danielle Spinelli argued the cause for respondent. With her on the brief were *Seth P. Waxman*, *Catherine M. A. Carroll*, *Annie L. Owens*, *Keith M. Harper*, *G. William Austin*, *Catherine F. Munson*, *Adam H. Charnes*, and *Raymond M. Bennett*.*

JUSTICE KENNEDY delivered the opinion of the Court.

The Tohono O'odham Nation (Nation) is an Indian Tribe with federal recognition. The Nation's main reservation is in the Sonoran desert of southern Arizona. Counting this and other reservation lands, the Nation's landholdings are approximately 3 million acres.

The Nation brought two actions based on the same alleged violations of fiduciary duty with respect to the Nation's lands and other assets. One action was filed against federal officials in District Court and the other against the United States in the Court of Federal Claims (CFC). The Court of Appeals for the Federal Circuit held that the CFC suit was not barred by the rule that the CFC lacks jurisdiction over

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*Briefs of *amici curiae* urging affirmance were filed for the Chamber of Commerce of the United States of America by *Jonathan L. Marcus*, *Theodore P. Metzler*, *Robin S. Conrad*, and *Amar D. Sarwal;* for the Colorado River Indian Tribes et al. by *Steven D. Gordon* and *Stephen J. McHugh;* for the National Association of Home Builders by *Robert H. Thomas*, *Mark M. Murakami*, *Rebecca A. Copeland*, *Mary DiCrescenzo*, and *Thomas J. Ward;* and for the Osage Nation by *Patricia A. Millett*, *James P. Tuite*, *Merrill C. Godfrey*, and *James T. Meggesto*.

Gregory C. Sisk, *pro se*, filed a brief as *amicus curiae*.

an action "for or in respect to" a claim that is also the subject of an action pending in another court. 28 U. S. C. § 1500. The question presented is whether a common factual basis like the one apparent in the Nation's suits suffices to bar jurisdiction under § 1500.

I

The case turns on the relationship between the two suits the Nation filed. The first suit was filed in the United States District Court for the District of Columbia against federal officials responsible for managing tribal assets held in trust by the Federal Government. The complaint alleged various violations of fiduciary duty with respect to those assets. The Nation claimed, for example, that the officials failed to provide an accurate accounting of trust property; to refrain from self-dealing; or to use reasonable skill in investing trust assets. The complaint requested equitable relief, including an accounting.

The next day the Nation filed the instant action against the United States in the CFC. The CFC complaint described the same trust assets and the same fiduciary duties that were the subject of the District Court complaint. And it alleged almost identical violations of fiduciary duty, for which it requested money damages. The CFC case was dismissed under § 1500 for want of jurisdiction.

A divided panel of the Court of Appeals for the Federal Circuit reversed. 559 F. 3d 1284 (2009). Two suits are for or in respect to the same claim, it reasoned, only if they share operative facts and also seek overlapping relief. Finding no overlap in the relief requested, the court held that the two suits at issue were not for or in respect to the same claim.

This Court granted certiorari. 559 U. S. 1066 (2010).

II

Since 1868, Congress has restricted the jurisdiction of the CFC and its predecessors when related actions are pending

elsewhere. Section 1500, identical in most respects to the original statute, provides:

> "The United States Court of Federal Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States."

The rule is more straightforward than its complex wording suggests. The CFC has no jurisdiction over a claim if the plaintiff has another suit for or in respect to that claim pending against the United States or its agents.

The question to be resolved is what it means for two suits to be "for or in respect to" the same claim. *Keene Corp.* v. *United States*, 508 U. S. 200 (1993), provided a partial answer. It held that two suits are for or in respect to the same claim when they are "based on substantially the same operative facts . . . , at least if there [is] some overlap in the relief requested." *Id.*, at 212. The *Keene* case did not decide whether the jurisdictional bar also operates if the suits are based on the same operative facts but do not seek overlapping relief. Still, *Keene* narrows the permissible constructions of "for or in respect to" a claim to one of two interpretations. Either it requires substantial factual and some remedial overlap, or it requires substantial factual overlap without more.

Congress first enacted the jurisdictional bar now codified in § 1500 to curb duplicate lawsuits brought by residents of the Confederacy following the Civil War. The so-called "cotton claimants"—named for their suits to recover for cotton taken by the Federal Government—sued the United States in the Court of Claims under the Abandoned Property Collection Act, 12 Stat. 820, while at the same time suing

federal officials in other courts, seeking relief under tort law for the same alleged actions. See *Keene*, *supra*, at 206–207; Schwartz, Section 1500 of the Judicial Code and Duplicate Suits Against the Government and Its Agents, 55 Geo. L. J. 573, 574–580 (1967). Although the rule embodied in § 1500 originated long ago, Congress reenacted the statute at various times, most recently in 1948. See Act of June 25, 1948, 62 Stat. 942; *Keene*, 508 U. S., at 206–207.

The text of § 1500 reflects a robust response to the problem first presented by the cotton claimants. It bars jurisdiction in the CFC not only if the plaintiff sues on an identical claim elsewhere—a suit "for" the same claim—but also if the plaintiff's other action is related although not identical—a suit "in respect to" the same claim. The phrase "in respect to" does not resolve all doubt as to the scope of the jurisdictional bar, but "it does make it clear that Congress did not intend the statute to be rendered useless by a narrow concept of identity." *Id.*, at 213. It suggests a broad prohibition, regardless of whether "claim" carries a special or limited meaning. Cf. *United States* v. *Jones*, 131 U. S. 1 (1889) ("claim" in the Little Tucker Act refers only to requests for money).

Of the two constructions of "for or in respect to" the same claim that *Keene* permits—one based on facts alone and the other on factual plus remedial overlap—the former is the more reasonable interpretation in light of the statute's use of a similar phrase in a way consistent only with factual overlap. The CFC bar applies even where the other action is not against the Government but instead against a "person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States." The statute refers to a person who acts under color of federal law in respect to a cause of action at the time it arose. But at that time, the person could not act in respect to the relief requested, for no complaint was yet filed. This use of the phrase "in respect to a cause of action"

must refer to operative facts and not whatever remedies an aggrieved party might later request. A person acts under color of federal law in respect to a cause of action by claiming or wielding federal authority in the relevant factual context.

Although the two phrases are not identical—one is in respect to a claim, the other a cause of action—they are almost so, and there is reason to think that both phrases refer to facts alone and not to relief. As the *Keene* Court explained, "the term 'claim' is used here synonymously with 'cause of action.'" 508 U. S., at 210. And if either of the two phrases were to include both operative facts and a specific remedy, it would be the one that uses the term "cause of action" rather than "claim." "Cause of action" is the more technical term, while "claim" is often used in a commonsense way to mean a right or demand. Here, for the reasons stated in the preceding paragraph, "in respect to a cause of action" refers simply to facts without regard to judicial remedies. So, if the phrase with the more technical of the two terms does not embrace the concept of remedy, it is reasonable to conclude that neither phrase does. Even if the terms "claim" or "cause of action" include the request for relief, the phrase "for or in respect to" gives the statutory bar a broader scope.

Reading the statute to require only factual and not also remedial overlap makes sense in light of the unique remedial powers of the CFC. The CFC is the only judicial forum for most nontort requests for significant monetary relief against the United States. See 28 U. S. C. § 1491 (2006 ed. and Supp. III); § 1346(a)(2) (2006 ed.). Unlike the district courts, however, the CFC has no general power to provide equitable relief against the Government or its officers. Compare *United States* v. *King*, 395 U. S. 1, 2–3 (1969), with 5 U. S. C. § 702; see also *United States* v. *Alire*, 6 Wall. 573, 575 (1868) ("[T]he only judgments which the Court of Claims are authorized to render against the government . . . are judgments for money found due from the government to the petitioner"). The distinct jurisdiction of the CFC makes over-

lapping relief the exception and distinct relief the norm. For that reason, a statute aimed at precluding suits in the CFC that duplicate suits elsewhere would be unlikely to require remedial overlap.

Remedial overlap between CFC actions and those in other courts was even more unusual when § 1500's rule was first enacted in 1868. At that time the CFC had a more limited jurisdiction than it does now, for the Tucker Act's general waiver of sovereign immunity for nontort claims for monetary relief had not yet been enacted. See 24 Stat. 505. And while the district courts can today adjudicate suits against the United States for money damages under the Little Tucker Act, 28 U. S. C. § 1346(a)(2), and the Federal Tort Claims Act § 1346(b), in 1868 the United States could only be sued in the Court of Claims. *United States* v. *Mitchell*, 463 U. S. 206, 212–214 (1983); G. Sisk, Litigation With the Federal Government § 4.02(a)(1) (4th ed. 2006). Because the kinds of suits and forms of relief available against the United States were few and constrained, remedial overlap between CFC suits and those in other courts was even less common then than now. If the statute were to require remedial as well as factual overlap, it would have had very limited application in 1868 despite its broad language that bars not only identical but also related claims. The rule in § 1500 effects a significant jurisdictional limitation, and Congress reenacted it even as changes in the structure of the courts made suits on the same facts more likely to arise. Doing so reaffirmed the force of the bar and thus the commitment to curtailing redundant litigation.

The panel of the Court of Appeals could not identify "any purpose that § 1500 serves today," 559 F. 3d, at 1292, in large part because it was bound by Circuit precedent that left the statute without meaningful force. For example, the panel cited *Tecon Engineers, Inc.* v. *United States*, 170 Ct. Cl. 389, 343 F. 2d 943 (1965), which held that § 1500 does not prohibit two identical suits from proceeding so long as the action in

the CFC, or at that time the Court of Claims, is filed first. The *Tecon* holding is not presented in this case because the CFC action here was filed after the District Court suit.

Still, the Court of Appeals was wrong to allow its precedent to suppress the statute's aims. Courts should not render statutes nugatory through construction. In fact the statute's purpose is clear from its origins with the cotton claimants—the need to save the Government from burdens of redundant litigation—and that purpose is no less significant today. The conclusion that two suits are for or in respect to the same claim when they are based on substantially the same operative facts allows the statute to achieve its aim. *Keene*, *supra*, at 206. Developing a factual record is responsible for much of the cost of litigation. Discovery is a conspicuous example, and the preparation and examination of witnesses at trial is another. The form of relief requested matters less, except insofar as it affects what facts parties must prove. An interpretation of § 1500 focused on the facts rather than the relief a party seeks preserves the provision as it was meant to function, and it keeps the provision from becoming a mere pleading rule, to be circumvented by carving up a single transaction into overlapping pieces seeking different relief. Cf. *Casman* v. *United States*, 135 Ct. Cl. 647 (1956) (CFC had jurisdiction notwithstanding common facts in district court suit because the plaintiff sought different relief in each forum).

Concentrating on operative facts is also consistent with the doctrine of claim preclusion, or res judicata, which bars "repetitious suits involving the same cause of action" once "a court of competent jurisdiction has entered a final judgment on the merits." *Commissioner* v. *Sunnen*, 333 U. S. 591, 597 (1948). The jurisdictional bar in § 1500 was enacted in part to address the problem that judgments in suits against officers were not preclusive in suits against the United States. *Matson Nav. Co.* v. *United States*, 284 U. S. 352, 355–356 (1932). So it is no surprise that the statute

would operate in similar fashion. The now-accepted test in preclusion law for determining whether two suits involve the same claim or cause of action depends on factual overlap, barring "claims arising from the same transaction." *Kremer* v. *Chemical Constr. Corp.*, 456 U. S. 461, 482, n. 22 (1982); see also Restatement (Second) of Judgments § 24 (1980). The transactional test is of course much younger than the rule embodied in § 1500, but even in the 19th century it was not uncommon to identify a claim for preclusion purposes based on facts rather than relief. See J. Wells, Res Adjudicata and Stare Decisis § 241, p. 208 (1878) ("The true distinction between demands or rights of action which are single and entire, and those which are several and distinct, is, that the former immediately arise out of one and the same act or contract, and the latter out of different acts or contracts" (internal quotation marks omitted)); 2 H. Black, Law of Judgments § 726, p. 866 (1891) (The test for identity is: "Would the same evidence support and establish both the present and the former cause of action"). Reading § 1500 to depend on the underlying facts and not also on the relief requested gives effect to the principles of preclusion law embodied in the statute.

There is no merit to the Nation's assertion that the interpretation adopted here cannot prevail because it is unjust, forcing plaintiffs to choose between partial remedies available in different courts. The hardship in this case is far from clear. The Nation could have filed in the CFC alone and if successful obtained monetary relief to compensate for any losses caused by the Government's breach of duty. It also seems likely that Indian tribes in the Nation's position could go to district court first without losing the chance to later file in the CFC, for Congress has provided in every appropriations Act for the Department of the Interior since 1990 that the statute of limitations on Indian trust mismanagement claims shall not run until the affected tribe has been

given an appropriate accounting. See, *e. g.*, 123 Stat. 2922; 104 Stat. 1930.

Even were some hardship to be shown, considerations of policy divorced from the statute's text and purpose could not override its meaning. Although Congress has permitted claims against the United States for monetary relief in the CFC, that relief is available by grace and not by right. See *Beers* v. *Arkansas*, 20 How. 527, 529 (1858) ("[A]s this permission is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted"). If indeed the statute leads to incomplete relief, and if plaintiffs like the Nation are dissatisfied, they are free to direct their complaints to Congress. This Court "enjoy[s] no 'liberty to add an exception . . . to remove apparent hardship.'" *Keene*, 508 U. S., at 217–218 (quoting *Corona Coal Co.* v. *United States*, 263 U. S. 537, 540 (1924)).

Keene reserved the question whether common facts are sufficient to bar a CFC action where a similar case is pending elsewhere. To continue to reserve the question would force the CFC to engage in an unnecessary and complicated remedial inquiry, and it would increase the expense and duration of litigation. The question thus demands an answer, and the answer is yes. Two suits are for or in respect to the same claim, precluding jurisdiction in the CFC, if they are based on substantially the same operative facts, regardless of the relief sought in each suit.

III

The remaining question is whether the Nation's two suits have sufficient factual overlap to trigger the jurisdictional bar. The CFC dismissed the action here in part because it concluded that the facts in the Nation's two suits were, "for all practical purposes, identical." 79 Fed. Cl. 645, 656 (2007). It was correct to do so.

The two actions both allege that the United States holds the same assets in trust for the Nation's benefit. They describe almost identical breaches of fiduciary duty—that the United States engaged in self-dealing and imprudent investment, and failed to provide an accurate accounting of the assets held in trust, for example. Indeed, it appears that the Nation could have filed two identical complaints, save the caption and prayer for relief, without changing either suit in any significant respect.

Under § 1500, the substantial overlap in operative facts between the Nation's District Court and CFC suits precludes jurisdiction in the CFC. The Court of Appeals erred when it concluded otherwise.

IV

The holding here precludes the CFC from exercising jurisdiction over the Nation's suit while the District Court case is pending. Should the Nation choose to dismiss the latter action, or upon that action's completion, the Nation is free to file suit again in the CFC if the statute of limitations is no bar. In the meantime, and in light of the substantial overlap in operative facts between them, the two suits are "for or in respect to" the same claim under § 1500, and the CFC case must be dismissed. The contrary 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 KAGAN took no part in the consideration or decision of this case.

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

Congress enacted the statute currently codified at 28 U. S. C. § 1500 to put an end to parallel litigation seeking duplicative relief against the United States and its agents. Respondent Tohono O'odham Nation (Nation) seeks in the

Court of Federal Claims (CFC) some of the same relief on the same facts as it does in its pending District Court action. Accordingly, applying our decision in *Keene Corp.* v. *United States*, 508 U. S. 200 (1993), I agree with the Court that § 1500 bars the Nation's CFC action. Because the Nation's two actions seek overlapping relief, this case does not present the question that the Court decides today—whether § 1500 bars an action in the CFC when the plaintiff's actions share a common factual basis but seek different forms of relief. Nonetheless, the Court holds that a common factual basis alone suffices to bar jurisdiction in the CFC. Under the Court's reading of the statute, a plaintiff cannot pursue a claim in the CFC based on the same facts as another pending action, even when Congress has required that plaintiff to file separate actions in two courts to obtain different forms of relief necessary to make the plaintiff whole. I cannot agree that § 1500 demands this result.

I

Section 1500 bars jurisdiction in the CFC over "any claim for or in respect to which the plaintiff . . . has pending in any other court any suit or process against the United States" or any agent of the United States. In *Keene*, we construed this statute to "turn on whether the plaintiff's other suit was based on substantially the same operative facts as the Court of Claims action, at least if there was some overlap in the relief requested." *Id.*, at 212. It was irrelevant for purposes of § 1500, we observed, that the two suits proceeded on different legal theories. *Ibid.* Because the plaintiff's actions both sought the same monetary relief, albeit on different theories, we held that the CFC lacked jurisdiction. *Id.*, at 217–218. We thus found "it unnecessary to consider" whether § 1500 barred a CFC claim that was based on substantially the same operative facts as another suit but that sought different relief. See *id.*, at 212, n. 6, 216.

As construed in *Keene*, § 1500 bars the Nation's CFC action. As the majority holds, see *ante*, at 317–318, the Nation's CFC and District Court actions are based on nearly identical facts. The two actions also seek overlapping relief: Both complaints request money to remedy the same injury—the Government's alleged breach of its fiduciary duty to maintain accurate accounts of the Nation's assets. The Nation does not dispute that its District Court complaint requests such relief.[1] See Brief for Respondent 51 ("If . . . the accounting reveals that assets that belong to the Nation do not appear on the books, it may be appropriate to order equitable restitution of those assets"). The Nation's CFC complaint is fairly read to do the same. The CFC complaint alleges that the Government has failed "to keep and render clear and accurate accounts." App. to Pet. for Cert. 66a. It claims that by reason of this and other alleged breaches of fiduciary duty, the Nation "has been damaged in such amounts as may be proven at trial." *Id.*, at 67a. And the complaint requests "a determination that the Defendant is liable to the Nation in damages for the injuries and losses caused as a result of Defendant's breaches of fiduciary duty" and a "determination of the amount of damages due the Nation." *Id.*, at 72a–73a. Thus, just like the District Court complaint, the CFC complaint requests money to remedy the Government's alleged failure to keep accurate accounts.[2]

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[1] The majority characterizes the Nation's District Court complaint as seeking "equitable relief," *ante*, at 310, but does not mention that the complaint seeks, among other things, equitable *monetary* relief such as disgorgement and restitution, see App. to Pet. for Cert. 91a.

[2] In reaching the opposite conclusion, the Court of Appeals relied on the fact that the Nation's District Court complaint seeks equitable relief whereas its CFC complaint seeks damages. See 559 F. 3d 1284, 1288–1289 (CA Fed. 2009). *Keene* makes clear, however, that actions based on substantially the same operative facts implicate § 1500 so long as they seek overlapping relief. See *Keene Corp.* v. *United States*, 508 U. S. 200, 212 (1993). The formal label affixed to the form of relief sought is irrelevant. In this case, both the Nation's CFC complaint and its District Court com-

Because the Nation's two complaints are "based on substantially the same operative facts" and there is "at least . . . some overlap in the relief requested," *Keene*, 508 U. S., at 212, § 1500 bars jurisdiction over the Nation's CFC action.

II

The case does not present the question, left open in *Keene*, "whether common facts [alone] are sufficient to bar a CFC action where a similar case is pending elsewhere." *Ante*, at 317. Indeed, for most of the history of this case, the Government did not even argue that common facts were sufficient to preclude CFC jurisdiction; until its petition for rehearing in the Court of Appeals, the Government argued only that *Keene* required dismissal of the Nation's CFC action because the Nation's two actions were based on the same facts and sought overlapping relief. Deciding this case on the basis of *Keene* would have been the "far more prudent course than recharacterizing the case in an attempt to reach premature decision on an important question." *Missouri* v. *Jenkins*, 495 U. S. 33, 80 (1990) (KENNEDY, J., concurring in part and concurring in judgment). Instead, discarding the restraint we exhibited in *Keene*, the Court unnecessarily chooses to hold that § 1500 bars jurisdiction in the CFC whenever a plaintiff's CFC action is based on substantially the same facts as a suit pending elsewhere.[3] This reading of § 1500 is, in my opinion, incorrect.

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plaint seek money to remedy the Government's alleged failure to keep accurate accounts.

[3] The majority does not contend that the facts of this case require it to decide this question. It justifies its decision to reach the question on the ground that its rule would eliminate "an unnecessary and complicated remedial inquiry" and would decrease "the expense and duration of litigation." *Ante*, at 317. It provides no reason to believe, however, that inquiry into relief requested is unduly complicated in the vast majority of cases. Cf. *Loveladies Harbor, Inc.* v. *United States*, 27 F. 3d 1545, 1552 (CA Fed. 1994) (en banc) ("The principles of *Casman* [v. *United States*, 135 Ct. Cl. 647 (1956),] . . . are not that difficult to comprehend or apply"). More

A

Since the enactment of § 1500 in 1868, Congress has expanded the avenues by which persons with legitimate claims against the United States may obtain relief. See *ante*, at 314. In some circumstances, Congress has chosen to require plaintiffs to file actions in two different courts to obtain complete relief relating to a single set of operative facts. For example, with some exceptions, the CFC has no power to issue equitable relief. See *Bowen* v. *Massachusetts*, 487 U. S. 879, 905 (1988); see also 28 U. S. C. § 1491(a). As a result, a plaintiff seeking both money damages and injunctive relief to remedy distinct harms arising from the same set of facts may be forced to file actions in both the CFC and federal district court.

For half a century, the CFC has recognized that § 1500 does not preclude jurisdiction in that court when Congress has required a plaintiff to split a claim into two actions to obtain different forms of relief necessary to make the plaintiff whole. In *Casman* v. *United States*, 135 Ct. Cl. 647 (1956), a terminated federal employee sought backpay in the Court of Claims and reinstatement to his position in District Court. The plaintiff's two suits arose from the same facts (his termination) but sought "entirely different" forms of relief within the exclusive jurisdiction of two courts.[4] *Id.*, at 650. In light of our previous recognition that the purpose of § 1500 "'was only to require an election between a suit in the Court of Claims and one brought in another court,'" *id.*,

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importantly, the majority does not explain why the benefits it perceives to result from deciding this question today outweigh the potential for its reading of the statute to leave some plaintiffs with incomplete recompense for their injuries. See *infra* this page and 323–324.

[4] Congress has since enacted legislation to permit plaintiffs in Casman's situation to obtain complete relief in the CFC. See Act of Aug. 29, 1972, § 1, 86 Stat. 652, 28 U. S. C. § 1491(a)(2) (permitting the CFC to "issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records").

at 649 (quoting *Matson Nav. Co.* v. *United States*, 284 U. S. 352, 355–356 (1932)), the Court of Claims held that § 1500 was inapplicable when a "plaintiff has no right to elect between two courts," 135 Ct. Cl., at 650. To hold otherwise, the court acknowledged, "would be to say to plaintiff, 'If you want your job back you must forget your back pay'; conversely, 'If you want your back pay, you cannot have your job back.' " *Ibid.;* see also *Loveladies Harbor, Inc.* v. *United States*, 27 F. 3d 1545, 1551 (CA Fed. 1994) (en banc) (reaffirming *Casman*'s inquiry into the form of relief sought).

By reserving the question "whether two actions based on the same operative facts, but seeking completely different relief, would implicate § 1500," our decision in *Keene* expressly preserved the *Casman* holding. 508 U. S., at 212, n. 6. The consequence of today's decision is clear: The *Casman* rule is no longer good law. Under the majority's reading of § 1500, because Casman's two suits were based on common facts, § 1500 barred jurisdiction in the CFC over his backpay claim even though he could not have obtained backpay in his District Court action.

The jurisdictional scheme governing actions against the United States often requires other plaintiffs to file two actions in different courts to obtain complete relief in connection with one set of facts. As just one example, an action seeking injunctive relief to set aside agency action must proceed in district court, but a claim that the same agency action constitutes a taking of property requiring just compensation must proceed in the CFC. See, *e. g.*, *Alaska* v. *United States*, 32 Fed. Cl. 689 (1995). After today's decision, § 1500 may well prevent a plaintiff from pursuing a takings claim in the CFC if an action to set aside the agency action is pending in district court. This type of plaintiff may face a choice between equally unattractive options: forgo injunctive relief in the district court to preserve her claim for monetary relief in the CFC, or pursue injunctive relief and hope that the statute of limitations on her takings claim, see 28 U. S. C.

§ 2501, does not expire before the district court action is resolved.[5]

B

1

The text, purpose, and history of § 1500 provide strong reason to believe that Congress did not intend for § 1500 to put plaintiffs to a choice between two nonduplicative remedies that Congress has made available exclusively in two forums. The statute bars jurisdiction in the CFC over a

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[5] The majority apparently doubts that its holding puts the Nation to a similarly difficult choice. It first suggests that the Nation could file solely in the CFC to obtain damages for the Government's alleged breaches of fiduciary duty. See *ante*, at 316. The Nation could indeed choose to file only in the CFC—just as any plaintiff could choose to forgo injunctive relief to pursue money damages in the CFC—but the Nation believes it is entitled to more than monetary relief. The Nation's District Court action seeks an equitable accounting to remedy the same breaches of fiduciary duty, and the CFC has held that it lacks jurisdiction to issue a preliability accounting. See *Klamath and Modoc Tribes* v. *United States*, 174 Ct. Cl. 483, 487–488, 490 (1966). But see *Eastern Shawnee Tribe of Okla.* v. *United States*, 582 F. 3d 1306, 1308 (CA Fed. 2009) (suggesting in dicta that the CFC can order an equitable accounting as "ancillary relief" under 28 U. S. C. §§ 1491(a)(2) and (b)(2)), cert. pending, No. 09–1521.

The majority next suggests that Congress has tolled the statute of limitations governing the Nation's CFC claims. See *ante*, at 316–317. But the cited statute only applies to claims "concerning losses to or mismanagement of trust funds." 123 Stat. 2922. It does not appear to toll the statute of limitations for claims concerning assets other than funds, such as tangible assets. See App. to Pet. for Cert. 67a–69a (seeking damages for the Government's mismanagement of the Nation's mineral estates). Expiration of the 6-year statute of limitations governing claims in the CFC is a very real prospect in this and other cases; the Nation's District Court action has been pending for more than four years.

As the majority notes, see *ante*, at 314–315, the validity of the Court of Claims' holding in *Tecon Engineers, Inc.* v. *United States*, 170 Ct. Cl. 389, 343 F. 2d 943 (1965), is not presented in this case. This Court has never considered that holding. Accordingly, I do not consider whether the Nation could have avoided application of § 1500 altogether by filing its CFC action first.

"claim for or in respect to which" a plaintiff has a suit or process pending elsewhere. When Congress first enacted § 1500's predecessor, the statute establishing the jurisdiction of the Court of Claims used the term "claims" to refer to demands for money damages. See Act of Mar. 3, 1863, §§ 2–3, 12 Stat. 765; see *United States* v. *Jones*, 131 U. S. 1, 17 (1889) (noting that the statute's provisions "were inconsistent with the enforcement of any claims under the law except claims for money").[6] Congress thus would have understood the term "claim" in § 1500 to describe the particular relief sought in the Court of Claims. Cf. *Commissioner* v. *Keystone Consol. Industries, Inc.*, 508 U. S. 152, 159 (1993).

Determining the meaning of "claim" is only part of the inquiry, however. The question remains what constitutes a suit or process "for or in respect to" a CFC claim. The purpose and history of the statute elucidate the meaning of this ambiguous phrase. As the majority explains, Congress enacted the statute to prevent "duplicative lawsuits" brought by the so-called "cotton claimants" in the aftermath of the Civil War. *Keene*, 508 U. S., at 206; see *ante*, at 311–312. The cotton claimants sought monetary compensation for seized cotton in the Court of Claims pursuant to the Abandoned Property Collection Act, 12 Stat. 820. Because they had difficulty satisfying the statutory requirement that, to obtain compensation, they must not have given aid or comfort to participants in the rebellion, see § 3 of the Act, they also sought relief—either in the form of money damages or actual cotton—in separate lawsuits against federal officials

[6] Congress has consistently used the term "claim" to refer to a demand for money in the context of the CFC. See 28 U. S. C. § 1491(a)(1) (conferring jurisdiction in the CFC over "any *claim* against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort" (emphasis added)). Of course, since § 1500's enactment, Congress has authorized the CFC to issue relief other than money damages in certain cases. See § 1491(a)(2).

on tort theories such as conversion. "It was these duplicative lawsuits that induced Congress" to enact § 1500's predecessor. *Keene*, 508 U. S., at 206.

This historical backdrop sheds light on what Congress would have understood to be a suit or process "for or in respect to" a "claim" in the Court of Claims. Congress undoubtedly intended to preclude a claim for money in the Court of Claims when the plaintiff was pursuing a suit "for" the same money in district court. Because, however, some cotton claimants sought return of the cotton itself in district court, it was also necessary to preclude jurisdiction in the Court of Claims when the plaintiff's other action was "in respect to" that demand for money—*i. e.*, when the plaintiff was seeking duplicative relief. Had the courts awarded such plaintiffs both the cotton itself and money damages, the plaintiffs would have obtained twice what they deserved. In this way, Congress eschewed "a narrow concept of identity" that would have permitted plaintiffs to pursue and obtain duplicative relief to remedy the very same harm. *Id.*, at 213.

The legislative history confirms Congress' intent to preclude requests for duplicative relief. The statute's sponsor explained that the purpose of the statute was "to put to their election that large class of persons having cotton claims[,] . . . who are here at the same time endeavoring to prosecute their claims, and have filed them in the Court of Claims, so that after they put the Government to the expense of beating them once in a court of law they can turn around and try the whole question in the Court of Claims."[7] Cong. Globe, 40th Cong., 2d Sess., 2769 (1868) (statement of Sen. Edmunds); see also *Matson Nav. Co.*, 284 U. S., at 355–356. Congress thus appears to have had in mind cases in which "the whole ques-

[7] Because § 1500's jurisdictional bar applies only when the other suit is pending, "there is a good argument that, even when first enacted, the statute did not actually perform the preclusion function emphasized by its sponsor." *Keene*, 508 U. S., at 217.

tion" could be tried in the Court of Claims. The statute's history does not suggest that Congress intended to require an election between two nonduplicative forms of relief available exclusively in two different courts. In such a case, "the whole question" could not be tried in either court.

2

None of the majority's reasons for its contrary construction of the statute is convincing. First, the majority reasons that the phrase "claim for or in respect to" must refer only to factual overlap because the statute uses the phrase "cause of action . . . in respect thereto" (which the majority paraphrases as "in respect to a cause of action") in a way that is "consistent only with factual overlap." *Ante*, at 312. This point rests on a misreading of the statutory text. The statute asks whether a plaintiff has pending a "suit or process" for or in respect to the plaintiff's CFC claim—not whether it has pending a "cause of action" for or in respect to that claim.[8] Even if the term "cause of action" refers only to operative facts—such that the inquiry whether a person was acting under color of federal law in respect to a cause of action is purely factual in nature—a "suit or process" will inevitably include a request for relief.

Second, the majority states that, "in light of the unique remedial powers of the CFC," requiring remedial overlap would make no sense because it would result in a "very limited application" of the statute. *Ante*, at 313, 314. Here, the majority overlooks the nearly 150-year history of the statute. It was the cotton claimants' parallel requests for duplicative relief that prompted passage of § 1500 in the first place. Since then, litigants have continued to seek duplicative relief

[8] Section 1500 refers to the "cause of action alleged in such suit or process" only for the limited purpose of determining whether the other suit or process is against an agent of the United States. When the plaintiff's other action is against the United States itself, the term "cause of action" has no relevance to the § 1500 inquiry.

against the Government in two courts, as *Keene* and this very case illustrate. See 508 U. S., at 204–205 (seeking tort damages in the District Court and compensation on a takings theory in the CFC); *supra,* at 318–321 (seeking restitution and disgorgement in the District Court and money damages in the CFC); see also, *e. g.*, *Ex parte Skinner & Eddy Corp.*, 265 U. S. 86, 91–92 (1924) (seeking money damages against the United States in the Court of Claims and against a federal entity in state court); *Corona Coal Co.* v. *United States*, 263 U. S. 537, 539 (1924) (seeking money damages against the United States in the Court of Claims and against a federal agent in District Court); *British Am. Tobacco Co.* v. *United States*, 89 Ct. Cl. 438, 439–440 (1939) *(per curiam)* (seeking tort damages in the District Court and contract damages in the Court of Claims). As these cases make clear, interpreting § 1500 to prohibit requests for duplicative relief hardly renders the statute of limited application.

Third, the majority suggests that its construction of § 1500 is necessary to achieve the statute's aim of "sav[ing] the Government from burdens of redundant litigation." *Ante*, at 315. Parallel actions seeking the same or duplicative relief, or different forms of relief that are available entirely in one court, are redundant; actions seeking different forms of relief that Congress has made available exclusively in different courts are not. To the extent the majority is concerned about the burdens of parallel discovery, federal courts have ample tools at their disposal, such as stays, to prevent such burdens. See Schwartz, Section 1500 of the Judicial Code and Duplicate Suits Against the Government and Its Agents, 55 Geo. L. J. 573, 599 (1967).

Finally, the majority contends that focusing on operative facts is consistent with the principles of claim preclusion embodied in the statute. Claim preclusion ordinarily "bar[s] claims arising from the same transaction." *Kremer* v. *Chemical Constr. Corp.*, 456 U. S. 461, 482, n. 22 (1982). There is, however, an exception to this rule when a plaintiff

was unable to obtain a certain remedy in the earlier action. See Restatement (Second) of Judgments § 26(1)(c) (1980) (claim preclusion does not apply where "[t]he plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy or form of relief in the first action because of the limitations on the subject matter jurisdiction of the courts"); see also *Marrese* v. *American Academy of Orthopaedic Surgeons*, 470 U. S. 373, 382 (1985); 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4412, p. 276 (2d ed. 2002). This principle has long informed claim preclusion law. See, *e. g.*, Restatement of Judgments § 62, Comment *k* (1942) ("[W]here a plaintiff brings an action in a State in which the courts have jurisdiction only with reference to one portion of his cause of action, he is not barred from maintaining an action in a proper court for the other portion"); 2 H. Black, Law of Judgments § 618, p. 744 (1891) ("A judgment is not conclusive of any matter which, from the nature of the case, the form of action, or the character of the pleadings, could not have been adjudicated in the former suit"). For these reasons, preclusion doctrine actually undermines the majority's position.

In sum, the majority offers no coherent justification for its conclusion that Congress intended to preclude jurisdiction in the CFC whenever a plaintiff's claim in that court is based on substantially the same facts as a suit pending elsewhere without reference to the relief sought.

* * *

Even before today's decision, § 1500 had been described as "anachronistic," *Keene*, 508 U. S., at 217, "harsh," *id.*, at 222 (Stevens, J., dissenting), and "arbitrar[y]," 79 Fed. Cl. 645, 659, n. 16 (2007). Judges and commentators have long called for congressional attention to the statute. See, *e. g.*, *Keene*, 508 U. S., at 222 (Stevens, J., dissenting); Schwartz, *supra*, at 601. Today's decision—which unnecessarily considers and repudiates the *Casman* rule—renders such attention all the

more pressing. Under the Court's construction of § 1500, plaintiffs whom Congress has forced to file parallel actions in the CFC and a district court to obtain complete relief must now choose either to forgo relief in the district court or to file first in the district court and risk the expiration of the statute of limitations on their claims in the CFC. I cannot agree that Congress intended, or intends, for § 1500 to produce this result. For these reasons, I respectfully concur only in the judgment.

JUSTICE GINSBURG, dissenting.

I dissent from the Court's immoderate reading of 28 U. S. C. § 1500 and would affirm the Federal Circuit's judgment.

According to the Court, the Court of Federal Claims (CFC) lacks subject-matter jurisdiction over the Tohono O'odham Nation's (Nation) claim because the Tribe was simultaneously pursuing in the D. C. District Court an action with "a common factual basis." *Ante*, at 310. It matters not, the Court holds, that to gain complete relief, the Nation had to launch two suits, for neither of the two courts whose jurisdiction the Tribe invoked could alone provide full redress. See *ante*, at 316–317.

The Court concludes that "claim" or "cause of action," terms the Court considers synonymous as used in § 1500,* see *ante*, at 313, refers to "operative facts," and not to the

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*"'Cause of action,'" the Court simultaneously states, "is the more technical term." *Ante*, at 313. If "more technical" means more precise, clear or certain, the Court is incorrect. See *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62, 67–68 (1933) ("A 'cause of action' may mean one thing for one purpose and something different for another."). In its discourse on the term, the Court has fallen into an old error; the drafters of the Federal Rules endeavored to "eliminate the unfortunate rigidity and confusion surrounding the words 'cause of action.'" 5 C. Wright & A. Miller, Federal Practice and Procedure § 1216, p. 207 (3d ed. 2004). Today's invocation of a supposed particular or exact meaning for the phrase risks reviving that confusion.

remedies a plaintiff seeks. See *ibid.* Section 1500 speaks of "the time when the cause of action . . . arose," a time antedating the commencement of suit. The Court infers, therefore, that a "claim" or "cause of action" is discrete from a pleading's request for relief. See *ante,* at 312–313. In fact, however, entitlement to relief is essential to the existence of a claim or cause of action, which arises when a person suffers a harm capable of judicial redress. See 2 J. Story, Equity Jurisprudence § 1521*a,* p. 741 (8th ed. 1861) ("[T]he cause of action . . . arises when . . . the party has a right to apply to a court . . . for relief.").

A plaintiff may not, § 1500 instructs, petition both the CFC and a district court, invoking in each a distinct legal theory appropriate to the forum, but seeking redress for a single injury. When Congress bars a plaintiff from obtaining complete relief in one suit, however, and does not call for an election of remedies, Congress is most sensibly read to have comprehended that the operative facts give rise to two discrete claims. *Casman* v. *United States,* 135 Ct. Cl. 647 (1956), as JUSTICE SOTOMAYOR spells out, see *ante,* at 322, is the paradigm case. There, a discharged federal employee, complaining of wrongful termination, sought reinstatement in a district-court action and backpay in the Court of Claims. Section 1500 does not stand in the way, the Court of Claims held in *Casman,* when the plaintiff suffered two distinct injuries, for which she seeks discrete forms of relief within the exclusive competence of different courts. See 135 Ct. Cl., at 649–650 (claim for backpay "entirely different" from claim for reinstatement). The Federal Circuit, in my view, rightly adhered to *Casman* in *Loveladies Harbor, Inc.* v. *United States,* 27 F. 3d 1545 (1994) (en banc), and rightly did so in this case.

While I agree with much of JUSTICE SOTOMAYOR's opinion concurring in the judgment, I do not agree with her conclusion that § 1500 bars the Nation's CFC action. JUSTICE SOTOMAYOR joins the Court's judgment (although not the

Court's reasoning) because the "Tohono O'odham Nation seeks in the [CFC] *some* of the same relief on the same facts as it does in its pending District Court action." *Ante*, at 318–319 (emphasis added). But to the extent that "the Nation's two actions seek overlapping relief," *ante*, at 319, a disposition less harsh would be in order. Ordinarily, when a plaintiff's allegations and demands for relief are excessive, her complaint is not instantly dismissed on that account. Instead, she may seek leave to trim her pleading, permission a court "should freely give . . . when justice so requires." Rule 15(a)(2) (CFC 2010). Cf. Rule 54(c) (judgment, other than default, need not conform to demand for relief, but "should grant the relief to which each party is entitled").

As JUSTICE SOTOMAYOR and the Nation recognize, to avoid both duplication and the running of the statute of limitations, the CFC suit could be stayed while the companion District Court action proceeds. See *ante*, at 328; Brief for Respondent 35. That is a common practice when a prior action is pending. See *Pennsylvania R. Co.* v. *United States*, 363 U. S. 202, 204–206 (1960) (instructing Court of Claims to stay pending proceedings to enable litigant to obtain District Court review of relevant agency order); *Creppel* v. *United States*, 41 F. 3d 627, 633 (CA Fed. 1994) ("[T]he Court of Federal Claims may stay a takings action pending completion of a related action in a district court.").

Why is this Court not positioned to direct the CFC to disregard requests for relief simultaneously sought in a district-court action, or at least to recognize that an amended CFC complaint could save the case? I see no impediment to either course, in § 1500 or any other law or rule.

Syllabus

AT&T MOBILITY LLC *v.* CONCEPCION ET UX.

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

No. 09–893. Argued November 9, 2010—Decided April 27, 2011

The cellular telephone contract between respondents (Concepcions) and petitioner (AT&T) provided for arbitration of all disputes, but did not permit classwide arbitration. After the Concepcions were charged sales tax on the retail value of phones provided free under their service contract, they sued AT&T in a California Federal District Court. Their suit was consolidated with a class action alleging, *inter alia*, that AT&T had engaged in false advertising and fraud by charging sales tax on "free" phones. The District Court denied AT&T's motion to compel arbitration under the Concepcions' contract. Relying on the California Supreme Court's *Discover Bank* decision, it found the arbitration provision unconscionable because it disallowed classwide proceedings. The Ninth Circuit agreed that the provision was unconscionable under California law and held that the Federal Arbitration Act (FAA), which makes arbitration agreements "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract," 9 U. S. C. § 2, did not pre-empt its ruling.

Held: Because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines* v. *Davidowitz*, 312 U. S. 52, 67, California's *Discover Bank* rule is pre-empted by the FAA. Pp. 339–352.

(a) Section 2 reflects a "liberal federal policy favoring arbitration," *Moses H. Cone Memorial Hospital* v. *Mercury Constr. Corp.*, 460 U. S. 1, 24, and the "fundamental principle that arbitration is a matter of contract," *Rent-A-Center, West, Inc.* v. *Jackson*, 561 U. S. 63, 67. Thus, courts must place arbitration agreements on an equal footing with other contracts, *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U. S. 440, 443, and enforce them according to their terms, *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior Univ.*, 489 U. S. 468, 478. Section 2's saving clause permits agreements to be invalidated by "generally applicable contract defenses," but not by defenses that apply only to arbitration or derive their meaning from the fact that an agreement to arbitrate is at issue. *Doctor's Associates, Inc.* v. *Casarotto*, 517 U. S. 681, 687. Pp. 339–340.

(b) In *Discover Bank*, the California Supreme Court held that class waivers in consumer arbitration agreements are unconscionable if the

agreement is in an adhesion contract, disputes between the parties are likely to involve small amounts of damages, and the party with inferior bargaining power alleges a deliberate scheme to defraud. Pp. 340–341.

(c) The Concepcions claim that the *Discover Bank* rule is a ground that "exist[s] at law or in equity for the revocation of any contract" under FAA § 2. When state law prohibits outright the arbitration of a particular type of claim, the FAA displaces the conflicting rule. But the inquiry is more complex when a generally applicable doctrine is alleged to have been applied in a fashion that disfavors or interferes with arbitration. Although § 2's saving clause preserves generally applicable contract defenses, it does not suggest an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives. Cf. *Geier* v. *American Honda Motor Co.*, 529 U. S. 861, 872. The FAA's overarching purpose is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate informal, streamlined proceedings. Parties may agree to limit the issues subject to arbitration, *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U. S. 614, 628, to arbitrate according to specific rules, *Volt*, *supra*, at 479, and to limit with whom they will arbitrate, *Stolt-Nielsen S. A.* v. *Animal Feeds Int'l Corp.*, 559 U. S. 662, 683. Pp. 341–346.

(d) Class arbitration, to the extent it is manufactured by *Discover Bank* rather than consensual, interferes with fundamental attributes of arbitration. The switch from bilateral to class arbitration sacrifices arbitration's informality and makes the process slower, more costly, and more likely to generate procedural morass than final judgment. And class arbitration greatly increases risks to defendants. The absence of multilayered review makes it more likely that errors will go uncorrected. That risk of error may become unacceptable when damages allegedly owed to thousands of claimants are aggregated and decided at once. Arbitration is poorly suited to these higher stakes. In litigation, a defendant may appeal a certification decision and a final judgment, but 9 U. S. C. § 10 limits the grounds on which courts can vacate arbitral awards. Pp. 346–352.

584 F. 3d 849, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, THOMAS, and ALITO, JJ., joined. THOMAS, J., filed a concurring opinion, *post*, p. 352. BREYER, J., filed a dissenting opinion, in which GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined, *post*, p. 357.

Andrew J. Pincus argued the cause for petitioner. With him on the briefs were *Kenneth S. Geller*, *Evan M. Tager*,

Counsel

Archis A. Parasharami, *Kevin Ranlett*, *Donald M. Falk*, and *Neal Berinhout.*

Deepak Gupta argued the cause for respondents. With him on the brief were *Scott L. Nelson*, *Gregory A. Beck*, *Kirk B. Hulett*, *Craig M. Nicholas*, and *Alex M. Tomasevic.**

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*Briefs of *amici curiae* urging reversal were filed for the State of South Carolina et al. by *Henry D. McMaster*, Attorney General of South Carolina, *James Emory Smith, Jr.*, Assistant Deputy Attorney General, and *Mark L. Shurtleff*, Attorney General of Utah; for the American Bankers Association et al. by *Alan S. Kaplinsky*, *Jeremy T. Rosenblum*, and *Mark J. Levin;* for the Center for Class Action Fairness by *Brian P. Brooks;* for the Chamber of Commerce of the United States of America by *Roy T. Englert, Jr.*, *Robin S. Conrad*, and *Amar D. Sarwal;* for CTIA—The Wireless Association by *Paul D. Clement* and *Michael F. Altschul;* for DIRECTV, Inc., et al. by *Jeffrey S. Davidson;* for Distinguished Law Professors by *Andrew G. McBride;* for DRI—The Voice of the Defense Bar by *Kevin C. Newsom* and *John R. Kouris;* for the Equal Employment Advisory Council by *Rae T. Vann;* for the New England Legal Foundation by *Benjamin G. Robbins* and *Martin J. Newhouse;* and for the Pacific Legal Foundation by *Deborah J. La Fetra.*

Briefs of *amici curiae* urging affirmance were filed for the State of Illinois et al. by *Lisa Madigan*, Attorney General of Illinois, *Michael A. Scodro*, Solicitor General, and *Jane Elinor Notz*, Deputy Solicitor General, and by the Attorneys General for their respective jurisdictions as follows: *Peter J. Nickles* of the District of Columbia, *Douglas F. Gansler* of Maryland, *Lori Swanson* of Minnesota, *Steve Bullock* of Montana, *Gary K. King* of New Mexico, *Robert E. Cooper, Jr.*, of Tennessee, and *William H. Sorrell* of Vermont; for the American Antitrust Institute by *Richard M. Brunell* and *Albert A. Foer;* for the American Association for Justice by *Andre M. Mura* and *John Vail;* for Civil Procedure and Complex Litigation Professors by *William B. Rubenstein*, *Theodore Eisenberg*, *John Leubsdorf*, *Arthur R. Miller*, and *Judith Resnik;* for the Constitutional Accountability Center by *Douglas T. Kendall* and *Elizabeth B. Wydra;* for Contracts Professors by *Peter K. Stris;* for Federal Jurisdiction Professors by *Stephen I. Vladeck* and *Michael J. Quirk;* for the Lawyers' Committee for Civil Rights Under Law et al. by *Sarah Crawford*, *Terisa E. Chaw*, *Catherine Ruckelshaus*, *Rebecca Hamburg*, and *Sharyn A. Tejani;* for the Legal Aid Society of the District of Columbia et al. by *Bonnie I. Robin-Vergeer*, *Michael D. Donovan*, and *James C. Sturdevant;* for the NAACP Legal Defense & Educational Fund, Inc., by *John Payton*, *Debo P. Adegbile*, and *Joshua Civin;* for the National Academy of Arbitrators by *James*

JUSTICE SCALIA delivered the opinion of the Court.

Section 2 of the Federal Arbitration Act (FAA) makes agreements to arbitrate "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U. S. C. §2. We consider whether the FAA prohibits States from conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures.

I

In February 2002, Vincent and Liza Concepcion entered into an agreement for the sale and servicing of cellular telephones with AT&T Mobility LLC (AT&T).[1] The contract provided for arbitration of all disputes between the parties, but required that claims be brought in the parties' "individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding." App. to Pet. for Cert. 61a.[2] The agreement authorized AT&T to make unilateral amendments, which it did to the arbitration provision on several occasions. The version at issue in this case reflects revisions made in December 2006, which the parties agree are controlling.

The revised agreement provides that customers may initiate dispute proceedings by completing a one-page Notice of Dispute form available on AT&T's Web site. AT&T may

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A. Feldman; for the National Workrights Institute by *Theodore J. St. Antoine* and *Lewis Maltby;* for Marygrace Coneff et al. by *Leslie A. Bailey, Arthur H. Bryant, F. Paul Bland, Jr.,* and *Matthew Wessler;* and for Jonathan C. Kaltwasser by *Joseph N. Kravec, Jr.*

Hiro N. Aragaki filed a brief for Arbitration Professors as *amici curiae.*

[1] The Concepcions' original contract was with Cingular Wireless. AT&T acquired Cingular in 2005 and renamed the company AT&T Mobility in 2007. *Laster* v. *AT&T Mobility LLC,* 584 F. 3d 849, 852, n. 1 (CA9 2009).

[2] That provision further states that "the arbitrator may not consolidate more than one person's claims, and may not otherwise preside over any form of a representative or class proceeding." App. to Pet. for Cert. 61a.

then offer to settle the claim; if it does not, or if the dispute is not resolved within 30 days, the customer may invoke arbitration by filing a separate Demand for Arbitration, also available on AT&T's Web site. In the event the parties proceed to arbitration, the agreement specifies that AT&T must pay all costs for nonfrivolous claims; that arbitration must take place in the county in which the customer is billed; that, for claims of $10,000 or less, the customer may choose whether the arbitration proceeds in person, by telephone, or based only on submissions; that either party may bring a claim in small claims court in lieu of arbitration; and that the arbitrator may award any form of individual relief, including injunctions and presumably punitive damages. The agreement, moreover, denies AT&T any ability to seek reimbursement of its attorney's fees, and, in the event that a customer receives an arbitration award greater than AT&T's last written settlement offer, requires AT&T to pay a $7,500 minimum recovery and twice the amount of the claimant's attorney's fees.[3]

The Concepcions purchased AT&T service, which was advertised as including the provision of free phones; they were not charged for the phones, but they were charged $30.22 in sales tax based on the phones' retail value. In March 2006, the Concepcions filed a complaint against AT&T in the United States District Court for the Southern District of California. The complaint was later consolidated with a putative class action alleging, among other things, that AT&T had engaged in false advertising and fraud by charging sales tax on phones it advertised as free.

In March 2008, AT&T moved to compel arbitration under the terms of its contract with the Concepcions. The Concepcions opposed the motion, contending that the arbitration agreement was unconscionable and unlawfully exculpatory

[3] The guaranteed minimum recovery was increased in 2009 to $10,000. Brief for Petitioner 7.

under California law because it disallowed classwide procedures. The District Court denied AT&T's motion. It described AT&T's arbitration agreement favorably, noting, for example, that the informal dispute-resolution process was "quick, easy to use," and likely to "promp[t] full or . . . even excess payment to the customer *without* the need to arbitrate or litigate"; that the $7,500 premium functioned as "a substantial inducement for the consumer to pursue the claim in arbitration" if a dispute was not resolved informally; and that consumers who were members of a class would likely be worse off. *Laster* v. *T-Mobile USA, Inc.*, 2008 WL 5216255, *11–*12 (SD Cal., Aug. 11, 2008). Nevertheless, relying on the California Supreme Court's decision in *Discover Bank* v. *Superior Court*, 36 Cal. 4th 148, 113 P. 3d 1100 (2005), the court found that the arbitration provision was unconscionable because AT&T had not shown that bilateral arbitration adequately substituted for the deterrent effects of class actions. *Laster*, 2008 WL 5216255, *14.

The Ninth Circuit affirmed, also finding the provision unconscionable under California law as announced in *Discover Bank*. *Laster* v. *AT&T Mobility LLC*, 584 F. 3d 849, 855 (2009). It also held that the *Discover Bank* rule was not pre-empted by the FAA because that rule was simply "a refinement of the unconscionability analysis applicable to contracts generally in California." 584 F. 3d, at 857 (internal quotation marks omitted). In response to AT&T's argument that the Concepcions' interpretation of California law discriminated against arbitration, the Ninth Circuit rejected the contention that "'class proceedings will reduce the efficiency and expeditiousness of arbitration'" and noted that "'*Discover Bank* placed arbitration agreements with class action waivers on the *exact same footing* as contracts that bar class action litigation outside the context of arbitration.'" *Id.*, at 858 (quoting *Shroyer* v. *New Cingular Wireless Services, Inc.*, 498 F. 3d 976, 990 (CA9 2007)).

We granted certiorari, 560 U. S. 923 (2010).

II

The FAA was enacted in 1925 in response to widespread judicial hostility to arbitration agreements. See *Hall Street Associates, L. L. C.* v. *Mattel, Inc.*, 552 U. S. 576, 581 (2008). Section 2, the "primary substantive provision of the Act," *Moses H. Cone Memorial Hospital* v. *Mercury Constr. Corp.*, 460 U. S. 1, 24 (1983), provides, in relevant part, as follows:

> "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U. S. C. § 2.

We have described this provision as reflecting both a "liberal federal policy favoring arbitration," *Moses H. Cone*, *supra*, at 24, and the "fundamental principle that arbitration is a matter of contract," *Rent-A-Center, West, Inc.* v. *Jackson*, 561 U. S. 63, 67 (2010). In line with these principles, courts must place arbitration agreements on an equal footing with other contracts, *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U. S. 440, 443 (2006), and enforce them according to their terms, *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior Univ.*, 489 U. S. 468, 478 (1989).

The final phrase of § 2, however, permits arbitration agreements to be declared unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract." This saving clause permits agreements to arbitrate to be invalidated by "generally applicable contract defenses, such as fraud, duress, or unconscionability," but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue. *Doctor's Associates, Inc.* v. *Casarotto*, 517 U. S. 681, 687 (1996); see also *Perry* v. *Thomas*, 482 U. S. 483, 492–493, n. 9 (1987).

The question in this case is whether § 2 pre-empts California's rule classifying most collective-arbitration waivers in consumer contracts as unconscionable. We refer to this rule as the *Discover Bank* rule.

Under California law, courts may refuse to enforce any contract found "to have been unconscionable at the time it was made," or may "limit the application of any unconscionable clause." Cal. Civ. Code Ann. § 1670.5(a) (West 1985). A finding of unconscionability requires "a 'procedural' and a 'substantive' element, the former focusing on 'oppression' or 'surprise' due to unequal bargaining power, the latter on 'overly harsh' or 'one-sided' results." *Armendariz* v. *Foundation Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 114, 6 P. 3d 669, 690 (2000); accord, *Discover Bank*, 36 Cal. 4th, at 159–161, 113 P. 3d, at 1108.

In *Discover Bank*, the California Supreme Court applied this framework to class-action waivers in arbitration agreements and held as follows:

> "[W]hen the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then . . . the waiver becomes in practice the exemption of the party 'from responsibility for [its] own fraud, or willful injury to the person or property of another.' Under these circumstances, such waivers are unconscionable under California law and should not be enforced." *Id.*, at 162–163, 113 P. 3d, at 1110 (quoting Cal. Civ. Code Ann. § 1668).

California courts have frequently applied this rule to find arbitration agreements unconscionable. See, *e. g.*, *Cohen* v. *DIRECTV, Inc.*, 142 Cal. App. 4th 1442, 1451–1453, 48 Cal. Rptr. 3d 813, 819–821 (2006); *Klussman* v. *Cross Country*

Bank, 134 Cal. App. 4th 1283, 1297, 36 Cal Rptr. 3d 728, 738–739 (2005); *Aral* v. *EarthLink, Inc.*, 134 Cal. App. 4th 544, 556–557, 36 Cal. Rptr. 3d 229, 237–239 (2005).

III

A

The Concepcions argue that the *Discover Bank* rule, given its origins in California's unconscionability doctrine and California's policy against exculpation, is a ground that "exist[s] at law or in equity for the revocation of any contract" under FAA §2. Moreover, they argue that even if we construe the *Discover Bank* rule as a prohibition on collective-action waivers rather than simply an application of unconscionability, the rule would still be applicable to all dispute-resolution contracts, since California prohibits waivers of class litigation as well. See *America Online, Inc.* v. *Superior Court*, 90 Cal. App. 4th 1, 17–18, 108 Cal. Rptr. 2d 699, 711–713 (2001).

When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA. *Preston* v. *Ferrer*, 552 U. S. 346, 353 (2008). But the inquiry becomes more complex when a doctrine normally thought to be generally applicable, such as duress or, as relevant here, unconscionability, is alleged to have been applied in a fashion that disfavors arbitration. In *Perry* v. *Thomas*, 482 U. S. 483 (1987), for example, we noted that the FAA's pre-emptive effect might extend even to grounds traditionally thought to exist "'at law or in equity for the revocation of any contract.'" *Id.*, at 492, n. 9 (emphasis deleted). We said that a court may not "rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what . . . the state legislature cannot." *Id.*, at 493, n. 9.

An obvious illustration of this point would be a case finding unconscionable or unenforceable as against public policy

consumer arbitration agreements that fail to provide for judicially monitored discovery. The rationalizations for such a holding are neither difficult to imagine nor different in kind from those articulated in *Discover Bank*. A court might reason that no consumer would knowingly waive his right to full discovery, as this would enable companies to hide their wrongdoing. Or the court might simply say that such agreements are exculpatory—restricting discovery would be of greater benefit to the company than the consumer, since the former is more likely to be sued than to sue. See *Discover Bank*, *supra*, at 161, 113 P. 3d, at 1108–1109 (arguing that class waivers are similarly one sided). And, the reasoning would continue, because such a rule applies the general principle of unconscionability or public-policy disapproval of exculpatory agreements, it is applicable to "any" contract and thus preserved by §2 of the FAA. In practice, of course, the rule would have a disproportionate impact on arbitration agreements; but it would presumably apply to contracts purporting to restrict discovery in litigation as well.

Other examples are easy to imagine. The same argument might apply to a rule classifying as unconscionable arbitration agreements that fail to abide by the Federal Rules of Evidence, or that disallow an ultimate disposition by a jury (perhaps termed "a panel of twelve lay arbitrators" to help avoid pre-emption). Such examples are not fanciful, since the judicial hostility towards arbitration that prompted the FAA had manifested itself in "a great variety" of "devices and formulas" declaring arbitration against public policy. *Robert Lawrence Co.* v. *Devonshire Fabrics, Inc.*, 271 F. 2d 402, 406 (CA2 1959). And although these statistics are not definitive, it is worth noting that California's courts have been more likely to hold contracts to arbitrate unconscionable than other contracts. Broome, An Unconscionable Application of the Unconscionability Doctrine: How the California Courts Are Circumventing the Federal Arbitration Act, 3 Hastings Bus. L. J. 39, 54, 66 (2006); Randall, Judicial

Attitudes Toward Arbitration and the Resurgence of Unconscionability, 52 Buffalo L. Rev. 185, 186–187 (2004).

The Concepcions suggest that all this is just a parade of horribles, and no genuine worry. "Rules aimed at destroying arbitration" or "demanding procedures incompatible with arbitration," they concede, "would be preempted by the FAA because they cannot sensibly be reconciled with Section 2." Brief for Respondents 32. The "grounds" available under § 2's saving clause, they admit, "should not be construed to include a State's mere preference for procedures that are incompatible with arbitration and 'would wholly eviscerate arbitration agreements.'" *Id.*, at 33 (quoting *Carter* v. *SSC Odin Operating Co., LLC*, 237 Ill. 2d 30, 50, 927 N. E. 2d 1207, 1220 (2010)).[4]

We largely agree. Although § 2's saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives. Cf. *Geier* v. *American Honda Motor Co.*, 529 U. S. 861, 872 (2000); *Crosby* v. *National Foreign Trade Council*, 530 U. S. 363, 372–373 (2000). As we have said, a federal statute's saving clause "'cannot in reason be construed as [allowing] a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself.'" *American Telephone & Telegraph Co.* v. *Central Office Telephone, Inc.*, 524 U. S. 214, 227–228 (1998) (quoting *Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 446 (1907)).

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[4] The dissent seeks to fight off even this eminently reasonable concession. It says that to its knowledge "we have not . . . applied the Act to strike down a state statute that treats arbitrations on par with judicial and administrative proceedings," *post*, at 366 (opinion of BREYER, J.), and that "we should think more than twice before invalidating a state law that . . . puts agreements to arbitrate and agreements to litigate 'upon the same footing,'" *post*, at 361.

We differ with the Concepcions only in the application of this analysis to the matter before us. We do not agree that rules requiring judicially monitored discovery or adherence to the Federal Rules of Evidence are "a far cry from this case." Brief for Respondents 32. The overarching purpose of the FAA, evident in the text of §§ 2, 3, and 4, is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings. Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.

B

The "principal purpose" of the FAA is to "ensur[e] that private arbitration agreements are enforced according to their terms." *Volt*, 489 U. S., at 478; see also *Stolt-Nielsen S. A.* v. *AnimalFeeds Int'l Corp.*, 559 U. S. 662, 681–682 (2010). This purpose is readily apparent from the FAA's text. Section 2 makes arbitration agreements "valid, irrevocable, and enforceable" as written (subject, of course, to the saving clause); § 3 requires courts to stay litigation of arbitral claims pending arbitration of those claims "in accordance with the terms of the agreement"; and § 4 requires courts to compel arbitration "in accordance with the terms of the agreement" upon the motion of either party to the agreement (assuming that the "making of the arbitration agreement or the failure . . . to perform the same" is not at issue). In light of these provisions, we have held that parties may agree to limit the issues subject to arbitration, *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U. S. 614, 628 (1985), to arbitrate according to specific rules, *Volt*, *supra*, at 479, and to limit *with whom* a party will arbitrate its disputes, *Stolt-Nielsen*, *supra*, at 683.

The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute. It can be speci-

fied, for example, that the decisionmaker be a specialist in the relevant field, or that proceedings be kept confidential to protect trade secrets. And the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution. *14 Penn Plaza LLC* v. *Pyett*, 556 U. S. 247, 269 (2009); *Mitsubishi Motors Corp.*, *supra*, at 628.

The dissent quotes *Dean Witter Reynolds Inc.* v. *Byrd*, 470 U. S. 213, 219 (1985), as "'reject[ing] the suggestion that the overriding goal of the Arbitration Act was to promote the expeditious resolution of claims.'" *Post*, at 360 (opinion of BREYER, J.). That is greatly misleading. After saying (accurately enough) that "the overriding goal of the Arbitration Act was [not] to promote the expeditious resolution of claims," but to "ensure judicial enforcement of privately made agreements to arbitrate," 470 U. S., at 219, *Dean Witter* went on to explain: "This is not to say that Congress was blind to the potential benefit of the legislation for expedited resolution of disputes. Far from it . . . ." *Id.*, at 220. It then quotes a House Report saying that "the costliness and delays of litigation . . . can be largely eliminated by agreements for arbitration." *Ibid.* (quoting H. R. Rep. No. 96, 68th Cong., 1st Sess., 2 (1924)). The concluding paragraph of this part of its discussion begins as follows:

> "We therefore are not persuaded by the argument that the conflict between two goals of the Arbitration Act—enforcement of private agreements and encouragement of efficient and speedy dispute resolution—must be resolved in favor of the latter in order to realize the intent of the drafters." 470 U. S., at 221.

In the present case, of course, those "two goals" do not conflict—and it is the dissent's view that would frustrate *both* of them.

Contrary to the dissent's view, our cases place it beyond dispute that the FAA was designed to promote arbitration.

They have repeatedly described the Act as "embod[ying] [a] national policy favoring arbitration," *Buckeye Check Cashing*, 546 U. S., at 443, and "a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary," *Moses H. Cone*, 460 U. S., at 24; see also *Hall Street Assocs.*, 552 U. S., at 581. Thus, in *Preston* v. *Ferrer*, holding pre-empted a state-law rule requiring exhaustion of administrative remedies before arbitration, we said: "A prime objective of an agreement to arbitrate is to achieve 'streamlined proceedings and expeditious results,'" which objective would be "frustrated" by requiring a dispute to be heard by an agency first. 552 U. S., at 357–358. That rule, we said, would, "at the least, hinder speedy resolution of the controversy." *Id.*, at 358.[5]

California's *Discover Bank* rule similarly interferes with arbitration. Although the rule does not *require* classwide arbitration, it allows any party to a consumer contract to demand it *ex post.* The rule is limited to adhesion contracts, *Discover Bank*, 36 Cal. 4th, at 162–163, 113 P. 3d, at 1110, but the times in which consumer contracts were anything

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[5] Relying upon nothing more indicative of congressional understanding than statements of witnesses in committee hearings and a press release of Secretary of Commerce Herbert Hoover, the dissent suggests that Congress "thought that arbitration would be used primarily where merchants sought to resolve disputes of fact . . . [and] possessed roughly equivalent bargaining power." *Post,* at 362. Such a limitation appears nowhere in the text of the FAA and has been explicitly rejected by our cases. "Relationships between securities dealers and investors, for example, may involve unequal bargaining power, but we [have] nevertheless held . . . that agreements to arbitrate in that context are enforceable." *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U. S. 20, 33 (1991); see also *id.*, at 32–33 (allowing arbitration of claims arising under the Age Discrimination in Employment Act of 1967 despite allegations of unequal bargaining power between employers and employees). Of course the dissent's disquisition on legislative history fails to note that it contains nothing—not even the testimony of a stray witness in committee hearings—that contemplates the existence of class arbitration.

other than adhesive are long past.[6] *Carbajal* v. *H&R Block Tax Servs., Inc.*, 372 F. 3d 903, 906 (CA7 2004); see also *Hill* v. *Gateway 2000, Inc.*, 105 F. 3d 1147, 1149 (CA7 1997). The rule also requires that damages be predictably small, and that the consumer allege a scheme to cheat consumers. *Discover Bank*, *supra*, at 162–163, 113 P. 3d, at 1110. The former requirement, however, is toothless and malleable (the Ninth Circuit has held that damages of $4,000 are sufficiently small, see *Oestreicher* v. *Alienware Corp.*, 322 Fed. Appx. 489, 492 (2009) (unpublished)), and the latter has no limiting effect, as all that is required is an allegation. Consumers remain free to bring and resolve their disputes on a bilateral basis under *Discover Bank*, and some may well do so; but there is little incentive for lawyers to arbitrate on behalf of individuals when they may do so for a class and reap far higher fees in the process. And faced with inevitable class arbitration, companies would have less incentive to continue resolving potentially duplicative claims on an individual basis.

Although we have had little occasion to examine classwide arbitration, our decision in *Stolt-Nielsen* is instructive. In that case we held that an arbitration panel exceeded its power under § 10(a)(4) of the FAA by imposing class procedures based on policy judgments rather than the arbitration agreement itself or some background principle of contract law that would affect its interpretation. 559 U. S., at 684–687. We then held that the agreement at issue, which was silent on the question of class procedures, could not be interpreted to allow them because the "changes brought about by the shift from bilateral arbitration to class-action arbitration" are "fundamental." *Id.*, at 686. This is obvious as a

[6] Of course States remain free to take steps addressing the concerns that attend contracts of adhesion—for example, requiring class-action-waiver provisions in adhesive agreements to be highlighted. Such steps cannot, however, conflict with the FAA or frustrate its purpose to ensure that private arbitration agreements are enforced according to their terms.

structural matter: Classwide arbitration includes absent parties, necessitating additional and different procedures and involving higher stakes. Confidentiality becomes more difficult. And while it is theoretically possible to select an arbitrator with some expertise relevant to the class-certification question, arbitrators are not generally knowledgeable in the often-dominant procedural aspects of certification, such as the protection of absent parties. The conclusion follows that class arbitration, to the extent it is manufactured by *Discover Bank* rather than consensual, is inconsistent with the FAA.

First, the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment. "In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." 559 U. S., at 685. But before an arbitrator may decide the merits of a claim in classwide procedures, he must first decide, for example, whether the class itself may be certified, whether the named parties are sufficiently representative and typical, and how discovery for the class should be conducted. A cursory comparison of bilateral and class arbitration illustrates the difference. According to the American Arbitration Association (AAA), the average consumer arbitration between January and August 2007 resulted in a disposition on the merits in six months, four months if the arbitration was conducted by documents only. AAA, Analysis of the AAA's Consumer Arbitration Caseload, online at http://www.adr.org/si.asp?id=5027 (all Internet materials as visited Apr. 25, 2011, and available in Clerk of Court's case file). As of September 2009, the AAA had opened 283 class arbitrations. Of those, 121 remained active, and 162 had been settled, withdrawn,

or dismissed. Not a single one, however, had resulted in a final award on the merits. Brief for AAA as *Amicus Curiae* in *Stolt-Nielsen*, O. T. 2009, No. 08–1198, pp. 22–24. For those cases that were no longer active, the median time from filing to settlement, withdrawal, or dismissal—not judgment on the merits—was 583 days, and the mean was 630 days. *Id.*, at 24.[7]

Second, class arbitration *requires* procedural formality. The AAA's rules governing class arbitrations mimic the Federal Rules of Civil Procedure for class litigation. Compare AAA, Supplementary Rules for Class Arbitrations (effective Oct. 8, 2003), online at http://www.adr.org/sp.asp?id=21936, with Fed. Rule Civ. Proc. 23. And while parties can alter those procedures by contract, an alternative is not obvious. If procedures are too informal, absent class members would not be bound by the arbitration. For a class-action money judgment to bind absentees in litigation, class representatives must at all times adequately represent absent class members, and absent members must be afforded notice, an opportunity to be heard, and a right to opt out of the class. *Phillips Petroleum Co.* v. *Shutts*, 472 U. S. 797, 811–812 (1985). At least this amount of process would presumably be required for absent parties to be bound by the results of arbitration.

We find it unlikely that in passing the FAA Congress meant to leave the disposition of these procedural requirements to an arbitrator. Indeed, class arbitration was not even envisioned by Congress when it passed the FAA in 1925; as the California Supreme Court admitted in *Discover Bank*, class arbitration is a "relatively recent development." 36 Cal. 4th, at 163, 113 P. 3d, at 1110. And it is at the very

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[7] The dissent claims that class arbitration should be compared to class litigation, not bilateral arbitration. *Post,* at 363. Whether arbitrating a class is more desirable than litigating one, however, is not relevant. A State cannot defend a rule requiring arbitration-by-jury by saying that parties will still prefer it to trial-by-jury.

least odd to think that an arbitrator would be entrusted with ensuring that third parties' due process rights are satisfied.

Third, class arbitration greatly increases risks to defendants. Informal procedures do of course have a cost: The absence of multilayered review makes it more likely that errors will go uncorrected. Defendants are willing to accept the costs of these errors in arbitration, since their impact is limited to the size of individual disputes, and presumably outweighed by savings from avoiding the courts. But when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims. Other courts have noted the risk of "in terrorem" settlements that class actions entail, see, *e. g.*, *Kohen* v. *Pacific Inv. Management Co. LLC*, 571 F. 3d 672, 677–678 (CA7 2009), and class arbitration would be no different.

Arbitration is poorly suited to the higher stakes of class litigation. In litigation, a defendant may appeal a certification decision on an interlocutory basis and, if unsuccessful, may appeal from a final judgment as well. Questions of law are reviewed *de novo* and questions of fact for clear error. In contrast, 9 U. S. C. § 10 allows a court to vacate an arbitral award *only* where the award "was procured by corruption, fraud, or undue means"; "there was evident partiality or corruption in the arbitrators"; "the arbitrators were guilty of misconduct in refusing to postpone the hearing . . . or in refusing to hear evidence pertinent and material to the controversy[,] or of any other misbehavior by which the rights of any party have been prejudiced"; or if the "arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award . . . was not made." The AAA rules do authorize judicial review of certification decisions, but this review is unlikely to have much effect given these limitations; review under § 10 focuses on misconduct

rather than mistake. And parties may not contractually expand the grounds or nature of judicial review. *Hall Street Assocs.*, 552 U. S., at 578. We find it hard to believe that defendants would bet the company with no effective means of review, and even harder to believe that Congress would have intended to allow state courts to force such a decision.[8]

The Concepcions contend that because parties may and sometimes do agree to aggregation, class procedures are not necessarily incompatible with arbitration. But the same could be said about procedures that the Concepcions admit States may not superimpose on arbitration: Parties *could* agree to arbitrate pursuant to the Federal Rules of Civil Procedure, or pursuant to a discovery process rivaling that in litigation. Arbitration is a matter of contract, and the FAA requires courts to honor parties' expectations. *Rent-A-Center, West*, 561 U. S., at 67–69. But what the parties in the aforementioned examples would have agreed to is not arbitration as envisioned by the FAA, lacks its benefits, and therefore may not be required by state law.

The dissent claims that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system. See *post*, at 365. But States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons. Moreover, the claim here was most unlikely to go unresolved. As noted earlier, the arbitration agreement provides that AT&T will

[8] The dissent cites three large arbitration awards (none of which stems from classwide arbitration) as evidence that parties are willing to submit large claims before an arbitrator. *Post*, at 364. Those examples might be in point if it could be established that the size of the arbitral dispute was predictable when the arbitration agreement was entered. Otherwise, all the cases prove is that arbitrators can give huge awards—which we have never doubted. The point is that in class-action arbitration huge awards (with limited judicial review) will be entirely predictable, thus rendering arbitration unattractive. It is not reasonably deniable that requiring consumer disputes to be arbitrated on a classwide basis will have a substantial deterrent effect on incentives to arbitrate.

pay claimants a minimum of $7,500 and twice their attorney's fees if they obtain an arbitration award greater than AT&T's last settlement offer. The District Court found this scheme sufficient to provide incentive for the individual prosecution of meritorious claims that are not immediately settled, and the Ninth Circuit admitted that aggrieved customers who filed claims would be "essentially guarantee[d]" to be made whole, 584 F. 3d, at 856, n. 9. Indeed, the District Court concluded that the Concepcions were *better off* under their arbitration agreement with AT&T than they would have been as participants in a class action, which "could take months, if not years, and which may merely yield an opportunity to submit a claim for recovery of a small percentage of a few dollars." *Laster,* 2008 WL 5216255, *12.

* * *

Because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines* v. *Davidowitz,* 312 U. S. 52, 67 (1941), California's *Discover Bank* rule is pre-empted by the FAA. The judgment of the Ninth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE THOMAS, concurring.

Section 2 of the Federal Arbitration Act (FAA) provides that an arbitration provision "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U. S. C. §2. The question here is whether California's *Discover Bank* rule, see *Discover Bank* v. *Superior Court,* 36 Cal. 4th 148, 113 P. 3d 1100 (2005), is a "groun[d] . . . for the revocation of any contract."

It would be absurd to suggest that §2 requires only that a defense apply to "any contract." If §2 means anything, it

is that courts cannot refuse to enforce arbitration agreements because of a state public policy against arbitration, even if the policy nominally applies to "any contract." There must be some additional limit on the contract defenses permitted by § 2. Cf. *ante*, at 351 (opinion of the Court) (state law may not require procedures that are "not arbitration as envisioned by the FAA" and "lac[k] its benefits"); *post*, at 361 (BREYER, J., dissenting) (state law may require only procedures that are "consistent with the use of arbitration").

I write separately to explain how I would find that limit in the FAA's text. As I would read it, the FAA requires that an agreement to arbitrate be enforced unless a party successfully challenges the formation of the arbitration agreement, such as by proving fraud or duress. 9 U. S. C. §§ 2, 4. Under this reading, I would reverse the Court of Appeals because a district court cannot follow both the FAA and the *Discover Bank* rule, which does not relate to defects in the making of an agreement.

This reading of the text, however, has not been fully developed by any party, cf. Brief for Petitioner 41, n. 12, and could benefit from briefing and argument in an appropriate case. Moreover, I think that the Court's test will often lead to the same outcome as my textual interpretation and that, when possible, it is important in interpreting statutes to give lower courts guidance from a majority of the Court. See *US Airways, Inc.* v. *Barnett*, 535 U. S. 391, 411 (2002) (O'Connor, J., concurring). Therefore, although I adhere to my views on purposes-and-objectives pre-emption, see *Wyeth* v. *Levine*, 555 U. S. 555, 582 (2009) (opinion concurring in judgment), I reluctantly join the Court's opinion.

I

The FAA generally requires courts to enforce arbitration agreements as written. Section 2 provides that "[a] written provision in . . . a contract . . . to settle by arbitration a controversy thereafter arising out of such contract . . . shall

be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." Significantly, the statute does not parallel the words "valid, irrevocable, and enforceable" by referencing the grounds as exist for the "invalidation, revocation, or nonenforcement" of any contract. Nor does the statute use a different word or phrase entirely that might arguably encompass validity, revocability, and enforceability. The use of only "revocation" and the conspicuous omission of "invalidation" and "nonenforcement" suggest that the exception does not include all defenses applicable to any contract but rather some subset of those defenses. See *Duncan* v. *Walker*, 533 U. S. 167, 174 (2001) ("It is our duty to give effect, if possible, to every clause and word of a statute" (internal quotation marks omitted)).

Concededly, the difference between revocability, on the one hand, and validity and enforceability, on the other, is not obvious. The statute does not define the terms, and their ordinary meanings arguably overlap. Indeed, this Court and others have referred to the concepts of revocability, validity, and enforceability interchangeably. But this ambiguity alone cannot justify ignoring Congress' clear decision in § 2 to repeat only one of the three concepts.

To clarify the meaning of § 2, it would be natural to look to other portions of the FAA. Statutory interpretation focuses on "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson* v. *Shell Oil Co.*, 519 U. S. 337, 341 (1997). "A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *United Sav. Assn. of Tex.* v. *Timbers of Inwood Forest Associates, Ltd.*, 484 U. S. 365, 371 (1988).

Examining the broader statutory scheme, § 4 can be read to clarify the scope of § 2's exception to the enforcement of

arbitration agreements. When a party seeks to enforce an arbitration agreement in federal court, § 4 requires that "upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue," the court must order arbitration "in accordance with the terms of the agreement."

Reading §§ 2 and 4 harmoniously, the "grounds . . . for the revocation" preserved in § 2 would mean grounds related to the making of the agreement. This would require enforcement of an agreement to arbitrate unless a party successfully asserts a defense concerning the formation of the agreement to arbitrate, such as fraud, duress, or mutual mistake. See *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U. S. 395, 403–404 (1967) (interpreting § 4 to permit federal courts to adjudicate claims of "fraud in the inducement of the arbitration clause itself" because such claims "g[o] to the 'making' of the agreement to arbitrate"). Contract defenses unrelated to the making of the agreement—such as public policy—could not be the basis for declining to enforce an arbitration clause.*

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*The interpretation I suggest would be consistent with our precedent. Contract formation is based on the consent of the parties, and we have emphasized that "[a]rbitration under the Act is a matter of consent." *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior Univ.*, 489 U. S. 468, 479 (1989).

The statement in *Perry* v. *Thomas*, 482 U. S. 483 (1987), suggesting that § 2 preserves all state-law defenses that "arose to govern issues concerning the validity, revocability, and enforceability of contracts generally," *id.*, at 493, n. 9, is dicta. This statement is found in a footnote concerning a claim that the Court "decline[d] to address." *Id.*, at 492, n. 9. Similarly, to the extent that statements in *Rent-A-Center, West, Inc.* v. *Jackson*, 561 U. S. 63, 69, n. 1 (2010), can be read to suggest anything about the scope of state-law defenses under § 2, those statements are dicta, as well. This Court has never addressed the question whether the state-law "grounds" referred to in § 2 are narrower than those applicable to any contract.

Moreover, every specific contract defense that the Court has acknowledged is applicable under § 2 relates to contract formation. In *Doctor's Associates, Inc.* v. *Casarotto*, 517 U. S. 681, 687 (1996), this Court said

II

Under this reading, the question here would be whether California's *Discover Bank* rule relates to the making of an agreement. I think it does not.

In *Discover Bank*, 36 Cal. 4th 148, 113 P. 3d 1100, the California Supreme Court held that "class action waivers are, under certain circumstances, unconscionable as unlawfully exculpatory." *Id.*, at 165, 113 P. 3d, at 1112; see also *id.*, at 161, 113 P. 3d, at 1108 ("[C]lass action waivers [may be] substantively unconscionable inasmuch as they may operate effectively as exculpatory contract clauses that are contrary to public policy"). The court concluded that where a class-action waiver is found in an arbitration agreement in certain consumer contracts of adhesion, such waivers "should not be enforced." *Id.*, at 163, 113 P. 3d, at 1110. In practice, the court explained, such agreements "operate to insulate a party from liability that otherwise would be imposed under California law." *Id.*, at 161, 113 P. 3d, at 1109. The court did not conclude that a customer would sign such an agreement only if under the influence of fraud, duress, or delusion.

The court's analysis and conclusion that the arbitration agreement was exculpatory reveals that the *Discover Bank* rule does not concern the making of the arbitration agreement. Exculpatory contracts are a paradigmatic example of contracts that will not be enforced because of public policy.

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that fraud, duress, and unconscionability "may be applied to invalidate arbitration agreements without contravening § 2." All three defenses historically concern the making of an agreement. See *Morgan Stanley Capital Group Inc.* v. *Public Util. Dist. No. 1 of Snohomish Cty.*, 554 U. S. 527, 547 (2008) (describing fraud and duress as "traditional grounds for the abrogation of [a] contract" that speak to "unfair dealing at the contract formation stage"); *Hume* v. *United States*, 132 U. S. 406, 411, 414 (1889) (describing an unconscionable contract as one "such as no man in his senses and not under delusion would make" and suggesting that there may be "contracts so extortionate and unconscionable on their face as to raise the presumption of fraud in their inception" (internal quotation marks omitted)).

15 G. Giesel, Corbin on Contracts §§ 85.1, 85.17, 85.18 (rev. ed. 2003). Indeed, the court explained that it would not enforce the agreements because they are "'against the policy of the law.'" 36 Cal. 4th, at 161, 113 P. 3d, at 1108 (quoting Cal. Civ. Code Ann. § 1668 (West 1985)); see also 36 Cal. 4th, at 166, 113 P. 3d, at 1112 ("Agreements to arbitrate may not be used to harbor terms, conditions and practices that undermine public policy" (internal quotation marks omitted)). Refusal to enforce a contract for public-policy reasons does not concern whether the contract was properly made.

Accordingly, the *Discover Bank* rule is not a "groun[d] . . . for the revocation of any contract" as I would read § 2 of the FAA in light of § 4. Under this reading, the FAA dictates that the arbitration agreement here be enforced and the *Discover Bank* rule is pre-empted.

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

The Federal Arbitration Act says that an arbitration agreement "shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract.*" 9 U. S. C. § 2 (emphasis added). California law sets forth certain circumstances in which "class action waivers" in *any* contract are unenforceable. In my view, this rule of state law is consistent with the federal Act's language and primary objective. It does not "stan[d] as an obstacle" to the Act's "accomplishment and execution." *Hines* v. *Davidowitz*, 312 U. S. 52, 67 (1941). And the Court is wrong to hold that the federal Act pre-empts the rule of state law.

I

The California law in question consists of an authoritative state-court interpretation of two provisions of the California Civil Code. The first provision makes unlawful all contracts "which have for their object, directly or indirectly, to exempt anyone from responsibility for his own . . . violation of law."

Cal. Civ. Code Ann. § 1668 (West 1985). The second provision authorizes courts to "limit the application of any unconscionable clause" in a contract so "as to avoid any unconscionable result." § 1670.5(a).

The specific rule of state law in question consists of the California Supreme Court's application of these principles to hold that "some" (but not "all") "class action waivers" in consumer contracts are exculpatory and unconscionable under California "law." *Discover Bank* v. *Superior Court*, 36 Cal. 4th 148, 160, 162, 113 P. 3d 1100, 1108, 1110 (2005). In particular, in *Discover Bank* the California Supreme Court stated that, when a class-action waiver

> "is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then . . . the waiver becomes in practice the exemption of the party 'from responsibility for [its] own fraud, or willful injury to the person or property of another.' " *Id.*, at 162–163, 113 P. 3d, at 1110.

In such a circumstance, the "waivers are unconscionable under California law and should not be enforced." *Id.*, at 163, 113 P. 3d, at 1110.

The *Discover Bank* rule does not create a "blanket policy in California against class action waivers in the consumer context." *Provencher* v. *Dell, Inc.*, 409 F. Supp. 2d 1196, 1201 (CD Cal. 2006). Instead, it represents the "application of a more general [unconscionability] principle." *Gentry* v. *Superior Court*, 42 Cal. 4th 443, 457, 165 P. 3d 556, 564 (2007). Courts applying California law have enforced class-action waivers where they satisfy general unconscionability standards. See, *e. g.*, *Walnut Producers of Cal.* v. *Diamond Foods, Inc.*, 187 Cal. App. 4th 634, 647–650, 114 Cal. Rptr. 3d

449, 459–462 (2010); *Arguelles-Romero* v. *Superior Court*, 184 Cal. App. 4th 825, 843–845, 109 Cal. Rptr. 3d 289, 305–307 (2010); *Smith* v. *Americredit Financial Servs., Inc.*, No. 09cv1076, 2009 WL 4895280 (SD Cal., Dec. 11, 2009); cf. *Provencher*, *supra*, at 1201 (considering *Discover Bank* in choice-of-law inquiry). And even when they fail, the parties remain free to devise other dispute mechanisms, including informal mechanisms, that, in context, will not prove unconscionable. See *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior Univ.*, 489 U. S. 468, 479 (1989).

II

A

The *Discover Bank* rule is consistent with the federal Act's language. It "applies equally to class action litigation waivers in contracts without arbitration agreements as it does to class arbitration waivers in contracts with such agreements." 36 Cal. 4th, at 165–166, 113 P. 3d, at 1112. Linguistically speaking, it falls directly within the scope of the Act's exception permitting courts to refuse to enforce arbitration agreements on grounds that exist "for the revocation of *any* contract." 9 U. S. C. § 2 (emphasis added). The majority agrees. *Ante*, at 343.

B

The *Discover Bank* rule is also consistent with the basic "purpose behind" the Act. *Dean Witter Reynolds Inc.* v. *Byrd*, 470 U. S. 213, 219 (1985). We have described that purpose as one of "ensur[ing] judicial enforcement" of arbitration agreements. *Ibid.;* see also *Marine Transit Corp.* v. *Dreyfus*, 284 U. S. 263, 274, n. 2 (1932) (" 'The purpose of this bill is to make *valid and enforcible* agreements for arbitration' " (quoting H. R. Rep. No. 96, 68th Cong., 1st Sess., 1 (1924); emphasis added)); 65 Cong. Rec. 1931 (1924) ("It creates no new legislation, grants no new rights, except a remedy to enforce an agreement in commercial contracts and in

admiralty contracts"). As is well known, prior to the federal Act, many courts expressed hostility to arbitration, for example, by refusing to order specific performance of agreements to arbitrate. See S. Rep. No. 536, 68th Cong., 1st Sess., 2 (1924). The Act sought to eliminate that hostility by placing agreements to arbitrate "'*upon the same footing as other contracts.*'" *Scherk* v. *Alberto-Culver Co.*, 417 U. S. 506, 511 (1974) (quoting H. R. Rep. No. 96, at 2; emphasis added).

Congress was fully aware that arbitration could provide procedural and cost advantages. The House Report emphasized the "appropriate[ness]" of making arbitration agreements enforceable "at this time when there is so much agitation against the costliness and delays of litigation." *Id.*, at 2. And this Court has acknowledged that parties may enter into arbitration agreements in order to expedite the resolution of disputes. See *Preston* v. *Ferrer*, 552 U. S. 346, 357 (2008) (discussing "prime objective of an agreement to arbitrate"). See also *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U. S. 614, 628 (1985).

But we have also cautioned against thinking that Congress' primary objective was to guarantee these particular procedural advantages. Rather, that primary objective was to secure the "enforcement" of agreements to arbitrate. *Dean Witter*, 470 U. S., at 221. See also *id.*, at 219 (we "reject the suggestion that the overriding goal of the Arbitration Act was to promote the expeditious resolution of claims"); *id.*, at 219, 217 ("[T]he intent of Congress" requires us to apply the terms of the Act without regard to whether the result would be "possibly inefficient"); cf. *id.*, at 220 (acknowledging that "expedited resolution of disputes" might lead parties to prefer arbitration). The relevant Senate Report points to the Act's basic purpose when it says that "[t]he purpose of the [Act] is *clearly set forth in section 2*," S. Rep. No. 536, at 2 (emphasis added), namely, the section that says that an arbitration agreement "shall be valid, ir-

revocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract," 9 U. S. C. § 2.

Thus, insofar as we seek to implement Congress' intent, we should think more than twice before invalidating a state law that does just what § 2 requires, namely, puts agreements to arbitrate and agreements to litigate "upon the same footing."

III

The majority's contrary view (that *Discover Bank* stands as an "obstacle" to the accomplishment of the federal law's objective, *ante*, at 344–352) rests primarily upon its claims that the *Discover Bank* rule increases the complexity of arbitration procedures, thereby discouraging parties from entering into arbitration agreements, and to that extent discriminating in practice against arbitration. These claims are not well founded.

For one thing, a state rule of law that would sometimes set aside as unconscionable a contract term that forbids class arbitration is not (as the majority claims) like a rule that would require "ultimate disposition by a jury" or "judicially monitored discovery" or use of "the Federal Rules of Evidence." *Ante*, at 342, 344. Unlike the majority's examples, class arbitration is consistent with the use of arbitration. It is a form of arbitration that is well known in California and followed elsewhere. See, *e. g.*, *Keating* v. *Superior Court*, 167 Cal. Rptr. 481, 492 (App. 1980) (officially depublished); American Arbitration Association (AAA), Supplementary Rules for Class Arbitrations (2003), http://www.adr.org/sp.asp?id=21936 (as visited Apr. 25, 2011, and available in Clerk of Court's case file); JAMS, The Resolution Experts, Class Action Procedures (2009). Indeed, the AAA has told us that it has found class arbitration to be "a fair, balanced, and efficient means of resolving class disputes." Brief for AAA as *Amicus Curiae* in *Stolt-Nielsen S. A.* v. *AnimalFeeds Int'l Corp.*, O. T. 2009, No. 08–1198, p. 25 (hereinafter

AAA *Amicus* Brief). And unlike the majority's examples, the *Discover Bank* rule imposes equivalent limitations on litigation; hence it cannot fairly be characterized as a targeted attack on arbitration.

Where does the majority get its contrary idea—that individual, rather than class, arbitration is a "fundamental attribut[e]" of arbitration? *Ante*, at 344. The majority does not explain. And it is unlikely to be able to trace its present view to the history of the arbitration statute itself.

When Congress enacted the Act, arbitration procedures had not yet been fully developed. Insofar as Congress considered detailed forms of arbitration at all, it may well have thought that arbitration would be used primarily where merchants sought to resolve disputes of fact, not law, under the customs of their industries, where the parties possessed roughly equivalent bargaining power. See *Mitsubishi Motors*, *supra*, at 646 (Stevens, J., dissenting); Joint Hearings on S. 1005 and H. R. 646 before the Subcommittees of the Committees on the Judiciary, 68th Cong., 1st Sess., 15 (1924); Hearing on S. 4213 and S. 4214 before a Subcommittee of the Senate Committee on the Judiciary, 67th Cong., 4th Sess., 9–10 (1923); Dept. of Commerce, Secretary Hoover Favors Arbitration—Press Release (Dec. 28, 1925), Herbert Hoover Papers, Articles, Addresses, and Public Statements File, No. 536, p. 2 (Herbert Hoover Presidential Library); Cohen & Dayton, The New Federal Arbitration Law, 12 Va. L. Rev. 265, 281 (1926); AAA, Year Book on Commercial Arbitration in the United States (1927). This last mentioned feature of the history—roughly equivalent bargaining power—suggests, if anything, that California's statute is consistent with, and indeed may help to further, the objectives that Congress had in mind.

Regardless, if neither the history nor present practice suggests that class arbitration is fundamentally incompatible with arbitration itself, then on what basis can the majority hold California's law pre-empted?

For another thing, the majority's argument that the *Discover Bank* rule will discourage arbitration rests critically upon the wrong comparison. The majority compares the complexity of class arbitration with that of bilateral arbitration. See *ante,* at 348–349. And it finds the former more complex. See *ibid.* But, if incentives are at issue, the *relevant* comparison is not "arbitration with arbitration" but a comparison between class arbitration and judicial class actions. After all, in respect to the relevant set of contracts, the *Discover Bank* rule similarly and equally sets aside clauses that forbid class procedures—whether arbitration procedures or ordinary judicial procedures are at issue.

Why would a typical defendant (say, a business) prefer a judicial class action to class arbitration? AAA statistics "suggest that class arbitration proceedings take more time than the average commercial arbitration, but may take *less time* than the average class action in court." AAA *Amicus* Brief 24 (emphasis added). Data from California courts confirm that class arbitrations can take considerably less time than in-court proceedings in which class certification is sought. Compare *ante,* at 348–349 (providing statistics for class arbitration), with Judicial Council of California, Administrative Office of the Courts, Class Certification in California: Second Interim Report From the Study of California Class Action Litigation 18 (2010) (providing statistics for class-action litigation in California courts). And a single class proceeding is surely more efficient than thousands of separate proceedings for identical claims. Thus, if speedy resolution of disputes were all that mattered, then the *Discover Bank* rule would reinforce, not obstruct, that objective of the Act.

The majority's related claim that the *Discover Bank* rule will discourage the use of arbitration because "[a]rbitration is poorly suited to . . . higher stakes" lacks empirical support. *Ante,* at 350. Indeed, the majority provides no convincing reason to believe that parties are unwilling to submit high-

stake disputes to arbitration. And there are numerous counterexamples. Loftus, Rivals Resolve Dispute Over Drug, Wall Street Journal, Apr. 16, 2011, p. B2 (discussing $500 million settlement in dispute submitted to arbitration); Ziobro, Kraft Seeks Arbitration in Fight With Starbucks Over Distribution, Wall Street Journal, Nov. 30, 2010, p. B10 (describing initiation of an arbitration in which the payout "could be higher" than $1.5 billion); Markoff, Software Arbitration Ruling Gives I.B.M. $833 Million From Fujitsu, N. Y. Times, Nov. 30, 1988, p. A1 (describing both companies as "pleased with the ruling" resolving a licensing dispute).

Further, even though contract defenses, *e. g.*, duress and unconscionability, slow down the dispute resolution process, federal arbitration law normally leaves such matters to the States. *Rent-A-Center, West, Inc.* v. *Jackson*, 561 U. S. 63, 68 (2010) (arbitration agreements "may be invalidated by 'generally applicable contract defenses' " (quoting *Doctor's Associates, Inc.* v. *Casarotto*, 517 U. S. 681, 687 (1996))). A provision in a contract of adhesion (for example, requiring a consumer to decide very quickly whether to pursue a claim) might increase the speed and efficiency of arbitrating a dispute, but the State can forbid it. See, *e. g.*, *Hayes* v. *Oakridge Home*, 122 Ohio St. 3d 63, 67, 2009-Ohio-2054, ¶ 19, 908 N. E. 2d 408, 412 ("Unconscionability is a ground for revocation of an arbitration agreement"); *In re Poly-America, L. P.*, 262 S. W. 3d 337, 348 (Tex. 2008) ("Unconscionable contracts, however—whether relating to arbitration or not—are unenforceable under Texas law"). The *Discover Bank* rule amounts to a variation on this theme. California is free to define unconscionability as it sees fit, and its common law is of no federal concern so long as the State does not adopt a special rule that disfavors arbitration. Cf. *Doctor's Associates, supra*, at 687. See also *ante*, at 355–356, n. (THOMAS, J., concurring) (suggesting that, under certain circumstances, California might remain free to apply its unconscionability doctrine).

Because California applies the same legal principles to address the unconscionability of class arbitration waivers as it does to address the unconscionability of any other contractual provision, the merits of class proceedings should not factor into our decision. If California had applied its law of duress to void an arbitration agreement, would it matter if the procedures in the coerced agreement were efficient?

Regardless, the majority highlights the disadvantages of class arbitrations, as it sees them. See *ante*, at 350 (referring to the "greatly increase[d] risks to defendants"; the "chance of a devastating loss" pressuring defendants "into settling questionable claims"). But class proceedings have countervailing advantages. In general agreements that forbid the consolidation of claims can lead small-dollar claimants to abandon their claims rather than to litigate. I suspect that it is true even here, for as the Court of Appeals recognized, AT&T can avoid the $7,500 payout (the payout that supposedly makes the Concepcions' arbitration worthwhile) simply by paying the claim's face value, such that "the maximum gain to a customer for the hassle of arbitrating a $30.22 dispute is still just $30.22." *Laster* v. *AT&T Mobility LLC*, 584 F. 3d 849, 855, 856 (CA9 2009).

What rational lawyer would have signed on to represent the Concepcions in litigation for the possibility of fees stemming from a $30.22 claim? See, *e. g.*, *Carnegie* v. *Household Int'l, Inc.*, 376 F. 3d 656, 661 (CA7 2004) ("The *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30"). In California's perfectly rational view, nonclass arbitration over such sums will also sometimes have the effect of depriving claimants of their claims (say, for example, where claiming the $30.22 were to involve filling out many forms that require technical legal knowledge or waiting at great length while a call is placed on hold). *Discover Bank* sets forth circumstances in which the California courts believe that the terms of consumer contracts can be manipulated to

insulate an agreement's author from liability for its own frauds by "deliberately cheat[ing] large numbers of consumers out of individually small sums of money." 36 Cal. 4th, at 162–163, 113 P. 3d, at 1110. Why is this kind of decision—weighing the pros and cons of all class proceedings alike—not California's to make?

Finally, the majority can find no meaningful support for its views in this Court's precedent. The federal Act has been in force for nearly a century. We have decided dozens of cases about its requirements. We have reached results that authorize complex arbitration procedures. *E. g., Mitsubishi Motors*, 473 U. S., at 629 (antitrust claims arising in international transaction are arbitrable). We have upheld nondiscriminatory state laws that slow down arbitration proceedings. *E. g., Volt Information Sciences*, 489 U. S., at 477–479 (California law staying arbitration proceedings until completion of related litigation is not pre-empted). But we have not, to my knowledge, applied the Act to strike down a state statute that treats arbitrations on par with judicial and administrative proceedings. Cf. *Preston*, 552 U. S., at 355–356 (Act pre-empts state law that vests primary jurisdiction in state administrative board).

At the same time, we have repeatedly referred to the Act's basic objective as ensuring that courts treat arbitration agreements "like all other contracts." *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U. S. 440, 447 (2006). See also, *e. g., Vaden* v. *Discover Bank*, 556 U. S. 49, 64 (2009); *Doctor's Associates*, *supra*, at 687; *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U. S. 265, 281 (1995); *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U. S. 477, 483–484 (1989); *Perry* v. *Thomas*, 482 U. S. 483, 492–493, n. 9 (1987); *Mitsubishi Motors*, *supra*, at 627. And we have recognized that "[t]o immunize an arbitration agreement from judicial challenge" on grounds applicable to all other contracts "would be to elevate it over other forms of contract." *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U. S.

395, 404, n. 12 (1967); see also *Marchant* v. *Mead-Morrison Mfg. Co.*, 252 N. Y. 284, 299, 169 N. E. 386, 391 (1929) (Cardozo, C. J.) ("Courts are not at liberty to shirk the process of [contractual] construction under the empire of a belief that arbitration is beneficent any more than they may shirk it if their belief happens to be the contrary"); Cohen & Dayton, 12 Va. L. Rev., at 276 (the Act "is no infringement upon the right of each State to decide for itself what contracts shall or shall not exist under its laws").

These cases do not concern the merits and demerits of class actions; they concern equal treatment of arbitration contracts and other contracts. Since it is the latter question that is at issue here, I am not surprised that the majority can find no meaningful precedent supporting its decision.

IV

By using the words "save upon such grounds as exist at law or in equity for the revocation of any contract," Congress retained for the States an important role incident to agreements to arbitrate. 9 U. S. C. § 2. Through those words Congress reiterated a basic federal idea that has long informed the nature of this Nation's laws. We have often expressed this idea in opinions that set forth presumptions. See, *e. g.*, *Medtronic, Inc.* v. *Lohr*, 518 U. S. 470, 485 (1996) ("[B]ecause the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action"). But federalism is as much a question of deeds as words. It often takes the form of a concrete decision by this Court that respects the legitimacy of a State's action in an individual case. Here, recognition of that federalist ideal, embodied in specific language in this particular statute, should lead us to uphold California's law, not to strike it down. We do not honor federalist principles in their breach.

With respect, I dissent.

Syllabus

MONTANA *v.* WYOMING ET AL.

ON EXCEPTION TO REPORT OF SPECIAL MASTER

No. 137, Orig. Argued January 10, 2011—Decided May 2, 2011

Article V(A) of the Yellowstone River Compact (Compact) ratified by Montana, Wyoming, and North Dakota provides: "Appropriative rights to the beneficial uses of the water of the Yellowstone River System existing in each signatory State as of January 1, 1950, shall continue to be enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation." 65 Stat. 666. Montana filed a bill of complaint, alleging that Wyoming breached Article V(A) by allowing its upstream pre-1950 water users to switch from flood to sprinkler irrigation, which increases crop consumption of water and decreases the volume of runoff and seepage returning to the river system. Thus, even if Wyoming's pre-1950 users divert the same quantity of water as before, less water reaches downstream users in Montana. Concluding that the Compact permits more efficient irrigation systems so long as the conserved water is used to irrigate the same acreage watered in 1950, the Special Master found that Montana's increased-efficiency allegation failed to state a claim. Montana has filed an exception.

Held: Because Article V(A) of the Compact incorporates the ordinary doctrine of appropriation without significant qualification, and because in Wyoming and Montana that doctrine allows appropriators to improve their irrigation systems, even to the detriment of downstream appropriators, Montana's increased-efficiency allegation fails to state a claim for breach of the Compact under Article V(A). Pp. 374–389.

(a) Background appropriation law principles do not support Montana's position. The doctrine of appropriation provides that rights to water for irrigation are perfected and enforced in order of seniority, starting with the first person to divert water from a natural stream and apply it to a "beneficial use." Once perfected, that water right is senior to any later appropriators' rights and may be fulfilled entirely before the junior appropriators get any water. However, junior appropriators do acquire rights to the stream basically as it exists when they find it. Under this no-injury rule, junior users may, subject to the fulfillment of the senior users' existing rights, prevent senior users from enlarging their rights to the junior users' detriment. Here, the question is whether a switch to more efficient irrigation with less return flow is within Wyoming's pre-1950 users' existing appropriative rights or is an

improper enlargement of that right. Although the law of return flows is an unclear area of appropriation doctrine, the Special Master correctly concluded that Wyoming's pre-1950 users may switch to sprinkler irrigation. Pp. 374–385.

(1) A change in irrigation methods does not appear to run afoul of the no-injury rule in Montana and Wyoming, which generally concerns changes in the location of the diversion and the place or purpose of use. Thus, an appropriator may increase his consumption by changing to a more water-intensive crop so long as he makes no change in acreage irrigated or amount of water diverted. Ordinary, day-to-day operational changes or repairs also do not violate the rule. Consumption can even be increased by adding farm acreage, if that was part of the plan from the start, and diligently pursued through the years. Irrigation system improvements seem to be the same sort of changes. This view is consistent with the fact that by 1950 both States had statutes regulating certain changes to water rights, but neither required farmers to take official action before adjusting irrigation methods. Cases in both States frequently describe the no-injury rule as applying to changes in point of diversion, purpose of use, and place of use. The abundance of litigation over such changes—and the absence of any litigation over the sort of change at issue here—strongly implies that irrigation efficiency improvements were considered within the scope of the original appropriative right. Pp. 378–380.

(2) The doctrine of recapture—which permits an appropriator who has diverted water for irrigation to recapture and reuse his own runoff and seepage before it escapes his control or his property—also supports treating irrigation efficiency improvements as within the original appropriative right. Montana and Wyoming cases appear to apply this basic doctrine without any qualification based on whether the return flow would reenter the original stream or not. By using sprinklers instead of flood irrigation, Wyoming's pre-1950 water users effectively recapture water. The sprinklers reduce loss from seepage and runoff and are simply different mechanisms for increasing the volume of water available to crops without changing the amount of diversion. Pp. 380–384.

(3) This conclusion is consistent with the view of water law scholars who have considered the question presented in this case. Pp. 384–385.

(b) Also unpersuasive is Montana's argument that, if background appropriation law principles do not support its position, Article V(A)'s "beneficial use" definition nonetheless restricts the scope of pre-1950 appropriative rights to the net volume of water that was actually being consumed in 1950. Pp. 385–388.

(1) "Beneficial use" is "that use by which the water supply of a drainage basin is depleted when usefully employed by the activities of

man." 65 Stat. 665. Montana contends that the term means the *amount of* depletion, and thus any activity increasing Wyoming's pre-1950 depletions beyond pre-1950 levels exceeds Article V(A)'s scope. Pp. 385–386.

(2) Nothing in the Compact's definition suggests such an interpretation. A plain reading indicates that "beneficial use" is a *type* of use that depletes the water supply. This view is supported by the circumstances in the signatory States when the Compact was drafted. At that time, Wyoming had a statutory preference for irrigation, a depletive use, over power generation, a nondepletive use. It thus makes sense for the Compact to protect irrigation uses that were legislatively favored and represented the predominant use of the Yellowstone River system. Montana's reading, by contrast, would drastically redefine the term. The amount of water put to "beneficial use" has never been defined by net water consumption. In irrigation, that amount has always included a measure of necessary loss, *e. g.*, runoff or evaporation. If the Compact's definition were meant to drastically redefine "beneficial use," this Court would expect far more clarity. Moreover, if the Compact effected a dramatic reframing of ordinary appropriation principles, the rest of Article V(A), which expressly states that "the laws governing the acquisition and use of water under the doctrine of appropriation" control, would make little sense. Pp. 386–388.

(3) If Article V(A) were intended to guarantee Montana a set quantity of water, it could have done so plainly, as done in other compacts, *e. g.*, the Colorado River Compact of 1922. P. 388.

Exception overruled.

THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, GINSBURG, BREYER, ALITO, and SOTOMAYOR, JJ., joined. SCALIA, J., filed a dissenting opinion, *post*, p. 389. KAGAN, J., took no part in the consideration or decision of the case.

Steve Bullock, Attorney General of Montana, argued the cause for plaintiff. With him on the briefs were *Christian D. Tweeten*, *Jennifer Anders*, Assistant Attorney General, and *John B. Draper* and *Jeffrey J. Wechsler*, Special Assistant Attorneys General.

Peter K. Michael, Senior Assistant Attorney General of Wyoming, argued the cause for defendant Wyoming. With him on the brief were *Bruce A. Salzburg*, Attorney General,

Jay Jerde, Deputy Attorney General, and *David J. Willms*, Assistant Attorney General.

William M. Jay argued the cause for the United States as *amicus curiae* in support of defendants. With him on the brief were *Acting Solicitor General Katyal*, *Assistant Attorney General Moreno*, *Deputy Solicitor General Kneedler*, and *K. Jack Haugrud*.*

JUSTICE THOMAS delivered the opinion of the Court.

This case arises out of a dispute between Montana and Wyoming over the Yellowstone River Compact (or Compact). Montana alleges that Wyoming has breached Article V(A) of the Compact by allowing its pre-1950 water appropriators to increase their net water consumption by improving the efficiency of their irrigation systems. The new systems, Montana alleges, employ sprinklers that reduce the amount of wastewater returned to the river, thus depriving Montana's downstream pre-1950 appropriators of water to which they are entitled. The Special Master has filed a First Interim Report determining, as relevant here, that Montana's allegation fails to state a claim because more efficient irrigation systems are permissible under the Compact so long as the conserved water is used to irrigate the same acreage watered in 1950. We agree with the Special Master and overrule Montana's exception to that conclusion.

I

From its headwaters in Wyoming, the Yellowstone River flows nearly 700 miles northeast into Montana and then North Dakota, where it joins the Missouri River. Several of its tributaries, including the Clarks Fork, Tongue, Powder, and Bighorn Rivers, also begin in Wyoming and cross into Montana before joining the main stem of the Yellowstone

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**Jeanne S. Whiteing* filed a brief for the Northern Cheyenne Tribe as *amicus curiae*.

River. This river system's monthly and annual flows, which are dictated largely by snow melt, vary widely. In 1964, for example, the flow in the Tongue and Powder Rivers was nearly 10 times the 1961 flow. App. 936. As the rivers came into heavy use for irrigation, it became expedient to build water storage facilities for preserving the heaviest flows. See First Interim Report of Special Master 6 (hereinafter Report).

Before funding new water storage facilities, Congress sought agreement as to the allocation of the Yellowstone River system among Wyoming, Montana, and North Dakota. In 1932, Congress granted the States permission to negotiate a compact. See Act of June 14, 1932, ch. 253, 47 Stat. 306. Draft compacts were produced in 1935, 1942, and 1944, but none was fully agreed upon. Finally, in 1951 Montana, Wyoming, and North Dakota ratified the Yellowstone River Compact, and Congress consented to it. Act of Oct. 30, 1951, 65 Stat. 663.

The Yellowstone River Compact divides water into three tiers of priority. First, Article V(A) provides: "Appropriative rights to the beneficial uses of the water of the Yellowstone River System existing in each signatory State as of January 1, 1950, shall continue to be enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation." *Id.*, at 666. Second, Article V(B) allocates to each State the "quantity of that water as shall be necessary to provide supplemental water supplies" for the pre-1950 uses protected by Article V(A). *Ibid.* Third, "the remainder of the unused and unappropriated water" of each tributary is divided by percentage: Wyoming receives 60% of the remaining water in the Clarks Fork River, 80% in the Bighorn River, 40% in the Tongue River, and 42% in the Powder River; the rest goes to Montana. *Id.*, at 666–667.

In February 2008, we granted Montana leave to file a bill of complaint against Wyoming for breach of the Com-

pact. 552 U. S. 1175. Montana alleged that Wyoming had breached the Compact by consuming more than its share of the Tongue and Powder Rivers. Bill of Complaint 3, ¶ 8. Specifically, Montana claimed that Wyoming was appropriating water for a number of new, post-1950 uses: irrigating new acreage; building new storage facilities; conducting new groundwater pumping; and increasing consumption on existing agricultural acreage.[1] *Id.*, at 3–4, ¶¶ 9–12. According to Montana's complaint, the Compact did not permit Wyoming to use water for any of these practices as long as Montana's pre-1950 users' rights remained unfulfilled. *Id.*, at 3, ¶ 8.

In response, Wyoming filed a motion to dismiss the complaint. We appointed a Special Master and referred the motion to him. 555 U. S. 968 (2008). After briefing and argument, the Special Master recommended that we deny Wyoming's motion, because at least some of Montana's allegations state a claim for relief. The Special Master found that "Article V of the Compact protects pre-1950 appropriations in Montana from new surface and groundwater diversions in Wyoming, whether for direct use or for storage, that prevent adequate water from reaching Montana to satisfy those pre-1950 appropriations." Report 14–15. But the Special Master agreed with Wyoming that Montana's allegations regarding "efficiency improvements by pre-1950 appropriators in Wyoming" do not state a claim for relief. *Id.*, at 15. The States did not object to most of the Special Master's findings, and we have issued orders accordingly.

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[1] Montana has since clarified that increased consumption on existing acreage refers to the use of more efficient irrigation systems. The "efficiency" of irrigation for our purposes refers to the amount of wastewater that is lost, for example, to evaporation, seepage, runoff, or deep percolation. Some of the lost water returns to the river and is later available for downstream users. A more efficient irrigation system loses less water; thus, though it may draw the same volume of water from the river, *net* water consumption is increased.

See 562 U. S. 958 and 979 (2010). Montana has filed an exception to the Special Master's rejection of its increased-efficiency allegation. It is this exception that is before us.[2]

II

Article V(A) of the Compact states that "[a]ppropriative rights to the beneficial uses of [water] . . . existing in each signatory State as of January 1, 1950, shall continue to be enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation." Montana claims that its pre-1950 appropriators' rights are not "continu[ing] to be enjoyed" because upstream pre-1950 appropriators in Wyoming have increased their consumption by switching from flood to sprinkler irrigation. Montana alleges that sprinkler systems increase crop consumption of water and decrease the volume of runoff and seepage that returns to the Tongue and Powder rivers by 25% or more.[3] See Montana's Exception and Brief 3 (hereinafter Brief for Montana). As a result, even if Wyoming's pre-1950 water users divert the same quantity of water as before, less water reaches Montana. According to Montana, Article V(A) prohibits Wyoming from allowing this practice when it deprives Montana's pre-1950 users of their full water rights.

The question, therefore, is whether Article V(A) allows Wyoming's pre-1950 water users—diverting the same quantity of water for the same irrigation purpose and acreage as before 1950—to increase their consumption of water by

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[2] Montana also raised an exception to the Special Master's finding that if Montana can remedy the shortage of water to its pre-1950 users by curtailing its post-1950 uses without "prejudic[ing] Montana's other rights under the Compact," then an intrastate remedy is "the appropriate solution." Report 15. We recommitted this exception to the Special Master. 562 U. S. 958 (2010).

[3] For purposes of resolving Wyoming's motion to dismiss, we take as true Montana's allegation that the new sprinkler systems actually reduce return flow to the rivers. Wyoming has not conceded that this is true. See Wyoming's Reply to Montana's Exception 35, n. 6.

improving their irrigation systems even if it reduces the flow of water to Montana's pre-1950 users. Montana makes two basic arguments: that background principles of appropriation law, to the extent they are incorporated into the Compact, do not allow such an increase in consumption; and that even if they do, the terms of the Compact amended those principles in Montana's favor. The Special Master rejected these arguments, and so do we.

A

Because Article V(A) of the Compact protects "[a]ppropriative rights to the beneficial uses of [water]" as of 1950 "in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation," we begin with an overview of appropriation doctrine.[4] As the Special Master explained, if "[a]ppropriation law clearly proscribe[s] increases in consumption on existing acreage to the detriment of downstream appropriators, the Compact arguably would prohibit Wyoming from allowing its appropriators to make such increases to the detriment of Montana's pre-1950 uses." Report 65.

As is typical west of the 100th meridian, the doctrine of appropriation has governed water rights in Montana and Wyoming since the 1800's. See, *e. g.*, *Basey* v. *Gallagher*, 20 Wall. 670, 683 (1875). As relevant here, the doctrine provides that rights to water for irrigation are perfected and enforced in order of seniority, starting with the first person

[4] As with all contracts, we interpret the Compact according to the intent of the parties, here the signatory States. We thus look primarily to the doctrine of appropriation in Wyoming and Montana, but, like the States, we also look to Western water law more generally and authorities from before and after 1950. The States appear to have assumed that the doctrine has not changed in a way directly relevant here. We therefore do not decide whether Article V(A) intended to freeze appropriation law as it stood in 1949, or whether it incorporates the evolution of the doctrine over time, allowing Compact-protected rights to grow or shrink accordingly. We resolve the matter of Montana's exception without prejudice to that issue. See Report 39–40.

to divert water from a natural stream and apply it to a beneficial use (or to begin such a project, if diligently completed). See *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U. S. 92, 98 (1938); *Arizona* v. *California*, 298 U. S. 558, 565–566 (1936); Wyo. Const., Art. 8, § 3 ("Priority of appropriation for beneficial uses shall give the better right"). The scope of the right is limited by the concept of "beneficial use." That concept restricts a farmer "to the amount of water that is necessary to irrigate his land by making a reasonable use of the water." 1 C. Kinney, Law of Irrigation and Water Rights § 586, pp. 1007–1008 (2d ed. 1912) (hereinafter Kinney) (internal quotation marks omitted); see also *Bailey* v. *Tintinger*, 45 Mont. 154, 176–178, 122 P. 575, 583 (1912); *Quinn* v. *John Whitaker Ranch Co.*, 54 Wyo. 367, 376–380, 92 P. 2d 568, 570–571 (1939). Once such a water right is perfected, it is senior to any later appropriators' rights and may be fulfilled entirely before those junior appropriators get any water at all.

For our purposes, Montana's pre-1950 water users are similar to junior appropriators. As between the States, the Compact assigned the same seniority level to all pre-1950 water users in Montana and Wyoming. See Brief for Montana 23; Brief for United States as *Amicus Curiae* 12. But as Montana concedes, precisely because of this equal seniority, its downstream pre-1950 users cannot stop Wyoming's upstream pre-1950 users from fully exercising their water rights. Thus, when the rivers are low, Montana's downstream pre-1950 users might get no water at all because the equally senior users upstream in Wyoming may lawfully consume all of the water. Tr. of Oral Arg. 51.

Junior appropriators are not completely without rights, however. As they come online, appropriators acquire rights to the stream basically as it exists when they find it. See 2 Kinney § 803, at 1403–1404. Accordingly, subject to the fulfillment of all senior users' existing rights, under the no-

injury rule junior users can prevent senior users from enlarging their rights to the junior users' detriment. 1 W. Hutchins, Water Rights Laws in the Nineteen Western States 573 (1971) (hereinafter Hutchins).

Montana's pre-1950 users can therefore "insist that [Wyoming's pre-1950 users] confine themselves strictly within the rights which the law gives them, that is, to the amount of water within the extent of their appropriation which they actually apply to some beneficial use." 2 Kinney § 784, at 1366. That general proposition is undisputed; the dispute here is in its application. Is a switch to more efficient irrigation with less return flow within the extent of Wyoming's pre-1950 users' existing appropriative rights, or is it an improper enlargement of that right to the detriment of Montana's pre-1950 water users?

As the Special Master observed, the law of return flows is an unclear area of appropriation doctrine. Report 65 (citing Trelease, Reclamation Water Rights, 32 Rocky Mt. L. Rev. 464, 469 (1960)). The States have not directed us to any case on all fours with this one. Indeed, "[n]o western state court appears to have conclusively answered the question." Report 65.

Despite the lack of clarity, the Special Master found several reasons to conclude that Wyoming's pre-1950 users may switch to sprinkler irrigation. He found that the scope of the original appropriative right includes such a change so long as no additional water is diverted from the stream and the conserved water is used on the same acreage for the same agricultural purpose as before. We agree with the Special Master.[5]

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[5] The lack of clarity in this area of water law highlights the sensitive nature of our inquiry and counsels caution. Our original jurisdiction over cases between States brings us this dispute between Montana and Wyoming about the meaning of their congressionally approved Yellowstone River Compact. See U. S. Const., Art. III, § 2, cl. 2; 28 U. S. C.

1

First, although the no-injury rule prevents appropriators from making certain water-right changes that would harm other appropriators, a change in irrigation methods does not appear to run afoul of that rule in Montana and Wyoming. See *id.*, at 69. Because each new appropriator is entitled to the stream as it exists when he finds it, the general rule is that "if a change in these conditions is made by [a senior] appropriator, which interferes with the flow of the water to the material injury of [the junior appropriator's] rights, he may justly complain." 2 Kinney § 803, at 1404.

But the no-injury rule is not absolute; it generally concerns changes in the location of the diversion and the place or purpose of use. *Quigley* v. *McIntosh*, 110 Mont. 495, 505, 103 P. 2d 1067, 1072 (1940) ("[P]lace of diversion, or place or purpose of use, may be changed only if others are not thereby injured" (internal quotation marks omitted)); see also 1 S. Wiel, Water Rights in the Western States § 498, p. 532 (3d ed. 1911) (hereinafter Wiel); Mont. Rev. Code Ann. § 89–803 (1947); Wyo. Stat. Ann. § 41–3–104 (1977). Accordingly, certain types of changes can occur even though they may harm downstream appropriators. See D. Getches,

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§ 1251(a). Yet, because the Compact references and the parties direct us to principles of appropriation doctrine, we find ourselves immersed in state water law. See n. 4, *supra.* Our assessment of the scope of these water rights is merely a federal court's description of state law.

The highest court of each State, of course, remains "the final arbiter of what is state law." *West* v. *American Telephone & Telegraph Co.*, 311 U. S. 223, 236 (1940). We recognize that appropriation doctrine continues to evolve, and there are reasonable policy arguments in favor of both States' positions here. But it is not this Court's role to guide the development of state water regulation. See *id.*, at 237 ("[I]t is the duty of [federal courts] in every case to ascertain from all the available data what the state law is and apply it rather than to prescribe a different rule, however superior it may appear from the viewpoint of 'general law' "). Our decision is not intended to restrict the States' determination of their respective appropriation doctrines.

Water Law in a Nutshell 175 (4th ed. 2009) (hereinafter Getches). For instance, an appropriator may increase his consumption by changing to a more water-intensive crop so long as he makes no change in acreage irrigated or amount of water diverted. See *id.*, at 183; *East Bench Irrig. Co.* v. *Deseret Irrig. Co.*, 2 Utah 2d 170, 179, 271 P. 2d 449, 455 (1954) (assuming that farmers may "legally increase the quantity of water consumed in irrigating their lands by changing to more water consuming crops" and adding that "it would be difficult to prevent . . . such increased consumptive use"). Ordinary, day-to-day operational changes or repairs also do not violate the no-injury rule. See, *e. g.*, 1 Wiel § 56, at 51 ("Would the fact that my pump has for years dripped water onto a neighbor's ground give him a right to say that my pump must go on leaking?"). Consumption can even be increased by adding farm acreage, so long as that was part of the plan from the start, and diligently pursued through the years. See *Van Tassel Real Estate & Livestock Co.* v. *Cheyenne*, 49 Wyo. 333, 357–359, 54 P. 2d 906, 913 (1936) *(per curiam);* 1 Hutchins 377–378; *St. Onge* v. *Blakely*, 76 Mont. 1, 22–24, 245 P. 532, 539 (1926).

Improvements to irrigation systems seem to be the sort of changes that fall outside the no-injury rule as it exists in Montana and Wyoming. Those changes are not to the "place of diversion, or place or purpose of use," *Quigley*, *supra*, at 505, 103 P. 2d, at 1072, and thus seem to be excluded, much like crop changes or day-to-day irrigation adjustments or repairs. This is also consistent with the fact that by 1950 both States had statutes regulating certain changes to water rights, but neither required farmers to take official action before adjusting irrigation methods.[6] See Report 69–70, 87; *id.*, at 69 (they "do not generally have procedures for over-

[6] Mont. Rev. Code Ann. § 89–803; Wyo. Comp. Stat. Ann. § 71–401 (1945) (water rights "cannot be detached from the lands, place or purpose for which they are acquired" outside of specific exceptions); see also 1885 Mont. Laws p. 131, § 3.

seeing changes in water efficiencies stemming from crop shifts or irrigation improvements where there are no formal changes in the underlying water rights"). Like the Special Master, we find this to be persuasive evidence that the States considered such changes permissible.

Montana argues that, regardless of the statutes, private lawsuits could be brought to challenge such efficiency changes. But it has not provided a single example from either State. Instead, Montana and Wyoming cases typically describe the no-injury rule as applying to changes in point of diversion, purpose of use, and place of use. See, *e. g.*, *Maclay* v. *Missoula Irrig. Dist.*, 90 Mont. 344, 355–357, 3 P. 2d 286, 291 (1931); *Thayer* v. *Rawlins*, 594 P. 2d 951, 955 (Wyo. 1979). The abundance of litigation over such changes—and the absence of any litigation over the sort of change at issue here—strongly implies that irrigation efficiency improvements do not violate the no-injury rule and were considered within the scope of the original appropriative right.

2

The doctrine of recapture also supports treating improvements in irrigation efficiency as within the original appropriative right. Under this doctrine, an appropriator who has diverted water for irrigation purposes has the right to recapture and reuse his own runoff and seepage water before it escapes his control or his property.[7] An appropriator is entitled to the "exclusive control [of his appropriated water] so long as he is able and willing to apply it to beneficial uses, and such right extends to what is commonly known as wastage from surface run-off and deep percolation, necessarily incident to practical irrigation." *Ide* v. *United States*, 263 U. S. 497, 506 (1924) (internal quotation marks omitted); see also *Arizona Pub. Serv. Co.* v. *Long*, 160 Ariz. 429, 437–438,

[7] And in some narrowly defined circumstances, he retains this right even after the water leaves his property. See 1 Wiel §§ 38–40, at 37–43.

773 P. 2d 988, 996–997 (1989) ("No appropriator can compel any other appropriator to continue the waste of water which benefits the former. If the senior appropriator, through scientific and technical advances, can utilize his water so that none is wasted, no other appropriator can complain").

Montana contends that this rule does not apply when the runoff or seepage water would, if not recaptured, return to the same stream from which it was originally drawn. There is some support for Montana's position—that a beneficial user may not reuse water at all, even while it is still on his property, if it otherwise would flow back to the same stream—especially in Utah and Colorado cases. See *Deseret Irrig. Co.*, *supra*, at 180–182, 271 P. 2d, at 456–457; *Estate of Steed* v. *New Escalante Irrig. Co.*, 846 P. 2d 1223, 1226 (Utah 1992); *Comstock* v. *Ramsay*, 55 Colo. 244, 252–258, 133 P. 1107, 1110–1111 (1913).[8] But other authorities draw no such exception based on where the runoff or seepage is heading. See 2 Hutchins 580–582 (asserting that, even in Utah, "where the original appropriator retains possession and control of the waste and seepage water from irrigation of his lands, he is entitled to reuse these waters for his own benefit and need not return them *to the channel from which they were diverted*" (emphasis added)); Getches 139–145; *Woolman* v. *Garringer*, 1 Mont. 535 (1872). And Montana cites no case from either State here in which a court has recognized, much less found controlling, the idea that a water user may not reuse his own wastewater while it is still on his property simply because it otherwise would return to the original stream.

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[8] Colorado has a relatively unique doctrine of recapture. See Hoese, Comment, Recapture of Reclamation Project Ground Water, 53 Cal. L. Rev. 541, 544, n. 18 (1965) (noting the general doctrine of recapture, and adding that "[t]he Colorado rule, however, is to the contrary"); *United States* v. *Tilley*, 124 F. 2d 850, 858 (CA8 1941) (allowing recapture by the original appropriator under Nebraska law, and noting Colorado's opposite rule).

In fact, Montana and Wyoming appear to apply, without qualification, the basic doctrine that the original appropriator may freely recapture his used water while it remains on his property and reuse it for the same purpose on the same land. For example, in *Binning* v. *Miller*, 55 Wyo. 451, 102 P. 2d 54 (1940), a man was diverting water from a creek fed largely by irrigation runoff and seepage from Binning's property. Although the court found that the man had a right to that water once Binning's runoff and seepage had become a natural stream, it noted that his right remained subject to Binning's right "to use the water above mentioned for beneficial purposes upon the land for which the seepage water was [originally] appropriated." *Id.*, at 477, 102 P. 2d, at 63. In a later case, the court explained that the man could not "secure a permanent right to continue to receive the water" because Binning "might find better ways of utilizing the water on the same land so that less waste and seepage would occur." *Bower* v. *Big Horn Canal Assn.*, 77 Wyo. 80, 101, 307 P. 2d 593, 601 (1957).

Similarly, in *Bower* v. *Big Horn Canal Assn.*, the court held that Bower could appropriate water as it seeped across his property from the Big Horn Canal toward a nearby river. *Id.*, at 102–104, 307 P. 2d, at 602. The court added, however, that Bower's right was subject always to the Big Horn Canal's right: "No appropriator can compel any other appropriator to continue the waste of water which benefits the former." *Id.*, at 101, 307 P. 2d, at 601. Importantly, the court noted that "[i]f the senior appropriator by a different method of irrigation can so utilize his water that it is all consumed in transpiration and consumptive use and no waste water returns by seepage or percolation to the river, no other appropriator can complain." *Ibid.*

Finally, in *Fuss* v. *Franks*, 610 P. 2d 17 (Wyo. 1980), water was seeping from Fuss' property and into a pit in a public right of way. Franks was the first to appropriate the water

from the pit. The court upheld Franks' appropriation right because the water had already escaped from Fuss' property. The court said that the "owner of land upon which seepage or waste water rises has the right to use and reuse—capture and recapture—such waste waters," but only before the water escapes his land, and "for use only upon the land for which the water forming the seepage was originally appropriated." *Id.*, at 20 (internal quotation marks omitted). Fuss thus had no superior right to the water that had left his property, and especially not for reuse on other lands.

The law in Montana is similar. The Montana Supreme Court has explained that "the general rule . . . is that the owner of the right to use the water—his private property while in his possession,—may collect it, recapture it, before it leaves his possession." *Rock Creek Ditch & Flume Co.* v. *Miller*, 93 Mont. 248, 268, 17 P. 2d 1074, 1080 (1933); see also A. Stone, Montana Water Law 66 (1994) (noting that, according to the "early cases," while "the water is still seeping and running off one's own land, the landowner is free to recapture and further use it").

The right of recapture discussed in these authorities is broad. As the Special Master recognized, the "language of the Wyoming Supreme Court . . . was expansive" in *Binning*, *Bower*, and *Fuss*, and "all appear to hold that an appropriator in Wyoming can increase his water use efficiency by recovering runoff on his property or through other means so long as the increased consumption is on the same land to which the appropriative right attaches." Report 81; see also *id.*, at 78–85; Thompson, Case Note, Water Law—Reusing Irrigation Waste Water on Different Lands: A Warning To Get a New Permit, Fuss v. Franks, 610 P. 2d 17 (Wyo. 1980), 16 Land & Water L. Rev. 71, 76 (1981) (concluding that in Wyoming, "a prior appropriator can at anytime, utilize irrigation methods that are totally consumptive, such as pumping the collected waste water back to the top of the

field or installing a sprinkler system, thereby eliminating all waste of water"); Jones, Note, Rights of the Original Appropriator To Recapture Water Used in Irrigation, 11 Wyo. L. J. 39 (1956); Wille, Note, The Right To Use Waste Water Before It Re-enters the Stream, 12 Wyo. L. J. 47, 48 (1957).

The Wyoming and Montana doctrine of recapture strongly suggests that improvements in irrigation efficiency are within the original appropriative right of Wyoming's pre-1950 water users. By using sprinklers rather than flood irrigation, those water users effectively recapture water. The sprinklers, by reducing loss due to seepage and runoff, operate much like, if more efficiently than, cruder recapture systems involving ditches or pits. They are simply different mechanisms for increasing the volume of water available to the crops without changing the amount of diversion. *Binning*, *Bower*, and *Fuss* expressly acknowledged that in such situations, lower appropriators who have perfected their own appropriative rights are nonetheless at the mercy of the property owners from which their water flows. See 55 Wyo., at 474–477, 102 P. 2d, at 63; 77 Wyo., at 100–104, 307 P. 2d, at 601–602; 610 P. 2d, at 20.

3

Our conclusion is consistent with that of water law scholars who have considered the specific question presented in this case. One scholar asserted: "[O]f course, increasing efficiency at one site may reduce the amount of water available to downstream users who may rely on return flows from other users. [Wyoming] law, however, does not preclude more efficient uses merely because a downstream user may be injured." Squillace, A Critical Look at Wyoming Water Law, 24 Land & Water L. Rev. 307, 331 (1989); see *ibid.*, n. 156 ("For example, a farmer who traditionally consumes only 50% of the water applied to his land is free to change his crop or method of applying water so as to increase his consumption to 60%"); see also Thompson, *supra*, at 76 ("[A]

prior appropriator can at anytime . . . instal[l] a sprinkler system, thereby eliminating all waste of water"). And a national hornbook on water law has observed:

> "The rule allowing recapture and reuse of salvaged water on the original land can result in more water being consumed. For instance, if a water user is consuming less than the permitted amount of water and plants a more water-intensive crop or puts in a more efficient irrigation system, most or all of the water that had previously been returned to the stream might be consumed. This can deprive other appropriators of water on which they depend but it is allowed since it is technically within the terms of the original appropriation." Getches 143–144.

Montana has not identified any scholars who have reached the opposite conclusion.

For all of these reasons, we hold that the doctrine of appropriation in Wyoming and Montana allows appropriators to improve their irrigation systems, even to the detriment of downstream appropriators. We readily acknowledge that this area of law is far from clear. See *supra*, at 377. But the apparent scope of the no-injury rule in Wyoming and Montana, the doctrine of recapture and its broad reach in Wyoming and Montana case law, and the specific conclusions of water law scholars all point in the same direction, which also comports with the Special Master's exhaustive discussion and findings. Accordingly, if Article V(A) simply incorporates background principles of appropriation law, it allows Wyoming's pre-1950 water users to improve their irrigation efficiency, even to the detriment of Montana's pre-1950 users.

B

Montana, however, takes another tack. It argues that even if background principles of appropriation law do not support its position, Article V(A) of the Compact does not

protect the full scope of ordinary appropriative rights. Montana claims that the Compact's definition of "beneficial use" restricts the scope of protected pre-1950 appropriative rights to the net volume of water that was actually being consumed in 1950. We agree with the Special Master that this argument also fails.

1

Article V(A) protects "[a]ppropriative rights to the beneficial uses of . . . water." "Beneficial use," in turn, is defined in Article II(H) as "that use by which the water supply of a drainage basin is depleted when usefully employed by the activities of man." 65 Stat. 665. Montana contends that "beneficial use" is thus defined as the *amount of* depletion. According to Montana, any activity that increases pre-1950 water users' depletions in Wyoming beyond pre-1950 levels exceeds the scope of the appropriative rights that Article V(A) protects. See Brief for Montana 25–28. On this basis, Montana asserts that the Compact requires (subject to river conditions) that the same quantity of water that was reaching Montana as of January 1, 1950, continue to do so. *Id.*, at 26.

2

We acknowledge that "beneficial use" refers to a type of use that involves some depletion, as all irrigation does. See Report 61. The part of the Compact's definition of "beneficial use" that refers to depletion—"that use by which the water supply . . . is depleted"—is fairly clear. It begins with "that use," and the words that follow merely explain that "that use" must be a use that "deplete[s]" the "water supply." Nothing in the language suggests that "beneficial use" means a measure of the *amount* of water depleted. A "beneficial use" within the meaning of the Compact, therefore, is a *type* of use that depletes the water supply.

This plain reading makes sense in light of the circumstances existing in the signatory States when the Compact was drafted. At that time, Wyoming had a statutory prefer-

ence for irrigation, a type of depletive use, over power generation, a nondepletive use. Wyo. Comp. Stat. Ann. § 71–402 (1945). It makes sense that the Compact would have been written to protect the irrigation uses that were legislatively favored and represented the predominant use of the Yellowstone River system. See Tr. of Oral Arg. 45–47; 65 Stat. 663 (Compact Preamble) (noting that the Compact recognizes "the great importance of water for irrigation in the signatory States").

Montana's reading of the Compact, by contrast, does not follow from the text and would drastically redefine the term "beneficial use" from its longstanding meaning. The amount of water put to "beneficial use" has never been defined by net water consumption. The quantity of water "beneficially used" in irrigation, for example, has always included some measure of necessary loss such as runoff, evaporation, deep percolation, leakage, and seepage (regardless of whether any of it returns to the stream). So, water put to "[b]eneficial use is not what is actually consumed but what is actually necessary in good faith." 1 Wiel § 481, at 509; see also Trelease, The Concept of Reasonable Beneficial Use in the Law of Surface Streams, 12 Wyo. L. J. 1, 10 (1957) (listing irrigation as a beneficial use and noting that "the method of application, by flooding, channeling, or sprinkling, is immaterial"); J. Sax, B. Thompson, J. Leshy, & R. Abrams, Legal Control of Water Resources 131 (4th ed. 2006) (discussing normal irrigation practices and observing that the amount of water put to beneficial use "is often considerably more than the quantum actually consumed").

If the Compact's definition of "beneficial use" were meant to drastically redefine the term into shorthand for net water consumption, we would expect far more clarity. For example, the Compact could have stated that it would protect "only 'the amount of water *consumed* for a beneficial use in each signatory state as of January 1, 1950.'" Report 60. Or it could have defined "beneficial use" as the "*volume* by

which the water supply . . . is depleted." Moreover, if the Compact effected a dramatic reframing of ordinary appropriation principles, the rest of Article V(A), which expressly states that "the laws governing the acquisition and use of water under the doctrine of appropriation" control, would make little sense.

We agree with the Special Master that the definition of beneficial use in the Compact is unremarkable. Article V(A) does not change the scope of the pre-1950 appropriative rights that it protects in both States.

3

Finally, if Article V(A) were intended to guarantee Montana a set quantity of water, it could have done so as plainly as other compacts that do just that. By 1950, Wyoming itself had entered into at least one compact that defined water rights in terms of depletion. The Colorado River Compact of 1922 apportioned 7,500,000 acre-feet of water per year for "the exclusive beneficial consumptive use" of several upstream States, including Wyoming. National Resources Planning Bd., Water Resources Comm., Interstate Water Compacts, 1785–1941, p. 7 (1942). That compact specifically added that "[t]he States of the Upper Division will not cause the flow of the river at Lee Ferry to be depleted below an aggregate of 75,000,000 acre feet for any period of ten consecutive years . . . ." *Id.*, at 8. See also Republican River Compact (1943), Kan. Stat. Ann. § 82a–518 (1997) (allocating water by the acre-foot for beneficial consumptive use in Kansas, Nebraska, and Colorado). And, even here in the Yellowstone River Compact, Article V(B) unambiguously apportions the third tier of Yellowstone River system water by percentage. 65 Stat. 666. The notion that Article V(A) accomplishes essentially the same sort of depletive allocation with language that has a different and longstanding meaning is simply unpersuasive.

* * *

We conclude that the plain terms of the Compact protect ordinary "[a]ppropriative rights to the beneficial uses of [water] . . . existing in each signatory State as of January 1, 1950." Art. V(A), *ibid.* And the best evidence we have shows that the doctrine of appropriation in Wyoming and Montana allows appropriators to improve the efficiency of their irrigation systems, even to the detriment of downstream appropriators. Montana's allegation that Wyoming has breached Article V(A) of the Compact by allowing its pre-1950 water users to increase their irrigation efficiency thus fails to state a claim. Accordingly, Montana's first exception to the Special Master's First Interim Report is overruled.

It is so ordered.

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

JUSTICE SCALIA, dissenting.

Thanks to improved irrigation techniques, Wyoming's farmers and cattlemen appear to consume more of the water they divert from the Yellowstone River and its tributaries today than they did 60 years ago—that is to say, less of the diverted water ultimately finds its way back into the Yellowstone. The Court interprets the Yellowstone River Compact (Compact), see Act of Oct. 30, 1951, 65 Stat. 663, to grant those Wyomans* the right to increase their consumption so long as they do not increase the volume of water they diverted beyond pre-1950 levels. Thus, it holds, Montana cannot complain that the increased consumption interferes with its residents' pre-1950 appropriative water rights. I disagree because the Court's analysis substitutes

*The dictionary-approved term is "Wyomingite," which is also the name of a type of lava, see Webster's New International Dictionary 2961 (2d ed. 1954). I believe the people of Wyoming deserve better.

its none-too-confident reading of the common law, see *ante*, at 377, and n. 5, for the Compact's definition of "beneficial use."

The doctrine of appropriation allocates perpetual water rights along a river, on a "first in time[,] . . . superior in right" basis, *Wyoming* v. *Colorado*, 259 U. S. 419, 459 (1922), to those who divert its flow and apply the water to a beneficial use. See *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U. S. 92, 98 (1938). The "beneficial use" requirement does most of the legal work. It marks the types of uses that confer an appropriative right—irrigation being a paradigmatic example, see *United States* v. *Willow River Power Co.*, 324 U. S. 499, 504, n. 2 (1945); and it "measure[s]" the extent of an appropriator's claim, see *Ide* v. *United States*, 263 U. S. 497, 505 (1924); A. Tarlock, Law of Water Rights and Resources §§ 5:66, 5:68–5:69, pp. 5–130.3, 5–130.9 to 5–130.10 (2010). At common law, an appropriator claims the volume of water diverted and "reasonably required" by his intended use. *Id.*, §§ 5:65, 5:66, at 5–127, 5–130.2; see *Quinn* v. *John Whitaker Ranch Co.*, 54 Wyo. 367, 377–378, 92 P. 2d 568, 570–571 (1939).

The Compact borrows the concept of appropriation to define the rights of pre-1950 water users along the Yellowstone River and its tributaries. Article V(A) promises that "[a]ppropriative rights to the beneficial uses of the water of the Yellowstone River System existing in each signatory State as of January 1, 1950, shall continue to be enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation." 65 Stat. 666. Article II(H) elaborates that a "Beneficial Use" is one "by which the water supply of a drainage basin is *depleted* when usefully employed by the activities of man." *Id.*, at 665 (emphasis added).

Like the common law, this definition lays out the types of uses that qualify as beneficial and the volume of water an appropriator may claim through his beneficial use. But the Compact's focus on whether a use *depletes* a river's water

supply—not whether it *diverts* the river's flow—significantly limits the volume of water to which Wyoming is entitled. For purposes of the Compact, Wyoming may lay claim only to its beneficial users' net consumption of water, that is, the volume of water diverted from the river minus the volume that flows (or seeps) back into the river's channel.

This interpretation, and only this interpretation, gives meaning to the definition's use of the word "depleted." I cannot write off as an accident the choice of this word rather than the word consistently used elsewhere in the Compact: "diverted." See *Sosa* v. *Alvarez-Machain*, 542 U. S. 692, 711, n. 9 (2004). The Compact's authors knew how to use "diverted" and "diversion" when they wanted to. Those two words appear repeatedly in other provisions of the Compact, see Arts. II(G); V(B), (C); VII(A), (C), (D), 65 Stat. 665–668; and the Compact defines them in the sentence immediately preceding the definition of "beneficial use." See Art. II(G), *id.*, at 665. But the Compact's authors chose to define beneficial use in terms of *depletion*—the first and only time the Compact uses any derivative of the word "deplete." It is in my view a clear indication that the Compact intends to break from the common law's focus on diversion.

The Court reduces the Compact's deliberate use of "depleted" to an inconsequential slip of the pen. According to today's majority, Article II(H) speaks only to the types of uses that confer appropriative rights. "Nothing in the language," it says, "suggests that 'beneficial use' means a measure of the *amount* of water depleted." *Ante*, at 386. This is incomprehensible. On the Court's *own* interpretation "beneficial use" not only defines the types of uses that confer appropriative rights, but also determines the volume of water to which the rights attach—viz., *only* that volume put to one of the specified types of uses. The only question before us is whether "beneficial use" measures the volume *diverted* or the volume *depleted*—and the language of the Compact makes that clear.

The Court provides no plausible explanation for use of the word "depleted" instead of "diverted." Its best effort is the suggestion that the word was used to ensure that hydroelectric power generation and other disfavored, nondepletive uses do not confer appropriative rights. See *ante*, at 386–387. That is highly unlikely, for two reasons. First, relying on a subtle distinction between depletion and diversion would be one of the clumsiest ways imaginable to accomplish that simple goal, if it was not already accomplished by other provisions of the Compact. One would instead have expected the Compact simply to exclude the disfavored uses from the "usefu[l] . . . activities of man," Art. II(H), 65 Stat. 665, which confer appropriative rights. Cf. Mont. Code Ann. §85–2–102(4) (2009) (listing types of beneficial uses). Second, and even more conclusively, hydroelectric generation, water wheels, and mill races—the allegedly disfavored uses Wyoming and the United States offer up to explain the word "depleted"—are already excluded from appropriative rights (and probably from any need for appropriative rights) by the Compact's definition of diversion: "the taking or removing of water from the Yellowstone River or any tributary thereof when the water so taken or removed is not returned directly into the channel of the Yellowstone River or of the tributary from which it is taken." Art. II(G), 65 Stat. 665. The modifying clause seems specifically designed to exclude hydroelectric dams, water wheels, and mill races, which, when they divert water from the Yellowstone or its tributaries, "retur[n it] directly into the channel . . . from which it is taken."

The Court objects to my interpretation because the word "depleted" lacks the "clarity" necessary to "drastically redefine the term 'beneficial use' from its longstanding meaning," *ante*, at 387. According to the Court, "[t]he amount of water put to 'beneficial use' has never been defined by net water consumption." *Ibid.* Before making this statement, the Court has spent some nine pages, *ante*, at 377–385, conducting a

"sensitive . . . inquiry [that] counsels caution"; into a field (state water law) where the answer of this Court is not conclusive and hence not *ipso facto* correct ("it is not this Court's role to guide"); resulting in the Court's best guess concerning "an unclear area of appropriation doctrine"; answering a question which "'[n]o western state court [not even a lower court] appears to have conclusively answered.'" *Ante*, at 377, and n. 5. The Court calls that hitherto unanswered question "the law of return flows," *ante*, at 377, but it can more accurately be described as the question whether the volume of water to which an appropriator acquires rights is the entire volume diverted for a beneficial use, or rather only the volume depleted by the beneficial use. Which is to say that "beneficial use" has never had the "longstanding meaning" the Court posits. If it has in the past been assumed to refer to all water diverted from the stream rather than all water depleted from the stream, that is only because the issue of which of the two it means has never arisen. I find it quite extraordinary that the Court should expend such heroic efforts (imagine how many cases had to be read!) answering a state water-law question that *no* court of *any* Western State has *ever* answered—a question that would cross a Rabbi's eyes—when the text in front of us provides the clear answer insofar as this Compact is concerned: "depleted."

The Court suggests that if the Compact's authors wanted to break from (what it considers) the common law, they should have defined beneficial use as the "*volume* by which the water supply . . . is depleted." *Ante*, at 387–388 (internal quotation marks omitted). That objection seems to me to have little force when the Court cannot explain what work "depleted" is supposed to do other than indicate precisely the same concept more concisely. And the Court's helpful drafting tip proves that speaking with greater clarity is not so easy. Following the Court's advice would make nonsense of Article V(B) of the Compact. That provision allocates a

fixed percentage "of the unused and unappropriated water" of various tributaries to each State for post-1950 "storage or direct diversions for beneficial use on new lands or for other purposes." 65 Stat. 666. But if "beneficial use" in this last phrase means "*the volume of water* by which . . . the water supply is depleted," the provision makes no sense. It would allocate a fixed percentage of unused and unappropriated water for "a volume of water by which the water supply is depleted." It makes perfect sense, of course, if "beneficial use" means all uses that deplete the stream.

The Court also wonders why, "if Article V(A) were intended to guarantee Montana a set quantity of water," it did not "d[o] so as plainly as other" interstate water compacts "that do just that." *Ante,* at 388. This is a straw man. Montana does *not* demand a precise volume of water each year; nor does it insist that its pre-1950 water users always receive enough water to satisfy their pre-1950 needs. It merely asks that its pre-1950 water users occupy the same position relative to Wyoming's pre-1950 users in 2011 as they did in 1950—that whatever would have flowed back into the Yellowstone after Wyoming appropriators' beneficial uses in 1950 if the river then had this year's flow, will also flow back this year. See Tr. of Oral Arg. 13, 16, 24. In dry years, that may mean some Montanans will have to make do with less or go without.

Because I think the Court's disposition disregards the text of the Compact, I respectfully dissent.

BOBBY, WARDEN *v.* MITTS

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

No. 10–1000. Decided May 2, 2011

An Ohio jury convicted respondent Mitts on two counts of aggravated murder and two counts of attempted murder. At sentencing, the jurors were instructed that if they determined that the aggravating circumstances outweighed the mitigating factors, they had to recommend a death sentence. Otherwise, they had to recommend one of two possible life sentences. The jurors recommended death. In Mitts's subsequent federal habeas proceeding, the Sixth Circuit vacated the death sentence, concluding that the penalty phase jury instructions were contrary to *Beck* v. *Alabama*, 447 U. S. 625.

Held: The instructions are not invalid under *Beck*, which addressed whether "the risk of an unwarranted conviction" is created when a jury is forced to choose between finding a defendant guilty of a capital offense and declaring him innocent of any wrongdoing. 447 U. S., at 637. Penalty phase proceedings do not raise *Beck*'s concern about unwarranted conviction. See *California* v. *Ramos*, 463 U. S. 992, 1007–1009. Here, there is no reason to believe that the jurors could have been improperly influenced by a fear that a decision short of death would have allowed Mitts to "escape all penalties for his . . . crime," *Beck*, *supra*, at 629, since they were instructed to choose from two life sentence options if they could not recommend a death sentence.

Certiorari granted; 620 F. 3d 650, reversed.

PER CURIAM.

An Ohio jury convicted respondent Harry Mitts on two counts of aggravated murder and two counts of attempted murder. He was sentenced to death. At issue here is part of the jury instructions given during the penalty phase of Mitts's trial. The instructions, in pertinent part, were as follows:

> "[Y]ou must determine beyond a reasonable doubt whether the aggravating circumstances, which [Mitts] was found guilty of committing in the separate counts,

> are sufficient to outweigh the mitigating factors you find are present in this case.
>
> "When all 12 members of the jury find by proof beyond a reasonable doubt that the aggravating circumstances in each separate count with which [Mitts] has been found guilty of committing outweigh the mitigating factors, if any, then you must return such finding to the Court.
>
> "I instruct you as a matter of law that if you make such a finding, then you must recommend to the Court that the sentence of death be imposed on [Mitts].
>
> . . . . .
>
> "On the other hand, [if] after considering all the relevant evidence raised at trial, the evidence and testimony received at this hearing and the arguments of counsel, you find that the state of Ohio failed to prove beyond a reasonable doubt that the aggravating circumstances with which [Mitts] was found guilty of committing outweigh the mitigating factors, you will then proceed to determine which of two possible life imprisonment sentences to recommend to the Court." App. to Pet. for Cert. 352a–353a.

We considered virtually the same Ohio jury instructions last Term in *Smith* v. *Spisak*, 558 U. S. 139, 147 (2010). See *Mitts* v. *Bagley*, 620 F. 3d 650, 652 (CA6 2010) (noting that the "instructions in this case are the same Ohio instructions that were given in" *Spisak*). That case, like this one, involved review of a federal habeas petition under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). AEDPA provides, as relevant here, that relief may not be granted unless the state court adjudication "resulted in a decision that was contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States." 28 U. S. C. § 2254(d)(1).

In *Spisak*, we reversed a Court of Appeals decision that had found these instructions invalid under our decision in

Mills v. *Maryland*, 486 U. S. 367 (1988). See 558 U. S., at 148–149. Up until our decision in *Spisak*, Mitts had also pressed the claim that the instructions were invalid under *Mills*. After *Spisak* rejected that claim, the Court of Appeals in this case determined that the instructions were contrary to our decision in *Beck* v. *Alabama*, 447 U. S. 625 (1980), and accordingly vacated Mitts's death sentence. See 620 F. 3d, at 658.

In *Beck*, we held that the death penalty may not be imposed "when the jury was not permitted to consider a verdict of guilt of a lesser included non-capital offense, and when the evidence would have supported such a verdict." 447 U. S., at 627 (internal quotation marks omitted). We explained that such a scheme intolerably enhances the "risk of an unwarranted conviction" because it "interjects irrelevant considerations into the factfinding process, diverting the jury's attention from the central issue of whether the State has satisfied its burden of proving beyond a reasonable doubt that the defendant is guilty of a capital crime." *Id.*, at 638, 642. "[F]orcing the jury to choose between conviction on the capital offense and acquittal," we observed, "may encourage the jury to convict for an impermissible reason—its belief that the defendant is guilty of some serious crime and should be punished," even when there is "some doubt with respect to an element" of the capital offense. *Id.*, at 632, 642, 637. Because the scheme in *Beck* created a danger that the jury would resolve any doubts in favor of conviction, we concluded that it violated due process. See *id.*, at 638, 643.

According to the Court of Appeals below, the penalty phase instructions given at Mitts's trial—and the Supreme Court of Ohio decision upholding their use—were "contrary to" *Beck*, because they "interposed before the jury the same false choice" that our holding in *Beck* prohibits. 620 F. 3d, at 658, 657 (some internal quotation marks omitted). Referring to the instructions as "acquittal-first," the Court of Appeals stated that they impermissibly required the jury to

first decide whether to "acquit" Mitts of the death penalty before considering "mercy and some form of life imprisonment." *Id.*, at 656–657. Interpreting *Beck* to stand for the proposition that "a jury instruction violates due process if it requires a mandatory death penalty sentence that can only be avoided by an acquittal before the jury has an opportunity to consider life imprisonment," the Court of Appeals concluded that the instructions given during the penalty phase of Mitts's trial unconstitutionally "deprived the jury of a meaningful opportunity to consider" a life sentence. 620 F. 3d, at 658, 657 (some internal quotation marks omitted).

The instructions here are surely not invalid under our decision in *Beck*. The concern addressed in *Beck* was "the risk of an unwarranted *conviction*" created when the jury is forced to choose between finding the defendant guilty of a capital offense and declaring him innocent of any wrongdoing. 447 U. S., at 637 (emphasis added); *id.*, at 638; see also *Spaziano* v. *Florida*, 468 U. S. 447, 455 (1984) (explaining that the "goal of the *Beck* rule" is "to eliminate the distortion of the factfinding process that is created when the jury is forced into an all-or-nothing choice between capital murder and innocence"); *Schad* v. *Arizona*, 501 U. S. 624, 646 (1991) ("Our fundamental concern in *Beck* was that a jury convinced that the defendant had committed some violent crime but not convinced that he was guilty of a capital crime might nonetheless vote for a capital conviction if the only alternative was to set the defendant free with no punishment at all").

The question here, however, concerns the penalty phase, not the guilt phase, and we have already concluded that the logic of *Beck* is not directly applicable to penalty phase proceedings. In *California* v. *Ramos*, 463 U. S. 992 (1983), we rejected an argument that *Beck* prohibited an instruction to "a capital sentencing jury regarding the Governor's power to commute a sentence of life without possibility of parole." 463 U. S., at 994, 1006–1009. In so doing, we noted the "fun-

damental difference between the nature of the guilt/innocence determination at issue in *Beck* and the nature of the life/death choice at the penalty phase." *Id.*, at 1007. In light of that critical distinction, we observed that "the concern of *Beck* regarding the risk of an unwarranted conviction is simply not directly translatable to the deliberative process in which the capital jury engages in determining the appropriate penalty." *Id.*, at 1009; see also *Schad*, *supra*, at 647 (stating that the "central concern of *Beck* simply is not implicated" when the "jury was not faced with an all-or-nothing choice between the offense of conviction (capital murder) and innocence").

The jurors in Mitts's case could not have plausibly thought that if they declined to recommend the death penalty Mitts would "escape all penalties for his alleged participation in the crime." *Beck*, *supra*, at 629. They had just convicted him on two counts of aggravated murder and two counts of attempted murder. They were specifically instructed that if they did not find that the aggravating factors outweighed the mitigating factors—and therefore did not recommend the death penalty—they would choose from two life sentence options. There is accordingly no reason to believe that the jurors in this case, unlike the jurors in *Beck*, could have been improperly influenced by a fear that a decision short of death would have resulted in Mitts walking free.

We all but decided the question presented here in *Spisak* itself. After rejecting the contention that the Ohio instructions were contrary to *Mills*, we noted that "the Court of Appeals found the jury instructions unconstitutional for an additional reason, that the instructions 'require[d] the jury to unanimously reject a death sentence before considering other sentencing alternatives.' " 558 U. S., at 149 (quoting *Spisak* v. *Mitchell*, 465 F. 3d 684, 709 (CA6 2006)). That is essentially the *Beck* claim presented here. See 620 F. 3d, at 658 (holding that a "jury instruction violates due process if it requires a mandatory death penalty sentence that can only

be avoided by an acquittal before the jury has an opportunity to consider life imprisonment"). We rejected that claim in *Spisak* under AEDPA, noting that "[w]e have not . . . previously held jury instructions unconstitutional for this reason." 558 U. S., at 149. Although neither the parties nor the courts below in *Spisak* had cited *Beck*, a separate concurrence in *Spisak* would have struck down the instructions in reliance on that decision. See 558 U. S., at 158–161 (Stevens, J., concurring in part and concurring in judgment). The Court nonetheless concluded that whatever the merits of that argument on direct review, "the jury instructions at Spisak's trial were not contrary to 'clearly established Federal law' " under AEDPA. *Id.*, at 149. The same conclusion applies here.

The petition for certiorari and the motion for leave to proceed *in forma pauperis* are granted. The judgment of the Court of Appeals for the Sixth Circuit is

Reversed.

Syllabus

SCHINDLER ELEVATOR CORP. *v.* UNITED STATES EX REL. KIRK

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

No. 10–188. Argued March 1, 2011—Decided May 16, 2011

The public disclosure bar of the False Claims Act (FCA) generally forecloses private parties from bringing *qui tam* suits to recover falsely or fraudulently obtained federal payments where those suits are "based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media." 31 U. S. C. § 3730(e)(4)(A). Respondent Kirk brought such a suit, alleging that his former employer, petitioner Schindler Elevator Corp., had submitted hundreds of false claims for payment under its federal contracts. To support his allegations, Kirk pointed to information his wife received from the Labor Department (DOL) in response to three requests for records she filed under the Freedom of Information Act (FOIA), 5 U. S. C. § 552. Granting Schindler's motion to dismiss, the District Court concluded, *inter alia*, that the FCA's public disclosure bar deprived it of jurisdiction over Kirk's allegations that were based on information disclosed in a Government "report" or "investigation." The Second Circuit vacated and remanded, holding, in effect, that an agency's response to a FOIA request is neither a "report" nor an "investigation."

Held: A federal agency's written response to a FOIA request for records constitutes a "report" within the meaning of the FCA's public disclosure bar. Pp. 407–417.

(a) "[R]eport" in this context carries its ordinary meaning. Pp. 407–410.

(1) Because the FCA does not define "report," the Court looks first to the word's ordinary meaning. See, *e. g.*, *Gross* v. *FBL Financial Services, Inc.*, 557 U. S. 167, 175. Dictionaries define "report" as, for example, something that gives information. This ordinary meaning is consistent with the public disclosure bar's generally broad scope, see, *e. g.*, *Graham County Soil and Water Conservation Dist.* v. *United States ex rel. Wilson*, 559 U. S. 280, 290, as is evidenced by the other sources of public disclosure in § 3730(e)(4)(A), especially "news media." Pp. 407–408.

(2) Nor is there any textual basis for adopting a narrower definition of "report." The Second Circuit committed the very error this Court reversed in *Graham County.* In applying the *noscitur a sociis* canon to conclude that a narrower meaning for "report" was mandated, the court failed to consider all of the sources of public disclosure listed in the statute—in particular, the reference to "news media." See 559 U. S., at 290. Applying the ordinary meaning of "report" also does not render superfluous the other sources of public disclosure in § 3730(e)(4)(A). Pp. 409–410.

(b) The DOL's three written FOIA responses in this case, along with the accompanying records produced to Mrs. Kirk, are "reports" within the public disclosure bar's ordinary meaning. FOIA requires each agency receiving a request to "notify the person making such request of [its] determination and the reasons therefor." 5 U. S. C. § 552(a)(6)(A)(i). Like other federal agencies, the DOL has adopted FOIA regulations mandating a written response. Such agency responses plainly fall within the broad, ordinary meaning of "report" as, *e. g.,* something that gives information. Moreover, any records produced along with such responses are part of the responses, just as if they had been produced as an appendix to a printed report. Pp. 410–411.

(c) This Court is not persuaded by assertions that it would be anomalous to read the public disclosure bar to encompass written FOIA responses. Pp. 412–416.

(1) The Court's holding is not inconsistent with the public disclosure bar's drafting history. If anything, the drafting history supports this Court's holding. Kirk's case seems a classic example of the "opportunistic" litigation that the public disclosure bar is designed to discourage. 559 U. S., at 294. Anyone could identify a few regulatory filing and certification requirements, submit FOIA requests until he discovers a federal contractor who is out of compliance, and potentially reap a windfall in a *qui tam* action under the FCA. Pp. 412–413.

(2) Nor will extending the public disclosure bar to written FOIA responses necessarily lead to unusual consequences. Kirk argues that the Court's ruling would allow a suit by a *qui tam* relator possessing records whose release was required by FOIA even absent a request, but bar an action by a relator who got the same documents by way of a FOIA request. Even assuming, as Kirk does, that unrequested records are not covered by the public disclosure bar, the Court is not troubled by the different treatment. By its plain terms, the bar applies to some methods of public disclosure and not to others. See *Graham County,* 559 U. S., at 285. It would not be anomalous if some methods of FOIA disclosure fell within the bar's scope and some did not. Moreover, Kirk's assertion that potential defendants will now insulate themselves

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from liability by making a FOIA request for incriminating documents is pure speculation. Cf. *id.*, at 300. There is no suggestion that this has occurred in those Circuits that have long held that FOIA responses are "reports" within the public disclosure bar's meaning. Pp. 414–415.

(3) Even if the foregoing extratextual arguments were accepted, Kirk and his *amici* have provided no principled way to define "report" to exclude FOIA responses without excluding other documents—*e. g.*, the Justice Department's annual report of FOIA statistics—that are indisputably reports. Pp. 415–416.

(d) Whether Kirk's suit is "based upon . . . allegations or transactions" disclosed in the reports at issue is a question to be resolved on remand. Pp. 416–417.

601 F. 3d 94, reversed and remanded.

THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, and ALITO, JJ., joined. GINSBURG, J., filed a dissenting opinion, in which BREYER and SOTOMAYOR, JJ., joined, *post*, p. 417. KAGAN, J., took no part in the consideration or decision of the case.

Steven Alan Reiss argued the cause for petitioner. With him on the briefs were *Gregory Silbert*, *David Yolkut*, *Lisa R. Eskow*, *Gregory S. Coleman*, and *Marc S. Tabolsky*.

Jonathan A. Willens argued the cause and filed a brief for respondent.

Melissa Arbus Sherry argued the cause for the United States as *amicus curiae* urging affirmance. With her on the brief were *Acting Solicitor General Katyal*, *Deputy Solicitor General Stewart*, *Michael S. Raab*, and *Charles W. Scarborough*.*

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*Briefs of *amici curiae* urging reversal were filed for the Chamber of Commerce of the United States of America et al. by *Catherine E. Stetson*, *Jessica L. Ellsworth*, and *Robin S. Conrad;* and for the Equal Employment Advisory Council by *Rae T. Vann* and *Ann Elizabeth Reesman*.

Briefs of *amici curiae* urging affirmance were filed for AARP by *Kelly Bagby*, *Michael Schuster*, *Andrew M. Beato*, and *Kerrie C. Dent;* for Public Citizen by *Adina H. Rosenbaum* and *Allison M. Zieve;* and for Taxpayers Against Fraud Education Fund by *Jeremy L. Friedman*.

Clifton S. Elgarten, *Brian C. Elmer*, *Richard L. Beizer*, and *Andy Liu* filed a brief for United Technologies Corp. as *amicus curiae*.

JUSTICE THOMAS delivered the opinion of the Court.

The False Claims Act (FCA), 31 U. S. C. §§ 3729–3733, prohibits submitting false or fraudulent claims for payment to the United States, § 3729(a), and authorizes *qui tam* suits, in which private parties bring civil actions in the Government's name, § 3730(b)(1). This case concerns the FCA's public disclosure bar, which generally forecloses *qui tam* suits that are "based upon the public disclosure of allegations or transactions . . . in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation." § 3730(e)(4)(A) (footnote omitted).[1] We must decide whether a federal agency's written response to a request for records under the Freedom of Information Act (FOIA), 5 U. S. C. § 552, constitutes a "report" within the meaning of the public disclosure bar. We hold that it does.

I

Petitioner Schindler Elevator Corporation manufactures, installs, and services elevators and escalators.[2] In 1989, Schindler acquired Millar Elevator Industries, Inc., and the two companies merged in 2002.

Since 1999, Schindler and the United States have entered into hundreds of contracts that are subject to the Vietnam Era Veterans' Readjustment Assistance Act of 1972 (VEVRAA). That Act requires contractors like Schindler to report certain information to the Secretary of Labor, in-

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[1] During the pendency of this case, the Patient Protection and Affordable Care Act, 124 Stat. 119, amended the public disclosure bar. Because the amendments are not applicable to pending cases, *Graham County Soil and Water Conservation Dist.* v. *United States ex rel. Wilson*, 559 U. S. 280, 283, n. 1 (2010), this opinion refers to the statute as it existed when the suit was filed.

[2] The facts in this Part, which we must accept as true, are taken from the amended complaint and the filings submitted in opposition to Schindler's motion to dismiss.

cluding how many of its employees are "qualified covered veterans" under the statute. 38 U. S. C. § 4212(d)(1). VEVRAA regulations required Schindler to agree in each of its contracts that it would "submit VETS–100 Reports no later than September 30 of each year." 48 CFR § 52.222–37(c) (2008); see also § 22.1310(b).

Respondent Daniel Kirk, a United States Army veteran who served in Vietnam, was employed by Millar and Schindler from 1978 until 2003. In August 2003, Kirk resigned from Schindler in response to what he saw as Schindler's efforts to force him out.[3]

In March 2005, Kirk filed this action against Schindler under the FCA, which imposes civil penalties and treble damages on persons who submit false or fraudulent claims for payment to the United States. 31 U. S. C. § 3729(a). The FCA authorizes both civil actions by the Attorney General and private *qui tam* actions to enforce its provisions. § 3730. When, as here, the Government chooses not to intervene in a *qui tam* action, the private relator stands to receive between 25% and 30% of the proceeds of the action. § 3730(d)(2).

In an amended complaint filed in June 2007, Kirk alleged that Schindler had submitted hundreds of false claims for payment under its Government contracts. According to Kirk, Schindler had violated VEVRAA's reporting requirements by failing to file certain required VETS–100 reports and including false information in those it did file. The company's claims for payment were false, Kirk alleged, because

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[3] Kirk filed a complaint with the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP), claiming that he had been "improperly demoted and constructively terminated by Schindler despite his status as a Vietnam era veteran." App. 23a. The OFCCP investigated Schindler's compliance with VEVRAA and found insufficient evidence to support Kirk's claim. In November 2009, the Department of Labor affirmed the OFCCP's finding. 601 F. 3d 94, 99 (CA2 2010).

Schindler had falsely certified its compliance with VEVRAA. Kirk did not specify the amount of damages he sought on behalf of the United States, but he asserted that the value of Schindler's VEVRAA-covered contracts exceeded $100 million.

To support his allegations, Kirk pointed to information his wife, Linda Kirk, received from the Department of Labor (DOL) in response to three FOIA requests. Mrs. Kirk had sought all VETS–100 reports filed by Schindler for the years 1998 through 2006. The DOL responded by letter or e-mail to each request with information about the records found for each year, including years for which no responsive records were located. The DOL informed Mrs. Kirk that it found no VETS–100 reports filed by Schindler in 1998, 1999, 2000, 2002, or 2003. For the other years, the DOL provided Mrs. Kirk with copies of the reports filed by Schindler, 99 in all.

Schindler moved to dismiss on a number of grounds including that the FCA's public disclosure bar deprived the District Court of jurisdiction. See § 3730(e)(4)(A). The District Court granted the motion, concluding that most of Kirk's allegations failed to state a claim and that the remainder were based upon the public disclosure of allegations or transactions in an administrative "report" or "investigation." 606 F. Supp. 2d 448 (SDNY 2009).

The Court of Appeals for the Second Circuit vacated and remanded. 601 F. 3d 94 (2010). The court effectively held that an agency's response to a FOIA request is neither a "report" nor an "investigation" within the meaning of the FCA's public disclosure bar. See *id.*, at 103–111 (agreeing with *United States ex rel. Haight* v. *Catholic Healthcare West*, 445 F. 3d 1147 (CA9 2006), and disagreeing with *United States ex rel. Mistick PBT* v. *Housing Auth. of Pittsburgh*, 186 F. 3d 376 (CA3 1999)). We granted certiorari, 561 U. S. 1058 (2010), and now reverse and remand.

II

Schindler argues that "report" in the FCA's public disclosure bar carries its ordinary meaning and that the DOL's written responses to Mrs. Kirk's FOIA requests are therefore "reports." We agree.[4]

A

1

Adopted in 1986, the FCA's public disclosure bar provides:

> "No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information." 31 U. S. C. § 3730(e)(4)(A) (footnote omitted).

Because the statute does not define "report," we look first to the word's ordinary meaning. See *Gross* v. *FBL Financial Services, Inc.*, 557 U. S. 167, 175 (2009) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose" (internal quotation marks omitted)); *Asgrow Seed Co.* v. *Winterboer*, 513 U. S. 179, 187 (1995) ("When terms used in a statute are undefined, we give them their ordinary meaning"). A "report" is "something that gives information" or a "notification," Webster's Third New International Dictionary 1925

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[4] Because we conclude that a written response to a FOIA request qualifies as a "report" within the meaning of the public disclosure bar, we need not address whether an agency's search in response to a FOIA request also qualifies as an "investigation."

(1986), or "[a]n official or formal statement of facts or proceedings," Black's Law Dictionary 1300 (6th ed. 1990). See also 13 Oxford English Dictionary 650 (2d ed. 1989) ("[a]n account brought by one person to another"); American Heritage Dictionary 1103 (1981) ("[a]n account or announcement that is prepared, presented, or delivered, usually in formal or organized form"); Random House Dictionary 1634 (2d ed. 1987) ("an account or statement describing in detail an event, situation, or the like").

This broad ordinary meaning of "report" is consistent with the generally broad scope of the FCA's public disclosure bar. As we explained last Term, to determine the meaning of one word in the public disclosure bar, we must consider the provision's "entire text," read as an "integrated whole." *Graham County Soil and Water Conservation Dist.* v. *United States ex rel. Wilson*, 559 U. S. 280, 290, 293, n. 12 (2010); see also *Tyler* v. *Cain*, 533 U. S. 656, 662 (2001) ("We do not . . . construe the meaning of statutory terms in a vacuum"). The other sources of public disclosure in § 3730(e)(4)(A), especially "news media," suggest that the public disclosure bar provides "a broa[d] sweep." *Graham County*, *supra*, at 290. The statute also mentions "administrative hearings" twice, reflecting intent to avoid underinclusiveness even at the risk of redundancy.

The phrase "allegations or transactions" in § 3730(e)(4)(A) additionally suggests a wide-reaching public disclosure bar. Congress covered not only the disclosure of "allegations" but also "transactions," a term that courts have recognized as having a broad meaning. See, *e. g.*, *Moore* v. *New York Cotton Exchange*, 270 U. S. 593, 610 (1926) (" 'Transaction' is a word of flexible meaning"); *Hamilton* v. *United Healthcare of La., Inc.*, 310 F. 3d 385, 391 (CA5 2002) ("[T]he ordinary meaning of the term 'transaction' is a broad reference to many different types of business dealings between parties").

Nor is there any textual basis for adopting a narrower definition of "report." The Court of Appeals, in holding that FOIA responses were not "reports," looked to the words "hearing, audit, or investigation," and the phrase "criminal, civil, [and] administrative hearing[s]." It concluded that all of these sources "connote the synthesis of information in an investigatory context" to "serve some end of the government." 601 F. 3d, at 107; cf. Brief for Respondent 30, n. 15 ("Each is part of the government's ongoing effort to fight fraud"). Applying the *noscitur a sociis* canon, the Court of Appeals then determined that these "'neighboring words'" mandated a narrower meaning for "report" than its ordinary meaning. 601 F. 3d, at 107.

The Court of Appeals committed the very error we reversed in *Graham County.* Like the Fourth Circuit in that case, the Second Circuit here applied the *noscitur a sociis* canon only to the immediately surrounding words, to the exclusion of the rest of the statute. See 601 F. 3d, at 107, n. 6. We emphasized in *Graham County* that "*all* of the sources [of public disclosure] listed in § 3730(e)(4)(A) provide interpretive guidance." 559 U. S., at 289. When all of the sources are considered, the reference to "news media"—which the Court of Appeals did not consider—suggests a much broader scope. *Id.*, at 290.

The Government similarly errs by focusing only on the adjectives "congressional, administrative, or [GAO],"[5] which precede "report." Brief for United States as *Amicus Curiae* 18. It contends that these adjectives suggest that the public disclosure bar applies only to agency reports "analogous to those that Congress and the GAO would issue or

[5] Although the statute refers to the "Government Accounting Office," it is undisputed that Congress meant the General Accounting Office, also known as GAO and now renamed the Government Accountability Office. See *Graham County*, 559 U. S., at 287, n. 6.

conduct." *Ibid.* As we explained in *Graham County*, however, those three adjectives tell us nothing more than that a "report" must be governmental. See 559 U. S., at 289, n. 7. The governmental nature of the FOIA responses at issue is not disputed.

Finally, applying the ordinary meaning of "report" does not render superfluous the other sources of public disclosure in § 3730(e)(4)(A). Kirk argues that reading "report" to mean "something that gives information" would subsume the other words in the phrase "report, hearing, audit, or investigation." Brief for Respondent 23. But Kirk admits that hearings, audits, and investigations are processes "to *obtain* information." *Ibid.* (emphasis added). Those processes are thus clearly different from "something that *gives* information." Moreover, the statute contemplates some redundancy: An "audit," for example, will often be a type of "investigation."

We are not persuaded that we should adopt a "different, somewhat special meaning" of "report" over the word's "primary meaning." *Muscarello* v. *United States*, 524 U. S. 125, 130, 128 (1998). Indeed, we have cautioned recently against interpreting the public disclosure bar in a way inconsistent with a plain reading of its text. In *Graham County*, we rejected several arguments for construing the statute narrowly, twice emphasizing that the sole "touchstone" in the statutory text is "public disclosure." 559 U. S., at 292, 301. We chose in that case simply to give the text its "most natura[l] read[ing]," *id.*, at 287, and we do so again here.

B

A written agency response to a FOIA request falls within the ordinary meaning of "report." FOIA requires each agency receiving a request to "notify the person making such request of [its] determination and the reasons therefor." 5 U. S. C. § 552(a)(6)(A)(i). When an agency denies a request in whole or in part, it must additionally "set forth the names

and titles or positions of each person responsible for the denial," "make a reasonable effort to estimate the volume of any [denied] matter," and "provide any such estimate to the person making the request." §§ 552(a)(6)(C)(i), (F). The DOL has adopted more detailed regulations implementing FOIA and mandating a response in writing. See 29 CFR § 70.21(a) (2009) (requiring written notice of the grant of a FOIA request and a description of the manner in which records will be disclosed); §§ 70.21(b)–(c) (requiring a "brief statement of the reason or reasons for [a] denial," as well as written notification if a record "cannot be located or has been destroyed" (emphasis deleted)). So, too, have other federal agencies. See, *e. g.*, 28 CFR § 16.6 (2010) (Dept. of Justice); 43 CFR § 2.21 (2009) (Dept. of Interior); 7 CFR § 1.7 (2010) (Dept. of Agriculture). Such an agency response plainly is "something that gives information," a "notification," and an "official or formal statement of facts."

Any records the agency produces along with its written FOIA response are part of that response, "just as if they had been reproduced as an appendix to a printed report." *Mistick*, 186 F. 3d, at 384, n. 5. Nothing in the public disclosure bar suggests that a document and its attachments must be disaggregated and evaluated individually. If an allegation or transaction is disclosed in a record attached to a FOIA response, it is disclosed "in" that FOIA response and, therefore, disclosed "in" a report for the purposes of the public disclosure bar.[6]

The DOL's three written FOIA responses to Mrs. Kirk, along with their attached records, are thus reports within the meaning of the public disclosure bar. Each response was an "official or formal statement" that "[gave] information" and "notif[ied]" Mrs. Kirk of the agency's resolution of her FOIA request.

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[6] It is irrelevant whether a particular record is itself a report. The attached records do not "becom[e]" reports, 601 F. 3d, at 109, but simply are part of a report.

III

A

In interpreting a statute, "[o]ur inquiry must cease if the statutory language is unambiguous," as we have found, and "'the statutory scheme is coherent and consistent.'" *Robinson* v. *Shell Oil Co.*, 519 U. S. 337, 340 (1997) (quoting *United States* v. *Ron Pair Enterprises, Inc.*, 489 U. S. 235, 240 (1989)). We are not persuaded by assertions that it would be anomalous to read the public disclosure bar to encompass written FOIA responses.

1

The drafting history of the public disclosure bar does not contradict our holding. As originally enacted in 1863, the FCA placed no restriction on the sources from which a *qui tam* relator could acquire information on which to base a lawsuit. See *Graham County*, *supra*, at 293–294. Accordingly, this Court upheld the recovery of a relator, even though the Government claimed that he had discovered the basis for his lawsuit by reading a federal criminal indictment. See *United States ex rel. Marcus* v. *Hess*, 317 U. S. 537 (1943). In response, Congress amended the statute to preclude such "parasitic" *qui tam* actions based on "evidence or information in the possession of the United States . . . at the time such suit was brought." 559 U. S., at 294 (internal quotation marks omitted). Then, in 1986, Congress replaced the so-called Government knowledge bar with the narrower public disclosure bar. *Id.*, at 294–295.

The Court of Appeals concluded that it would be inconsistent with this drafting history to hold that written FOIA responses are reports. The court reasoned that doing so would "essentially resurrect, in a significant subset of cases, the government possession standard . . . repudiated in 1986." 601 F. 3d, at 109.

We disagree with the Court of Appeals' conclusion. As a threshold matter, "the drafting history of the public disclo-

sure bar raises more questions than it answers." *Graham County*, 559 U. S., at 296. In any event, it is hardly inconsistent with the drafting history to read the public disclosure bar as operating similarly to the Government knowledge bar in a "subset of cases." 601 F. 3d, at 109. As we have observed, "[r]ather than simply repeal the Government knowledge bar," the public disclosure bar was "an effort to strike *a balance* between encouraging private persons to root out fraud and stifling parasitic lawsuits." 559 U. S., at 294–295 (emphasis added).

If anything, the drafting history supports our holding. The sort of case that Kirk has brought seems to us a classic example of the "opportunistic" litigation that the public disclosure bar is designed to discourage. *Id.*, at 294 (internal quotation marks omitted). Although Kirk alleges that he became suspicious from his own experiences as a veteran working at Schindler, anyone could have filed the same FOIA requests and then filed the same suit. Similarly, anyone could identify a few regulatory filing and certification requirements, submit FOIA requests until he discovers a federal contractor who is out of compliance, and potentially reap a windfall in a *qui tam* action under the FCA. See Brief for Chamber of Commerce of the United States of America et al. as *Amici Curiae* 20 ("Government contractors . . . are required to submit certifications related to everything from how they dispose of hazardous materials to their affirmative action plans" (citing 40 U. S. C. § 3142 and 29 U. S. C. § 793)).[7]

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[7] There is no merit to the suggestion that the public disclosure bar is intended only to exclude *qui tam* suits that "ride the investigatory coattails of the government's own processes." Brief for Taxpayers Against Fraud Education Fund as *Amicus Curiae* 25, 26; see *Graham County*, 559 U. S., at 300 (rejecting the argument that the public disclosure bar applies only to allegations or transactions that "have landed on the desk of a DOJ lawyer").

2

Nor will extending the public disclosure bar to written FOIA responses necessarily lead to unusual consequences. FOIA requires agencies to release some records even absent a request. See 5 U. S. C. §§ 552(a)(1), (2). Kirk argues that it would be strange that two relators could obtain copies of the same document but that only the relator who got the document in response to a FOIA request would find his case barred.

This argument assumes that records released under FOIA, but not attached to a written FOIA response, do not fall within the public disclosure bar. We do not decide that question. But even assuming, as Kirk does, that such records are not covered by the public disclosure bar, we are not troubled by the different treatment. By its plain terms, the public disclosure bar applies to some methods of public disclosure and not to others. See *Graham County, supra*, at 285 ("[T]he FCA's public disclosure bar . . . deprives courts of jurisdiction over *qui tam* suits when the relevant information has already entered the public domain through *certain channels*" (emphasis added)). It would not be anomalous if some methods of FOIA disclosure fell within the scope of the public disclosure bar and some did not.

We also are not concerned that potential defendants will now insulate themselves from liability by making a FOIA request for incriminating documents. This argument assumes that the public disclosure of information in a written FOIA response forever taints that information for purposes of the public disclosure bar. But it may be that a relator who comes by that information from a different source has a legitimate argument that his lawsuit is not "based upon" the initial public disclosure. 31 U. S. C. § 3730(e)(4)(A). That question has divided the Courts of Appeals, and we do not resolve it here. See *Glaser* v. *Wound Care Consultants*,

Inc., 570 F. 3d 907, 915 (CA7 2009) (describing the split in authority). It may also be that such a relator qualifies for the "original source" exception.[8]

In any event, the notion that potential defendants will make FOIA requests to insulate themselves from liability is pure speculation. Cf. *Graham County*, *supra*, at 300 (rejecting as "strained speculation" an argument that local governments will manipulate the public disclosure bar to escape liability). There is no suggestion that this has occurred in those Circuits that have long held that FOIA responses are "reports" within the meaning of the public disclosure bar.

B

Even if we accepted these extratextual arguments, Kirk and his *amici* have provided no principled way to define "report" to exclude FOIA responses without excluding other documents that are indisputably reports. The Government, for example, struggled to settle on a single definition. Compare Brief for United States as *Amicus Curiae* 19 ("report" must be read to "reflect a focus on situations in which the government is conducting, or has completed, some focused inquiry or analysis concerning the relevant facts") with *id.*, at 21 ("A FOIA response is not a 'report' . . . because the federal agency is not charged with uncovering the truth of any matter"), and Tr. of Oral Arg. 33 ("[T]he way to think about it is whether or not the agency . . . is engaging in a

[8] An "original source" is "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information." § 3730(e)(4)(B). Some Courts of Appeals have narrowly construed the exception to limit "original sources" to those who were the cause of the public disclosure, while others have been more generous. See *United States ex rel. Duxbury* v. *Ortho Biotech Prods., L. P.*, 579 F. 3d 13, 22 (CA1 2009) (describing a three-way split among the Courts of Appeals). That question is not before us, and we do not decide it.

substantive inquiry into and a substantive analysis of information"). It is difficult to see how the Department of Justice's "Annual Report" of FOIA statistics—something that is indisputably a Government report—would qualify under the latter two definitions. See Dept. of Justice, Freedom of Information Act Annual Report, Fiscal Year 2010, http://www.justice.gov/oip/annual_report/2010/cover.htm (as visited May 12, 2011, and available in Clerk of Court's case file); see also Tr. of Oral Arg. 19 (Kirk conceding that the DOJ annual report is a report). And even if the first definition arguably encompasses that report, it would seem also to include FOIA responses, which convey the results of a Government agency's "focused inquiry."

Kirk also was unable to articulate a workable definition. His various proposed definitions suffer the same deficiencies as the Government's. Compare Brief for Respondent 27 and Tr. of Oral Arg. 17–18 with Brief for Respondent 34–39 and Tr. of Oral Arg. 23. Kirk's first suggestion would exclude "a lot of things that are labeled . . . report," *id.*, at 22, and the second—the definition advanced by the Court of Appeals—would seem to include written FOIA responses, *id.*, at 28–29. In the end, it appears that the "only argument is that FOIA is a different kind of mission"—"a special case." *Id.*, at 31. We see no basis for that distinction and adhere to the principle that undefined statutory terms carry their ordinary meaning.

* * *

The DOL's three written FOIA responses in this case, along with the accompanying records produced to Mrs. Kirk, are reports within the meaning of the public disclosure bar. Whether Kirk's suit is "based upon . . . allegations or transactions" disclosed in those reports is a question for the Court of Appeals to resolve on remand. The judgment of the United States Court of Appeals for the Second Circuit is reversed,

and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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

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

The Vietnam Era Veterans' Readjustment Assistance Act of 1972 (VEVRAA) requires federal contractors to certify, each year, the number of "qualified covered veterans" they employ and related information. 38 U. S. C. § 4212(d); 48 CFR §§ 22.1310(b) and 52.222–37(c) (2008). Respondent Daniel A. Kirk, a Vietnam War veteran and a former employee of petitioner Schindler Elevator Corporation (Schindler), had cause to believe, based on his own experience and observations, that Schindler failed to meet VEVRAA's annual information-reporting requirements. To confirm and support his on-the-job observations, Kirk obtained, through several Freedom of Information Act (FOIA) requests to the Department of Labor (DOL), copies of Schindler's VEVRAA filings. The DOL responses revealed that, in some years, Schindler filed no information, while in some other years, the corporation filed false information. Armed with DOL's confirmation of his own impressions, Kirk commenced suit against Schindler under the federal False Claims Act (FCA), 31 U. S. C. § 3729 *et seq.*

In a carefully developed, highly persuasive opinion, the Second Circuit explained why a federal agency's response to a FOIA request should not automatically qualify as a "report, hearing, audit, or investigation" preclusive of a whistleblower's lawsuit under the public disclosure bar of the FCA, § 3730(e)(4). I would affirm the Second Circuit's judgment

as faithful to the text, context, purpose, and history of the FCA's public disclosure bar.

The Court finds no "textual basis" for the Second Circuit's interpretation of the statutory language. *Ante*, at 409. But the Court of Appeals' opinion considered text as well as context. Leaving aside the term "report," the court explained:

> "All of the other terms in [§ 3730(e)(4)(A)'s] list of enumerated sources connote the synthesis of information in an investigatory context. '[C]riminal, civil, [and] administrative hearings,' for instance, all entail a government inquiry into a given subject, here into an alleged case of fraud. Similarly, government 'hearing[s and] audit[s]' are processes by which information is compiled with the concerted aim of deepening a government entity's knowledge of a given subject or, often, determining whether a party is in compliance with applicable law. . . .
>
> "In this context, the term 'report' most readily bears a narrower meaning than simply 'something that gives information.' Rather, it connotes the compilation or analysis of information with the aim of synthesizing that information in order to serve some end of the government, as in a 'hearing' or 'audit.' It does not naturally extend to cover the mechanistic production of documents in response to a FOIA request made by a member of the public." 601 F. 3d 94, 107 (2010) (citations omitted).

Focusing on the FOIA requests in this case, the Court of Appeals observed that DOL's responses did not "synthesize the documents or their contents with the aim of itself gleaning any insight or information, as . . . it necessarily would in conducting a 'hearing' or 'audit.'" *Id.*, at 108. Far from "compil[ing] or synthesiz[ing] information to serve its own investigative or analytic ends," *id.*, at 111, DOL merely assembled and duplicated records, or noted the absence of records.

Contrary to the Court's assertion, moreover, the Second Circuit was mindful of the "error we reversed in *Graham County* [*Soil and Water Conservation Dist.* v. *United States ex rel. Wilson*, 559 U. S. 280 (2010)]," *ante*, at 409; the Court of Appeals used the *noscitur a sociis* canon only "as a guide in sifting through the common understandings of 'report' and 'investigation' to discover their intended meaning within the FCA." 601 F. 3d, at 108, n. 6. The court explained:

> "We . . . have not used the canon to impose commonality on terms that 'do not share any . . . core of meaning,' *Graham County*, [559 U. S., at 289, n. 7]. To the contrary, the terms 'hearing,' 'report,' 'audit,' and 'investigation' all refer to processes of uncovering and analyzing information or to the products of those processes. Our interpretation focuses on their shared 'core of meaning.'" *Ibid.*

The Court faults the Court of Appeals for not considering § 3730(e)(4)(A)'s "reference to 'news media,'" *ante*, at 409, suggesting that this omission overlooked *Graham County*'s observation that "*all* of the sources [of public disclosure] listed in § 3730(e)(4)(A) provide interpretive guidance," 559 U. S. 280, 289 (2010). Schindler did not make this argument below. In any event, the point would have been unavailing. Disclosures "of allegations or transactions . . . from the *news* media," § 3730(e)(4)(A) (emphasis added), share a common core of meaning with disclosures in other sources that involve "processes of uncovering and analyzing information or . . . the products of those processes." 601 F. 3d, at 108, n. 6.

The Court regards the case Kirk has brought as "a classic example of the 'opportunistic' litigation that the public disclosure bar is designed to discourage." *Ante*, at 413. But as the Second Circuit observed:

> "[T]he facts of this case belie the assertion that individuals who are not original sources and who obtain infor-

> mation through FOIA requests will generally not be persons with firsthand knowledge of fraud but rather will be opportunistic litigators. The facts also illustrate how an overbroad reading of the jurisdictional bar would prevent an individual with independent but partial knowledge of a possible fraud would be barred from bringing a lawsuit that is neither parasitic nor frivolous." 601 F. 3d, at 110 (citation omitted).

By ranking DOL's ministerial response an "administrative . . . report," akin to a "Government Accounting Office report," § 3730(e)(4)(A) (footnote omitted), the Court weakens the force of the FCA as a weapon against fraud on the part of Government contractors. Why should a whistleblower attentive to the heightened pleading standards of Federal Rule of Civil Procedure 9(b) be barred from court if he seeks corroboration for his allegations, as Kirk did, through a FOIA request simply for copies of a contractor's filings? After today's decision, which severely limits whistleblowers' ability to substantiate their allegations before commencing suit, that question is worthy of Congress' attention.

Syllabus

CIGNA CORP. ET AL. *v.* AMARA ET AL., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED

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

No. 09–804. Argued November 30, 2010—Decided May 16, 2011

Until 1998, petitioner CIGNA Corporation's pension plan provided a retiring employee with an annuity based on preretirement salary and length of service. Its new plan replaced that annuity with a cash balance based on a defined annual contribution from CIGNA, increased by compound interest. The new plan translated already-earned benefits under the old plan into an opening amount in the cash balance account. Respondents, on behalf of beneficiaries of the CIGNA Pension Plan (also a petitioner), challenged the new plan's adoption, claiming, as relevant here, that CIGNA's notice of the changes was improper, particularly because the new plan in certain respects provided them with less generous benefits. The District Court found that CIGNA's disclosures violated its obligations under §§ 102(a), 104(b), and 204(h) of the Employee Retirement Income Security Act of 1974 (ERISA). In determining relief, it found that CIGNA's notice defects had caused the employees "likely harm." It then reformed the new plan and ordered CIGNA to pay benefits accordingly, finding its authority in ERISA § 502(a)(1)(B), which authorizes a plan "participant or beneficiary" to bring a "civil action" to "recover benefits due . . . under the terms of his plan." The Second Circuit affirmed.

Held:

1. Although § 502(a)(1)(B) did not give the District Court authority to reform CIGNA's plan, relief is authorized by § 502(a)(3), which allows a participant, beneficiary, or fiduciary "to obtain other appropriate equitable relief" to redress violations of ERISA "or the [plan's] terms." Pp. 435–442.

(a) The court ordered relief in two steps. Step 1: It ordered the terms of the plan reformed. Step 2: It ordered CIGNA to enforce the plan as reformed. Step 2 orders recovery of the benefits provided by the "terms of [the reformed] plan" and is thus consistent with § 502(a)(1)(B). However, that provision—which speaks of "enforc[ing]" the plan's terms, not changing them—does not suggest that it authorizes a court to alter those terms here, where the change, akin to reforming a contract, seems less like the simple enforcement of a contract as written and more like an equitable remedy. Nor can the Court accept the

Solicitor General's alternative rationale: that the District Court enforced the summary plan descriptions and that they are plan terms. That reading cannot be squared with ERISA § 102(a), which obliges plan administrators to furnish summary plan descriptions, but does not suggest that information about the plan provided by those disclosures is itself part of the plan. Nothing in § 502(a)(1)(B) suggests the contrary. The Solicitor General's reading also cannot be squared with the statute's division of authority between a plan's sponsor—who, like a trust's settlor, creates the plan's basic terms and conditions, executes a written instrument containing those terms and conditions, and provides in that instrument a procedure for making amendments—and the plan's administrator—a trustee-like fiduciary who manages the plan, follows its terms in doing so, and provides participants with the summary plan descriptions. ERISA carefully distinguishes these roles, and there is no reason to believe that the statute intends to mix the responsibilities by giving the administrator the power to set plan terms indirectly in the summaries, even when, as here, the administrator is also the plan sponsor. Finally, it is difficult to reconcile an interpretation that would make a summary's language legally binding with the basic summary plan description objective of clear, simple communication. Pp. 435–438.

(b) This Court has interpreted § 502(a)(3)'s phrase "appropriate equitable relief" as referring to "'those categories of relief'" that, before the merger of law and equity, "'were *typically* available in equity.'" *Sereboff* v. *Mid Atlantic Medical Services, Inc.*, 547 U. S. 356, 361. This case—concerning a beneficiary's suit against a plan fiduciary (whom ERISA typically treats as a trustee) about the terms of a plan (which ERISA typically treats as a trust)—is the kind of lawsuit that, before the merger, could have been brought only in an equity court, where the remedies available were traditionally considered equitable remedies. The District Court's injunctions obviously fall within this category. The other relief it ordered closely resembles three forms of traditional equitable relief. First, what the court did here may be regarded as the reformation of the plan's terms, in order to remedy false or misleading information CIGNA provided. The power to reform contracts is a traditional power of an equity court and is used to prevent fraud. Second, the part of the remedy holding CIGNA to its promise that the new plan would not take from its employees previously accrued benefits resembles estoppel, also a traditional equitable remedy. Third, the injunctions require the plan administrator to pay already retired beneficiaries money owed them under the plan as reformed. Equity courts possessed the power to provide monetary "compensation" for a loss resulting from a trustee's breach of duty, or to prevent the trustee's unjust enrichment. That surcharge remedy extended to a breach of trust com-

mitted by a fiduciary encompassing any violation of duty imposed on that fiduciary. Pp. 438–442.

2. Because § 502(a)(3) authorizes "appropriate equitable relief" for violations of ERISA, the relevant standard of harm will depend on the equitable theory by which the District Court provides relief. That court is to conduct the analysis in the first instance, but there are several equitable principles that it might apply on remand. Neither ERISA's relevant substantive provisions nor § 502(a)(3) sets a particular standard for determining harm. And equity law provides no general principle that "detrimental reliance" must be proved before a remedy is decreed. To the extent any such requirement arises, it is because the specific remedy being contemplated imposes that requirement. Thus, when a court exercises authority under § 502(a)(3) to impose a remedy equivalent to estoppel, a showing of detrimental reliance must be made. However, equity courts did not insist on a detrimental reliance showing where they ordered reformation where a fraudulent suppression, omission, or insertion materially affected the substance of a contract. Nor did they require a detrimental reliance showing when they ordered surcharge. They simply ordered a trust or beneficiary made whole following a trustee's breach of trust. This flexible approach belies a strict detrimental reliance requirement. To be sure, a fiduciary can be surcharged under § 502(a)(3) only upon a showing of actual harm, and such harm may consist of detrimental reliance. But it might also come from the loss of a right protected by ERISA or its trust-law antecedents. It is not difficult to imagine how the failure to provide proper summary information here, in violation of ERISA, injured employees even if they did not themselves act in reliance on the summaries. Thus, to obtain relief by surcharge for violations of §§ 102(a) and 104(b), a plan participant or beneficiary must show that the violation caused injury, but need show only actual harm and causation, not detrimental reliance. Pp. 442–445.

348 Fed. Appx. 627, vacated and remanded.

BREYER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, GINSBURG, ALITO, and KAGAN, JJ., joined. SCALIA, J., filed an opinion concurring in the judgment, in which THOMAS, J., joined, *post*, p. 445. SOTOMAYOR, J., took no part in the consideration or decision of the case.

Theodore B. Olson argued the cause for petitioners. With him on the briefs were *Amir C. Tayrani*, *Joseph J. Costello*, *Jeremy P. Blumenfeld*, and *Jamie M. Kohen*.

Stephen R. Bruce argued the cause for respondents. With him on the brief were *Allison C. Pienta*, *Thomas G. Moukawsher*, *Christopher J. Wright*, and *Timothy J. Simeone*.

Deputy Solicitor General Kneedler argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Acting Solicitor General Katyal*, *Matthew D. Roberts*, *M. Patricia Smith*, *Nathaniel I. Spiller*, and *Edward D. Sieger*.*

JUSTICE BREYER delivered the opinion of the Court.

In 1998, petitioner CIGNA Corporation changed the nature of its basic pension plan for employees. Previously, the plan provided a retiring employee with a defined benefit in the form of an annuity calculated on the basis of his preretirement salary and length of service. The new plan provided most retiring employees with a (lump sum) cash balance calculated on the basis of a defined annual contribution from CIGNA as increased by compound interest. Because many employees had already earned at least some old-plan benefits, the new plan translated already-earned benefits into an opening amount in the employee's cash balance account.

Respondents, acting on behalf of approximately 25,000 beneficiaries of the CIGNA Pension Plan (which is also a petitioner here), challenged CIGNA's adoption of the new plan. They claimed in part that CIGNA had failed to give them proper notice of changes to their benefits, particularly because the new plan in certain respects provided them with less generous benefits. See Employee Retirement Income Security Act of 1974 (ERISA), §§ 102(a), 104(b), 88 Stat. 841,

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*Briefs of *amici curiae* urging affirmance were filed for AARP by *Mary Ellen Signorille* and *Melvin Radowitz;* and for the National Employment Lawyers Association et al. by *Ellen M. Doyle*, *William T. Payne*, and *Rebecca M. Hamburg*.

848, as amended, § 204(h), as added, 100 Stat. 243, and as amended, 29 U. S. C. §§ 1022(a), 1024(b), 1054(h).

The District Court agreed that the disclosures made by CIGNA violated its obligations under ERISA. In determining relief, the court found that CIGNA's notice failures had caused the employees "likely harm." The court then reformed the new plan and ordered CIGNA to pay benefits accordingly. It found legal authority for doing so in ERISA § 502(a)(1)(B), 29 U. S. C. § 1132(a)(1)(B) (authorizing a plan "participant or beneficiary" to bring a "civil action" to "recover benefits due to him under the terms of his plan").

We agreed to decide whether the District Court applied the correct legal standard, namely, a "likely harm" standard, in determining that CIGNA's notice violations caused its employees sufficient injury to warrant legal relief. To reach that question, we must first consider a more general matter—whether the ERISA section just mentioned (ERISA's recovery-of-benefits-due provision, § 502(a)(1)(B)) authorizes entry of the relief the District Court provided. We conclude that it does not authorize this relief. Nonetheless, we find that a different equity-related ERISA provision, to which the District Court also referred, authorizes forms of relief similar to those that the court entered. § 502(a)(3), 29 U. S. C. § 1132(a)(3).

Section 502(a)(3) authorizes "appropriate equitable relief" for violations of ERISA. Accordingly, the relevant standard of harm will depend upon the equitable theory by which the District Court provides relief. We leave it to the District Court to conduct that analysis in the first instance, but we identify equitable principles that the court might apply on remand.

I

Because our decision rests in important part upon the circumstances present here, we shall describe those circumstances in some detail. We still simplify in doing so. But

the interested reader can find a more thorough description in two District Court opinions, which set forth that court's findings reached after a lengthy trial. See 559 F. Supp. 2d 192 (Conn. 2008); 534 F. Supp. 2d 288 (Conn. 2008).

A

Under CIGNA's pre-1998 defined-benefit retirement plan, an employee with at least five years' service would receive an annuity annually paying an amount that depended upon the employee's salary and length of service. Depending on when the employee had joined CIGNA, the annuity would equal either (1) 2 percent of the employee's average salary over his final three years with CIGNA, multiplied by the number of years worked (up to 30); or (2) $1^2/_3$ percent of the employee's average salary over his final five years with CIGNA, multiplied by the number of years worked (up to 35). Calculated either way, the annuity would approach 60 percent of a longtime employee's final salary. A well-paid longtime employee, earning, say, $160,000 per year, could receive a retirement annuity paying the employee about $96,000 per year until his death. The plan offered many employees at least one other benefit: They could retire early, at age 55, and receive an only-somewhat-reduced annuity.

In November 1997, CIGNA sent its employees a newsletter announcing that it intended to put in place a new pension plan. The new plan would substitute an "account balance plan" for CIGNA's pre-existing defined-benefit system. App. 991a (emphasis deleted). The newsletter added that the old plan would end on December 31, 1997, that CIGNA would introduce (and describe) the new plan sometime during 1998, and that the new plan would apply retroactively to January 1, 1998.

Eleven months later CIGNA filled in the details. Its new plan created an individual retirement account for each employee. (The account consisted of a bookkeeping entry backed by a CIGNA-funded trust.) Each year CIGNA

would contribute to the employee's individual account an amount equal to between 3 percent and 8.5 percent of the employee's salary, depending upon age, length of service, and certain other factors. The account balance would earn compound interest at a rate equal to the return on 5-year treasury bills plus one-quarter percent (but no less than 4.5 percent and no greater than 9 percent). Upon retirement the employee would receive the amount then in his or her individual account—in the form of either a lump sum or whatever annuity the lump sum then would buy. As promised, CIGNA would open the accounts and begin to make contributions as of January 1, 1998.

But what about the retirement benefits that employees had already earned prior to January 1, 1998? CIGNA promised to make an initial contribution to the individual's account equal to the value of that employee's already-earned benefits. And the new plan set forth a method for calculating that initial contribution. The method consisted of calculating the amount as of the employee's (future) retirement date of the annuity to which the employee's salary and length of service already (*i. e.*, as of December 31, 1997) entitled him and then discounting that sum to its present (*i. e.*, January 1, 1998) value.

An example will help: Imagine an employee born on January 1, 1966, who joined CIGNA in January 1991 on his 25th birthday, and who (during the five years preceding the plan changeover) earned an average salary of $100,000 per year. As of January 1, 1998, the old plan would have entitled that employee to an annuity equal to $100,000 times 7 (years then worked) times 1⅔ percent, or $11,667 per year—when he retired in 2031 at age 65. The 2031 price of an annuity paying $11,667 per year until death depends upon interest rates and mortality assumptions at that time. If we assume the annuity would pay 7 percent until the holder's death (and we use the mortality assumptions used by the plan, see App. 407a (incorporating the mortality table prescribed by Rev.

Rul. 95–6, 1995–1 Cum. Bull. 80)), then the 2031 price of such an annuity would be about $120,500. And CIGNA should initially deposit in this individual's account on January 1, 1998, an amount that will grow to become $120,500, 33 years later, in 2031, when the individual retires. If we assume a 5 percent average interest rate, then that amount presently (*i. e.*, as of January 1, 1998) equals about $24,000. And (with one further mortality-related adjustment that we shall describe *infra*, at 429–430) that is the amount, more or less, that the new plan's transition rules would have required CIGNA initially to deposit. Then CIGNA would make further annual deposits, and all the deposited amounts would earn compound interest. When the employee retired, he would receive the resulting lump sum.

The new plan also provided employees a guarantee: An employee would receive upon retirement either (1) the amount to which he or she had become entitled as of January 1, 1998, or (2) the amount then in his or her individual account, whichever was greater. Thus, the employee in our example would receive (in 2031) no less than an annuity paying $11,667 per year for life.

B

1

The District Court found that CIGNA's initial descriptions of its new plan were significantly incomplete and misled its employees. In November 1997, for example, CIGNA sent the employees a newsletter that said the new plan would "significantly enhance" its "retirement program," would produce "an overall improvement in . . . retirement benefits," and would provide "the same benefit security" with "steadier benefit growth." App. 990a, 991a, 993a. CIGNA also told its employees that they would "see the growth in [their] total retirement benefits from CIGNA every year," *id.*, at 952a, that its initial deposit "represent[ed] the full value of the benefit [they] earned for service before 1998," Record E–503

(Exh. 98), and that "[o]ne advantage the company *will not* get from the retirement program changes is cost savings," App. 993a.

In fact, the new plan saved the company $10 million annually (though CIGNA later said it devoted the savings to other employee benefits). Its initial deposit did not "represen[t] the full value of the benefit" that employees had "earned for service before 1998." And the plan made a significant number of employees worse off in at least the following specific ways:

First, the initial deposit calculation ignored the fact that the old plan offered many CIGNA employees the right to retire early (beginning at age 55) with only-somewhat-reduced benefits. This right was valuable. For example, as of January 1, 1998, respondent Janice Amara had earned vested age-55 retirement benefits of $1,833 per month, but CIGNA's initial deposit in her new-plan individual retirement account (ignoring this benefit) would have allowed her at age 55 to buy an annuity benefit of only $900 per month.

Second, as we previously indicated but did not explain, *supra*, at 428, the new plan adjusted CIGNA's initial deposit downward to account for the fact that, unlike the old plan's lifetime annuity, an employee's survivors would receive the new plan's benefits (namely, the amount in the employee's individual account) even if the employee died before retiring. The downward adjustment consisted of multiplying the otherwise-required deposit by the probability that the employee would live until retirement—a 90 percent probability in the example of our 32-year-old, *supra*, at 427–428. And that meant that CIGNA's initial deposit in our example—the amount that was supposed to grow to $120,500 by 2031—would be less than $22,000, not $24,000 (the number we computed). The employee, of course, would receive a benefit in return—namely, a form of life insurance. But at least some employees might have preferred the retirement

benefit and consequently could reasonably have thought it important to know that the new plan traded away one-tenth of their already-earned benefits for a life insurance policy that they might not have wanted.

Third, the new plan shifted the risk of a fall in interest rates from CIGNA to its employees. Under the old plan, CIGNA had to buy a retiring employee an annuity that paid a specified sum irrespective of whether falling interest rates made it more expensive for CIGNA to pay for that annuity. And falling interest rates also meant that any sum CIGNA set aside to buy that annuity would grow more slowly over time, thereby requiring CIGNA to set aside more money to make any specific sum available at retirement. Under the new plan CIGNA did not have to buy a retiring employee an annuity that paid a specific sum. The employee would simply receive whatever sum his account contained. And falling interest rates meant that the account's lump sum would earn less money each year after the employee retired. Annuities, for example, would become more expensive (any fixed purchase price paying for less annual income). At the same time falling interest meant that the individual account would grow more slowly over time, leaving the employee with less money at retirement.

Of course, interest rates might rise instead of fall, leaving CIGNA's employees better off under the new plan. But the latter advantage does not cancel out the former disadvantage, for most individuals are risk averse. And that means that most of CIGNA's employees would have preferred that CIGNA, rather than they, bear these risks.

The amounts likely involved are significant. If, in our example, interest rates between 1998 and 2031 averaged 4 percent rather than the 5 percent we assumed, and if in 2031 annuities paid 6 percent rather than the 7 percent we assumed, then CIGNA would have had to make an initial deposit of $35,500 (not $24,000) to assure that employee the

$11,667 annual annuity payment to which he had already become entitled. Indeed, that $24,000 that CIGNA would have contributed (leaving aside the life-insurance problem) would have provided enough money to buy (in 2031) an annuity that assured the employee an annual payment of only about $8,000 (rather than $11,667).

We recognize that the employee in our example (like others) might have continued to work for CIGNA after January 1, 1998; and he would thereby eventually have earned a pension that, by the time of his retirement, was worth far more than $11,667. But that is so because CIGNA made an *additional* contribution for each year worked *after* January 1, 1998. If interest rates fell (as they did), it would take the employee several additional years of work simply to catch up (under the new plan) to where he had already been (under the old plan) as of January 1, 1998—a phenomenon known in pension jargon as "wear away," see 534 F. Supp. 2d, at 303–304 (referring to respondents' requiring 6 to 10 years to catch up).

The District Court found that CIGNA told its employees nothing about any of these features of the new plan—which individually and together made clear that CIGNA's descriptions of the plan were incomplete and inaccurate. The District Court also found that CIGNA intentionally misled its employees. A focus group and many employees asked CIGNA, for example, to "'[d]isclose details'" about the plan, to provide "'individual comparisons,'" or to show "'[a]n actual projection for retirement.'" *Id.*, at 342. But CIGNA did not do so. Instead (in the words of one internal document), it "'focus[ed] on NOT providing employees before and after samples of the Pension Plan changes.'" *Id.*, at 343.

The District Court concluded, as a matter of law, that CIGNA's representations (and omissions) about the plan, made between November 1997 (when it announced the plan) and December 1998 (when it put the plan into effect) violated:

(1) ERISA § 204(h), implemented by Treas. Reg. § 1.411(d)–6, 26 CFR § 1.411(d)–6 (2000), which (as it existed at the relevant time) forbade an amendment of a pension plan that would "provide for a significant reduction in the rate of future benefit accrual" unless the plan administrator also sent a "written notice" that provided either the text of the amendment or summarized its likely effects, 29 U. S. C. § 1054(h) (2000 ed.) (amended 2001); Treas. Reg. § 1.411(d)–6, Q&A–10, 63 Fed. Reg. 68682 (1998); and

(2) ERISA §§ 102(a) and 104(b), which require a plan administrator to provide beneficiaries with summary plan descriptions and with summaries of material modifications, "written in a manner calculated to be understood by the average plan participant," that are "sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan," 29 U. S. C. §§ 1022(a), 1024(b) (2006 ed. and Supp. III).

2

The District Court then turned to the remedy. First, the court agreed with CIGNA that only employees whom CIGNA's disclosure failures had harmed could obtain relief. But it did not require each individual member of the relevant CIGNA employee class to show individual injury. Rather, it found (1) that the evidence presented had raised a presumption of "likely harm" suffered by the members of the relevant employee class, and (2) that CIGNA, though free to offer contrary evidence in respect to some or all of those employees, had failed to rebut that presumption. It concluded that this unrebutted showing was sufficient to warrant class-applicable relief.

Second, the court noted that § 204(h) had been interpreted by the Second Circuit to permit the invalidation of plan amendments not preceded by a proper notice, prior to the 2001 amendment that made this power explicit. 559 F. Supp. 2d, at 207 (citing *Frommert* v. *Conkright*,

433 F. 3d 254, 263 (2006)); see 29 U. S. C. § 1054(h)(6) (2006 ed.) (entitling participants to benefits "without regard to [the] amendment" in case of an "egregious failure"). But the court also thought that granting this relief here would harm, not help, the injured employees. That is because the notice failures all concerned the new plan that took effect in December 1998. The court thought that the notices in respect to the freezing of old-plan benefits, effective December 31, 1997, were valid. To strike the new plan while leaving in effect the frozen old plan would not help CIGNA's employees.

The court considered treating the November 1997 notice as a sham or treating that notice and the later 1998 notices as part and parcel of a single set of related events. But it pointed out that respondents "ha[d] argued none of these things." 559 F. Supp. 2d, at 208. And it said that the court would "not make these arguments now on [respondents'] behalf." *Ibid.*

Third, the court reformed the terms of the new plan's guarantee. It erased the portion that assured participants who retired the greater of "A" (that which they had already earned as of December 31, 1997, under the old plan, $11,667 in our example) *or* "B" (that which they would earn via CIGNA's annual deposits under the new plan, *including* CIGNA's initial deposit). And it substituted a provision that would guarantee each employee "A" (that which they had already earned, as of December 31, 1997, under the old plan) *plus* "B" (that which they would earn via CIGNA's annual deposits under the new plan, *excluding* CIGNA's initial deposit). In our example, the District Court's remedy would no longer force our employee to choose upon retirement *either* an $11,667 annuity *or* his new-plan benefits (including both CIGNA's annual deposits and CIGNA's initial deposit). It would give him an $11,667 annuity *plus* his new-plan benefits (with CIGNA's annual deposits but without CIGNA's initial deposit).

Fourth, the court "order[ed] and enjoin[ed] the CIGNA Plan to reform its records to reflect that all class members . . . now receive [the just described] 'A + B' benefits," and that it pay appropriate benefits to those class members who had already retired. *Id.*, at 222.

Fifth, the court held that ERISA § 502(a)(1)(B) provided the legal authority to enter this relief. That provision states that a "civil action may be brought" by a plan "participant or beneficiary . . . to recover benefits due to him under the terms of his plan." 29 U. S. C. § 1132(a)(1)(B). The court wrote that its orders in effect awarded "benefits under the terms of the plan" as reformed. 559 F. Supp. 2d, at 212.

At the same time the court considered whether ERISA § 502(a)(3) also provided legal authority to enter this relief. That provision states that a civil action may be brought

> "by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other *appropriate equitable relief* (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan." 29 U. S. C. § 1132(a)(3) (emphasis added).

The District Court decided not to answer this question because (1) it had just decided that the same relief was available under § 502(a)(1)(B), regardless, cf. *Varity Corp.* v. *Howe*, 516 U. S. 489, 515 (1996); and (2) the Supreme Court has "issued several opinions . . . that have severely curtailed the kinds of relief that are available under § 502(a)(3)," 559 F. Supp. 2d, at 205 (citing *Sereboff* v. *Mid Atlantic Medical Services, Inc.*, 547 U. S. 356 (2006); *Great-West Life & Annuity Ins. Co.* v. *Knudson*, 534 U. S. 204 (2002); and *Mertens* v. *Hewitt Associates*, 508 U. S. 248 (1993)).

3

The parties cross-appealed the District Court's judgment. The Court of Appeals for the Second Circuit issued a brief

summary order, rejecting all their claims, and affirming "the judgment of the district court for substantially the reasons stated" in the District Court's "well-reasoned and scholarly opinions." 348 Fed. Appx. 627 (2009). The parties filed cross-petitions for writs of certiorari in this Court. We granted the request in CIGNA's petition to consider whether a showing of "likely harm" is sufficient to entitle plan participants to recover benefits based on faulty disclosures.

II

CIGNA in the merits briefing raises a preliminary question. Brief for Petitioners 13–20. It argues first and foremost that the statutory provision upon which the District Court rested its orders, namely, the provision for recovery of plan benefits, § 502(a)(1)(B), does not in fact authorize the District Court to enter the kind of relief it entered here. And for that reason, CIGNA argues, whether the District Court did or did not use a proper standard for determining harm is beside the point. We believe that this preliminary question is closely enough related to the question presented that we shall consider it at the outset.

A

The District Court ordered relief in two steps. Step 1: It ordered the terms of the plan reformed (so that they provided an "A plus B," rather than a "greater of A or B" guarantee). Step 2: It ordered the plan administrator (which it found to be CIGNA) to enforce the plan as reformed. One can fairly describe step 2 as consistent with § 502(a)(1)(B), for that provision grants a participant the right to bring a civil action to "recover benefits due . . . under the terms of his plan." 29 U. S. C. § 1132(a)(1)(B). And step 2 orders recovery of the benefits provided by the "terms of [the] plan" *as reformed.*

But what about step 1? Where does § 502(a)(1)(B) grant a court the power to *change* the terms of the plan as they

previously existed? The statutory language speaks of "*enforc[ing]*" the "terms of the plan," not of *changing* them. 29 U. S. C. § 1132(a)(l)(B) (emphasis added). The provision allows a court to look outside the plan's written language in deciding what those terms are, *i. e.*, what the language means. See *UNUM Life Ins. Co. of America* v. *Ward*, 526 U. S. 358, 377–379 (1999) (permitting the insurance terms of an ERISA-governed plan to be interpreted in light of state insurance rules). But we have found nothing suggesting that the provision authorizes a court to alter those terms, at least not in present circumstances, where that change, akin to the reform of a contract, seems less like the simple enforcement of a contract as written and more like an equitable remedy. See *infra*, at 441.

Nor can we accept the Solicitor General's alternative rationale seeking to justify the use of this provision. The Solicitor General says that the District Court did enforce the plan's terms as written, adding that the "plan" includes the disclosures that constituted the summary plan descriptions. In other words, in the view of the Solicitor General, the terms of the summaries are terms of the plan.

Even if the District Court had viewed the summaries as plan "terms" (which it did not, see *supra*, at 433), however, we cannot agree that the terms of statutorily required plan summaries (or summaries of plan modifications) necessarily may be enforced (under § 502(a)(1)(B)) as the terms of the plan itself. For one thing, it is difficult to square the Solicitor General's reading of the statute with ERISA § 102(a), the provision that obliges plan administrators to furnish summary plan descriptions. The syntax of that provision, requiring that participants and beneficiaries be advised of their rights and obligations "under the plan," suggests that the information *about* the plan provided by those disclosures is not itself *part of* the plan. See 29 U. S. C. § 1022(a). Nothing in § 502(a)(1)(B) (or, as far as we can tell, anywhere else) suggests the contrary.

Nor do we find it easy to square the Solicitor General's reading with the statute's division of authority between a plan's sponsor and the plan's administrator. The plan's sponsor (*e. g.*, the employer), like a trust's settlor, creates the basic terms and conditions of the plan, executes a written instrument containing those terms and conditions, and provides in that instrument "a procedure" for making amendments. § 402, 29 U. S. C. § 1102. The plan's administrator, a trustee-like fiduciary, manages the plan, follows its terms in doing so, and provides participants with the summary documents that describe the plan (and modifications) in readily understandable form. §§ 3(21)(A), 101(a), 102, 104, 29 U. S. C. §§ 1002(21)(A), 1021(a), 1022, 1024 (2006 ed. and Supp. III). Here, the District Court found that the same entity, CIGNA, filled both roles. See 534 F. Supp. 2d, at 331. But that is not always the case. Regardless, we have found that ERISA carefully distinguishes these roles. See, *e. g.*, *Varity Corp.*, 516 U. S., at 498. And we have no reason to believe that the statute intends to mix the responsibilities by giving the administrator the power to set plan terms indirectly by including them in the summary plan descriptions. See *Curtiss-Wright Corp.* v. *Schoonejongen*, 514 U. S. 73, 81–85 (1995).

Finally, we find it difficult to reconcile the Solicitor General's interpretation with the basic summary plan description objective: clear, simple communication. See §§ 2(a), 102(a), 29 U. S. C. § 1001(a), 1022(a) (2006 ed.). To make the language of a plan summary legally binding could well lead plan administrators to sacrifice simplicity and comprehensibility in order to describe plan terms in the language of lawyers. Consider the difference between a will and the summary of a will or between a property deed and its summary. Consider, too, the length of Part I of this opinion, and then consider how much longer Part I would have to be if we had to include all the qualifications and nuances that a plan drafter

might have found important and feared to omit lest they lose all legal significance. The District Court's opinions take up 109 pages of the Federal Supplement. None of this is to say that plan administrators can avoid providing complete and accurate summaries of plan terms in the manner required by ERISA and its implementing regulations. But we fear that the Solicitor General's rule might bring about complexity that would defeat the fundamental purpose of the summaries.

For these reasons taken together we conclude that the summary documents, important as they are, provide communication with beneficiaries *about* the plan, but that their statements do not themselves constitute the *terms* of the plan for purposes of § 502(a)(1)(B). We also conclude that the District Court could not find authority in that section to reform CIGNA's plan as written.

B

If § 502(a)(1)(B) does not authorize entry of the relief here at issue, what about nearby § 502(a)(3)? That provision allows a participant, beneficiary, or fiduciary "to obtain other *appropriate equitable relief*" to redress violations of (here relevant) parts of ERISA "or the terms of the plan." 29 U. S. C. § 1132(a)(3) (emphasis added). The District Court strongly implied, but did not directly hold, that it would base its relief upon this subsection were it not for (1) the fact that the preceding "plan benefits due" provision, § 502(a)(1)(B), provided sufficient authority; and (2) certain cases from this Court that narrowed the application of the term "appropriate equitable relief," see, *e. g.*, *Mertens*, 508 U. S. 248; *Great-West*, 534 U. S. 204. Our holding in Part II–A, *supra*, removes the District Court's first obstacle. And given the likelihood that, on remand, the District Court will turn to and rely upon this alternative subsection, we consider the court's second concern. We find that concern misplaced.

We have interpreted the term "appropriate equitable relief" in §502(a)(3) as referring to "'those categories of relief'" that, traditionally speaking (*i. e.*, prior to the merger of law and equity), "'were *typically* available in equity.'" *Sereboff*, 547 U. S., at 361 (quoting *Mertens*, 508 U. S., at 256). In *Mertens*, we applied this principle to a claim seeking money damages brought by a beneficiary against a private firm that provided a trustee with actuarial services. We found that the plaintiff sought "nothing other than compensatory damages" against a nonfiduciary. *Id.*, at 253, 255 (emphasis deleted). And we held that such a claim, traditionally speaking, was legal, not equitable, in nature. *Id.*, at 255.

In *Great-West*, we considered a claim brought by a fiduciary against a tort-award-winning beneficiary seeking monetary reimbursement for medical outlays that the plan had previously made on the beneficiary's behalf. We noted that the fiduciary sought to obtain a lien attaching to (or a constructive trust imposed upon) money that the beneficiary had received from the tort-case defendant. But we noted that the money in question was not the "particular" money that the tort defendant had paid. And, traditionally speaking, relief that sought a lien or a constructive trust was legal relief, not equitable relief, unless the funds in question were "*particular* funds or property in the defendant's possession." 534 U. S., at 213 (emphasis added).

The case before us concerns a suit by a beneficiary against a plan fiduciary (whom ERISA typically treats as a trustee) about the terms of a plan (which ERISA typically treats as a trust). See *LaRue* v. *DeWolff, Boberg & Associates, Inc.*, 552 U. S. 248, 253, n. 4 (2008); *Varity Corp.*, *supra*, at 496–497. It is the kind of lawsuit that, before the merger of law and equity, respondents could have brought only in a court of equity, not a court of law. 4 A. Scott, W. Fratcher, & M. Ascher, Trusts §24.1, p. 1654 (5th ed. 2007) (hereinafter Scott & Ascher) ("Trusts are, and always have been, the bai-

liwick of the courts of equity"); *Duvall* v. *Craig*, 2 Wheat. 45, 56 (1817) (a trustee was "only suable in equity").

With the exception of the relief now provided by § 502(a)(1)(B), Restatement (Second) of Trusts §§ 198(1)–(2) (1957) (hereinafter Second Restatement); 4 Scott & Ascher § 24.2.1, the remedies available to those courts of equity were traditionally considered equitable remedies, see Second Restatement § 199; J. Adams, Doctrine of Equity: A Commentary on the Law as Administered by the Court of Chancery 61 (7th Am. ed. 1881) (hereinafter Adams); 4 Scott & Ascher § 24.2.

The District Court's affirmative and negative injunctions obviously fall within this category. *Mertens*, *supra*, at 256 (identifying injunctions, mandamus, and restitution as equitable relief). And other relief ordered by the District Court resembles forms of traditional equitable relief. That is because equity chancellors developed a host of other "distinctively equitable" remedies—remedies that were "fitted to the nature of the primary right" they were intended to protect. 1 S. Symons, Pomeroy's Equity Jurisprudence § 108, pp. 139–140 (5th ed. 1941) (hereinafter Pomeroy). See generally 1 J. Story, Commentaries on Equity Jurisprudence § 692 (12th ed. 1877) (hereinafter Story). Indeed, a maxim of equity states that "[e]quity suffers not a right to be without a remedy." R. Francis, Maxims of Equity 29 (1st Am. ed. 1823). And the relief entered here, insofar as it does not consist of injunctive relief, closely resembles three other traditional equitable remedies.

First, what the District Court did here may be regarded as the reformation of the terms of the plan, in order to remedy the false or misleading information CIGNA provided. The power to reform contracts (as contrasted with the power to enforce contracts as written) is a traditional power of an equity court, not a court of law, and was used to prevent fraud. See *Baltzer* v. *Raleigh & Augusta R. Co.*, 115 U. S. 634, 645 (1885) ("[I]t is well settled that equity would reform

the contract, and enforce it, as reformed, if the mistake or fraud were shown"); *Hearne* v. *Marine Ins. Co.*, 20 Wall. 488, 490 (1874) ("The reformation of written contracts for fraud or mistake is an ordinary head of equity jurisdiction"); *Bradford* v. *Union Bank of Tenn.*, 13 How. 57, 66 (1852); J. Eaton, Handbook of Equity Jurisprudence § 306, p. 618 (1901) (hereinafter Eaton) (courts of common law could only void or enforce, but not reform, a contract); 4 Pomeroy § 1375, at 1000 (reformation "chiefly occasioned by fraud or mistake," which were themselves concerns of equity courts); 1 Story §§ 152–154; see also 4 Pomeroy § 1375, at 999 (equity often considered reformation a "preparatory step" that "establishes the real contract").

Second, the District Court's remedy essentially held CIGNA to what it had promised, namely, that the new plan would not take from its employees benefits they had already accrued. This aspect of the remedy resembles estoppel, a traditional equitable remedy. See, *e. g.*, E. Merwin, Principles of Equity and Equity Pleading § 910 (H. Merwin ed. 1895); 3 Pomeroy § 804. Equitable estoppel "operates to place the person entitled to its benefit in the same position he would have been in had the representations been true." Eaton § 62, at 176. And, as Justice Story long ago pointed out, equitable estoppel "forms a very essential element in . . . fair dealing, and rebuke of all fraudulent misrepresentation, which it is the boast of courts of equity constantly to promote." 2 Story § 1533, at 776.

Third, the District Court injunctions require the plan administrator to pay to already retired beneficiaries money owed them under the plan as reformed. But the fact that this relief takes the form of a money payment does not remove it from the category of traditionally equitable relief. Equity courts possessed the power to provide relief in the form of monetary "compensation" for a loss resulting from a trustee's breach of duty, or to prevent the trustee's unjust enrichment. Restatement (Third) of Trusts § 95, and Com-

ment *a* (Tent. Draft No. 5, Mar. 2, 2009) (hereinafter Third Restatement); Eaton §§211–212, at 440. Indeed, prior to the merger of law and equity this kind of monetary remedy against a trustee, sometimes called a "surcharge," was "exclusively equitable." *Princess Lida of Thurn and Taxis* v. *Thompson*, 305 U. S. 456, 464 (1939); Third Restatement §95, and Comment *a;* G. Bogert & G. Bogert, Trusts and Trustees §862 (rev. 2d ed. 1995) (hereinafter Bogert); 4 Scott & Ascher §§24.2, 24.9, at 1659–1660, 1686; Second Restatement §197; see also *Manhattan Bank of Memphis* v. *Walker*, 130 U. S. 267, 271 (1889) ("The suit is plainly one of equitable cognizance, the bill being filed to charge the defendant, as a trustee, for a breach of trust"); 1 J. Perry, A Treatise on the Law of Trusts and Trustees §17, p. 13 (2d ed. 1874) (common-law attempts "to punish trustees for a breach of trust in damages, . . . w[ere] soon abandoned").

The surcharge remedy extended to a breach of trust committed by a fiduciary encompassing any violation of a duty imposed upon that fiduciary. See Second Restatement §201; Adams 59; 4 Pomeroy §1079; 2 Story §§1261, 1268. Thus, insofar as an award of make-whole relief is concerned, the fact that the defendant in this case, unlike the defendant in *Mertens*, is analogous to a trustee makes a critical difference. See 508 U. S., at 262–263. In sum, contrary to the District Court's fears, the types of remedies the court entered here fall within the scope of the term "appropriate equitable relief" in §502(a)(3).

III

Section 502(a)(3) invokes the equitable powers of the District Court. We cannot know with certainty which remedy the District Court understood itself to be imposing, nor whether the District Court will find it appropriate to exercise its discretion under §502(a)(3) to impose that remedy on remand. We need not decide which remedies are appropriate on the facts of this case in order to resolve the parties' dispute as to the appropriate legal standard in determin-

ing whether members of the relevant employee class were injured.

The relevant substantive provisions of ERISA do not set forth any particular standard for determining harm. They simply require the plan administrator to write and to distribute written notices that are "sufficiently accurate and comprehensive to reasonably apprise" plan participants and beneficiaries of "their rights and obligations under the plan." § 102(a); see also §§ 104(b), 204(h). Nor can we find a definite standard in the ERISA provision, § 502(a)(3) (which authorizes the court to enter "appropriate equitable relief" to redress ERISA "violations"). Hence any requirement of harm must come from the law of equity.

Looking to the law of equity, there is no general principle that "detrimental reliance" must be proved before a remedy is decreed. To the extent any such requirement arises, it is because the specific remedy being contemplated imposes such a requirement. Thus, as CIGNA points out, when equity courts used the remedy of *estoppel*, they insisted upon a showing akin to detrimental reliance, *i. e.*, that the defendant's statement "in truth, influenced the conduct of" the plaintiff, causing "prejudic[e]." Eaton § 61, at 175; see 3 Pomeroy § 805. Accordingly, when a court exercises its authority under § 502(a)(3) to impose a remedy equivalent to estoppel, a showing of detrimental reliance must be made.

But this showing is not always necessary for other equitable remedies. Equity courts, for example, would reform contracts to reflect the mutual understanding of the contracting parties where "fraudulent suppression[s], omission[s], or insertion[s]," 1 Story § 154, at 149, "material[ly] . . . affect[ed]" the "substance" of the contract, even if the "complaining part[y]" was negligent in not realizing its mistake, as long as its negligence did not fall below a standard of "reasonable prudence" and violate a legal duty, 3 Pomeroy §§ 856, 856b, at 334, 340–341. See *Baltzer*, 115 U. S., at 645; Eaton § 307(b).

Nor did equity courts insist upon a showing of detrimental reliance in cases where they ordered "surcharge." Rather, they simply ordered a trust or beneficiary made whole following a trustee's breach of trust. In such instances equity courts would "mold the relief to protect the rights of the beneficiary according to the situation involved." Bogert § 861, at 4. This flexible approach belies a strict requirement of "detrimental reliance."

To be sure, just as a court of equity would not surcharge a trustee for a nonexistent harm, 4 Scott & Ascher § 24.9, a fiduciary can be surcharged under § 502(a)(3) only upon a showing of actual harm—proved (under the default rule for civil cases) by a preponderance of the evidence. That actual harm may sometimes consist of detrimental reliance, but it might also come from the loss of a right protected by ERISA or its trust-law antecedents. In the present case, it is not difficult to imagine how the failure to provide proper summary information, in violation of the statute, injured employees even if they did not themselves act in reliance on summary documents—which they might not themselves have seen—for they may have thought fellow employees, or informal workplace discussion, would have let them know if, say, plan changes would likely prove harmful. We doubt that Congress would have wanted to bar those employees from relief.

The upshot is that we can agree with CIGNA only to a limited extent. We believe that, to obtain relief by surcharge for violations of §§ 102(a) and 104(b), a plan participant or beneficiary must show that the violation injured him or her. But to do so, he or she need only show harm and causation. Although it is not always necessary to meet the more rigorous standard implicit in the words "detrimental reliance," actual harm must be shown.

We are not asked to reassess the evidence. And we are not asked about the other prerequisites for relief. We are asked about the standard of prejudice. And we conclude

that the standard of prejudice must be borrowed from equitable principles, as modified by the obligations and injuries identified by ERISA itself. Information-related circumstances, violations, and injuries are potentially too various in nature to insist that harm must always meet that more vigorous "detrimental harm" standard when equity imposed no such strict requirement.

IV

We have premised our discussion in Part III on the need for the District Court to revisit its determination of an appropriate remedy for the violations of ERISA it identified. Whether or not the general principles we have discussed above are properly applicable in this case is for it or the Court of Appeals to determine in the first instance. Because the District Court has not determined if an appropriate remedy may be imposed under § 502(a)(3), we must vacate the judgment below and remand this case for further proceedings consistent with this opinion.

It is so ordered.

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

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

I agree with the Court that § 502(a)(1)(B) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U. S. C. § 1132(a)(1)(B), does not authorize relief for misrepresentations in a summary plan description (SPD). I do not join the Court's opinion because I see no need and no justification for saying anything more than that.

Section 502(a)(1)(B) of ERISA states that a plan participant or beneficiary may bring a civil action "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to

future benefits under the terms of the plan." ERISA defines the word "plan" as "an employee welfare benefit plan or an employee pension benefit plan or a plan which is both," 29 U. S. C. § 1002(3), and it requires that a "plan" "be established and maintained pursuant to a written instrument," § 1102(a)(1). An SPD, in contrast, is a disclosure meant "to reasonably apprise [plan] participants and beneficiaries of their rights and obligations under the plan." § 1022(a). It would be peculiar for a document meant to "apprise" participants of their rights *"under the plan"* to be itself part of the "plan." Any doubt that it is not is eliminated by ERISA's repeated differentiation of SPDs from the "written instruments" that constitute a plan, see, *e. g.*, §§ 1029(c), 1024(b)(2), and ERISA's assignment to different entities of responsibility for drafting and amending SPDs on the one hand and plans on the other, see §§ 1002(1), (2)(A); 1021(a) (2006 ed. and Supp. III), 1024(b)(1) (2006 ed.); *Beck* v. *PACE Int'l Union*, 551 U. S. 96, 101 (2007). An SPD, moreover, would not fulfill its purpose of providing an easily accessible summary of the plan if it were an authoritative part of the plan itself; the minor omissions appropriate for a summary would risk revising the plan.

Nothing else needs to be said to dispose of this case. The District Court based the relief it awarded upon ERISA § 502(a)(1)(B), and that provision alone. It thought that the "benefits" due "under the terms of the plan," 29 U. S. C. § 1132(a)(1)(B), could derive from an SPD, either because the SPD is part of the plan or because it is capable of somehow modifying the plan. Under either justification, that conclusion is wrong. An SPD is separate from a plan, and cannot amend a plan unless the plan so provides. See *Curtiss-Wright Corp.* v. *Schoonejongen*, 514 U. S. 73, 79, 85 (1995). I would go no further.

The Court, however, ventures on to address a different question: whether respondents may recover under § 502(a)(3) of ERISA, which allows plan participants "to obtain other

appropriate equitable relief." 29 U. S. C. § 1132(a)(3). The District Court expressly declined to answer this question, stating that it "need not consider whether any relief ordered under § 502(a)(1)(B) would also be available under § 502(a)(3)." 559 F. Supp. 2d 192, 205 (Conn. 2008). It did note that § 502(a)(3) might not help respondents because that provision authorizes only relief that was "'*typically* available in equity.'" *Ibid.* (quoting *Great-West Life & Annuity Ins. Co.* v. *Knudson*, 534 U. S. 204, 210 (2002); some internal quotation marks omitted). But it described this question as "particularly complicated," 559 F. Supp. 2d, at 205, and said that "in view of these knotty issues . . . the Court need not, and does not, decide whether Plaintiffs could obtain relief under § 502(a)(3)," *id.*, at 206.

It is assuredly not our normal practice to decide issues that a lower court "need not, and does not, decide," see *Cooper Industries, Inc.* v. *Aviall Services, Inc.*, 543 U. S. 157, 168–169 (2004), and this case presents no exceptional reason to do so. To the contrary, it presents additional reasons not to do so. *Mertens* v. *Hewitt Associates*, 508 U. S. 248 (1993), the case the District Court feared had "severely curtailed the kinds of relief . . . available under § 502(a)(3)," 559 F. Supp. 2d, at 205, is cited exactly one time in the parties' briefs—by the CIGNA petitioners for the utterly unrelated proposition that ERISA contains a "'carefully crafted and detailed enforcement scheme.'" Brief for Petitioners 2. And there is no discussion whatsoever of contract reformation or surcharge in the briefs of the parties or even *amici*.[1]

The opinion for the Court states that the District Court "strongly implied . . . that it would base its relief upon [§ 502(a)(3)] were it not for (1) the fact that . . . § 502(a)(1)(B) . . . provided sufficient authority; and (2) certain cases from

[1] "[P]lan reformation" makes an appearance in one sentence of one footnote of the Government's brief, see Brief for United States as *Amicus Curiae* 30, n. 9. This cameo hardly qualifies as "discussion."

this Court that narrowed the application of the term 'appropriate equitable relief.'" *Ante,* at 438. I find no such implication whatever—not even a weak one. The District Court simply said that § 502(a)(1)(B) provided relief, and that under our cases § 502(a)(3) might not do so. While some Members of this Court have sought to divine what legislators would have prescribed beyond what they did prescribe, none to my knowledge has hitherto sought to guess what district judges would have decided beyond what they did decide. And this, bear in mind, is not just a guess as to what the District Court would have done if it had known that its § 502(a)(1)(B) relief was (as we today hold) improper. The apparent answer to that is that it would have denied relief, since it thought itself constrained by "certain cases from this Court that [have] narrowed [§ 502(a)(3)]," *ante,* at 438. No, the course the Court guesses about is what the District Court would have done if it had known *both* that § 502(a)(1)(B) denies relief *and* that § 502(a)(3) provides it. This speculation upon speculation hardly renders our discussion of § 502(a)(3) relevant to the decision below; it is utterly irrelevant.

Why the Court embarks on this peculiar path is beyond me. It cannot even be explained by an eagerness to demonstrate—by blatant dictum, if necessary—that, by George, plan members misled by an SPD will be compensated. That they will normally be compensated is not in doubt. As the opinion for the Court notes, *ante,* at 432–433, the Second Circuit has interpreted ERISA as permitting the invalidation of plan amendments not preceded by proper notice, by reason of § 204(h), which reads:

> "An applicable pension plan may not be amended so as to provide for a significant reduction in the rate of future benefit accrual unless the plan administrator provides the notice described in paragraph (2) to each applicable individual . . . ." 29 U. S. C. § 1054(h)(1) (2006 ed., Supp. IV).

This provision appears a natural fit to respondents' claim, which is not that CIGNA was prohibited from changing its plan, but that CIGNA "failed to give them proper notice of changes to their benefits." *Ante*, at 424. It was inapplicable here only because of the peculiar facts of this case and the manner in which respondents chose to argue the case.[2]

Rather than attempting to read the District Judge's palm, I would simply remand. If the District Court dismisses the case based on an incorrect reading of *Mertens*, the Second Circuit can correct its error, and if the Second Circuit does not do so this Court can grant certiorari. The Court's discussion of the relief available under § 502(a)(3) and *Mertens* is purely dicta, binding upon neither us nor the District Court. The District Court need not read any of it—and, indeed, if it takes our suggestions to heart, we may very well reverse. Even if we adhere to our dicta that contract reformation, estoppel, and surcharge are " 'distinctively equitable' remedies," *ante*, at 440, it is far from clear that they are available remedies in this case. The opinion for the Court does not say (much less hold) that they are and disclaims the implication, see *ante*, at 442–443.

Contract reformation is a standard remedy for altering the terms of a writing that fails to express the agreement of the parties "owing to the fraud of one of the parties and mistake of the other." 27 R. Lord, Williston on Contracts § 69:55, p. 160 (4th ed. 2003). But here, the Court would be employing that doctrine to alter the terms of a contract in response to a third party's misrepresentations—not those of a party

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[2] The District Court found that § 204(h) was unhelpful because CIGNA had provided a valid notice of its decision to freeze benefits under the old plan. If the new plan were invalidated because of a defective § 204(h) notice, the freeze would return to force, and respondents would be worse off. Respondents might (and likely should) have argued that the notice for the freeze was itself void, but they "argued none of these things," and the District Court declined to "make these arguments now on [their] behalf." 559 F. Supp. 2d 192, 208 (Conn. 2008).

to the contract. The SPD is not part of the ERISA plan, and it was not written by the plan's sponsor. Although in this case CIGNA wrote both the plan and the SPD, it did so in different capacities: as sponsor when writing the plan, and as administrator when preparing the SPD. ERISA "carefully distinguishes these roles," *ante*, at 437; see also *Beck*, 551 U. S., at 101, and nothing the Court cites suggests that they blend together when performed by the same entity.

Admittedly, reformation might be available if the third party was an agent of a contracting party and its misrepresentations could thus be attributed to it under agency law. But such a relationship has not been alleged and is unlikely here. An ERISA administrator's duty to provide employees with an SPD arises by statute, 29 U. S. C. § 1024(b)(1) (2006 ed.), and not by reason of its relationship to the sponsor. The administrator is a legally distinct entity. Moreover, it is incoherent to think of the administrator as agent and the sponsor as principal. Were this the case, and were the administrator contracting with employees as an agent of the sponsor in producing the SPD, then the SPD would be part of the plan or would amend it—exactly what the opinion for the Court rejects in Part II–A, *ante*. And, in any event, SPDs may be furnished months after an employee accepts a pension or benefit plan. § 1024(b)(1). Reformation is meant to effectuate mutual intent at the time of contracting, and that intent is not retroactively revised by subsequent misstatements.

Equitable estoppel and surcharge are perhaps better suited to the facts of this case. CIGNA admits that respondents might be able to recover under § 502(a)(3) pursuant to an equitable estoppel theory, but it presumably makes this concession only because questions of reliance would be individualized and potentially inappropriate for class-action treatment. Surcharge (which CIGNA does not concede and which is not briefed) may encounter the same problem. The amount for which an administrator may be surcharged is, as

the opinion for the Court notes, the "actual harm" suffered by an employee, *ante*, at 444—that is, harm stemming from reliance on the SPD or the lost opportunity to contest or react to the switch. Cf. 3 A. Scott & W. Fratcher, Law of Trusts § 205, pp. 237–243 (4th ed. 1988). A remedy relating only to that harm would of course be far different from what the District Court imposed.[3]

* * *

I agree with the Court that an SPD is not part of an ERISA plan, and that, as a result, a plan participant or beneficiary may not recover for misrepresentations in an SPD under § 502(a)(1)(B). Because this is the only question properly presented for our review, and the only question briefed and argued before us, I concur only in the judgment.

[3] It is also not obvious that the relief sought in this case would constitute an equitable surcharge allowable under *Mertens* v. *Hewitt Associates*, 508 U. S. 248 (1993). Cf. *Knieriem* v. *Group Health Plan, Inc.*, 434 F. 3d 1058, 1063–1064 (CA8 2006). This question, however, like the Court's entire discussion of § 502(a)(3), is best left for a case in which the issue is raised and briefed.

Syllabus

KENTUCKY *v.* KING

CERTIORARI TO THE SUPREME COURT OF KENTUCKY

No. 09–1272. Argued January 12, 2011—Decided May 16, 2011

Police officers in Lexington, Kentucky, followed a suspected drug dealer to an apartment complex. They smelled marijuana outside an apartment door, knocked loudly, and announced their presence. As soon as the officers began knocking, they heard noises coming from the apartment; the officers believed that these noises were consistent with the destruction of evidence. The officers announced their intent to enter the apartment, kicked in the door, and found respondent and others. They saw drugs in plain view during a protective sweep of the apartment and found additional evidence during a subsequent search. The Circuit Court denied respondent's motion to suppress the evidence, holding that exigent circumstances—the need to prevent destruction of evidence—justified the warrantless entry. Respondent entered a conditional guilty plea, reserving his right to appeal the suppression ruling, and the Kentucky Court of Appeals affirmed. The Supreme Court of Kentucky reversed. The court assumed that exigent circumstances existed, but it nonetheless invalidated the search. The exigent circumstances rule did not apply, the court held, because the police should have foreseen that their conduct would prompt the occupants to attempt to destroy evidence.

Held:

1. The exigent circumstances rule applies when the police do not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment. Pp. 459–470.

(a) The Fourth Amendment expressly imposes two requirements: All searches and seizures must be reasonable; and a warrant may not be issued unless probable cause is properly established and the scope of the authorized search is set out with particularity. Although " 'searches and seizures inside a home without a warrant are presumptively unreasonable,' " *Brigham City* v. *Stuart*, 547 U. S. 398, 403, this presumption may be overcome when " 'the exigencies of the situation' make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment," *Mincey* v. *Arizona*, 437 U. S. 385, 394. One such exigency is the need "to prevent the imminent destruction of evidence." *Brigham City*, *supra*, at 403. Pp. 459–460.

(b) Under the "police-created exigency" doctrine, which lower courts have developed as an exception to the exigent circumstances rule,

exigent circumstances do not justify a warrantless search when the exigency was "created" or "manufactured" by the conduct of the police. The lower courts have not agreed, however, on the test for determining when police impermissibly create an exigency. Pp. 461–462.

(c) The proper test follows from the principle that permits warrantless searches: Warrantless searches are allowed when the circumstances make it reasonable, within the meaning of the Fourth Amendment, to dispense with the warrant requirement. Thus, a warrantless entry based on exigent circumstances is reasonable when the police did not create the exigency by engaging or threatening to engage in conduct violating the Fourth Amendment. A similar approach has been taken in other cases involving warrantless searches. For example, officers may seize evidence in plain view if they have not violated the Fourth Amendment in arriving at the spot from which the observation of the evidence is made, see *Horton* v. *California*, 496 U. S. 128, 136–140; and they may seek consent-based encounters if they are lawfully present in the place where the consensual encounter occurs, see *INS* v. *Delgado*, 466 U. S. 210, 217, n. 5. Pp. 462–463.

(d) Some courts, including the Kentucky Supreme Court, have imposed additional requirements—asking whether officers "'deliberately created the exigent circumstances with the bad faith intent to avoid the warrant requirement,'" 302 S. W. 3d 649, 656 (case below); reasoning that police may not rely on an exigency if "'it was reasonably foreseeable that [their] investigative tactics . . . would create the exigent circumstances,'" *ibid.;* faulting officers for knocking on a door when they had sufficient evidence to seek a warrant but did not do so; and finding that officers created or manufactured an exigency when their investigation was contrary to standard or good law enforcement practices. Such requirements are unsound and are thus rejected. Pp. 463–468.

(e) Respondent contends that an exigency is impermissibly created when officers engage in conduct that would cause a reasonable person to believe that entry was imminent and inevitable, but that approach is also flawed. The ability of officers to respond to an exigency cannot turn on such subtleties as the officers' tone of voice in announcing their presence and the forcefulness of their knocks. A forceful knock may be necessary to alert the occupants that someone is at the door, and unless officers identify themselves loudly enough, occupants may not know who is at their doorstep. Respondent's test would make it extremely difficult for officers to know how loudly they may announce their presence or how forcefully they may knock without running afoul of the police-created exigency rule. And in most cases, it would be nearly impossible for a court to determine whether that threshold had been passed. Pp. 468–469.

Syllabus

2. Assuming that an exigency existed here, there is no evidence that the officers either violated the Fourth Amendment or threatened to do so prior to the point when they entered the apartment. Pp. 470–472.

(a) Any question about whether an exigency existed here is better addressed by the Kentucky Supreme Court on remand. Pp. 470–471.

(b) Assuming an exigency did exist, the officers' conduct—banging on the door and announcing their presence—was entirely consistent with the Fourth Amendment. Respondent has pointed to no evidence supporting his argument that the officers made any sort of "demand" to enter the apartment, much less a demand that amounts to a threat to violate the Fourth Amendment. If there is contradictory evidence that has not been brought to this Court's attention, the state court may elect to address that matter on remand. Finally, the record makes clear that the officers' announcement that they were going to enter the apartment was made after the exigency arose. Pp. 471–472.

302 S. W. 3d 649, reversed and remanded.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, THOMAS, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. GINSBURG, J., filed a dissenting opinion, *post*, p. 473.

Joshua D. Farley, Assistant Attorney General of Kentucky, argued the cause for petitioner. With him on the briefs were *Jack Conway*, Attorney General, and *Bryan D. Morrow*, Assistant Attorney General.

Ann O'Connell argued the cause for the United States as *amicus curiae* urging reversal. With her on the brief were *Acting Solicitor General Katyal*, *Assistant Attorneys General Kris* and *Breuer*, *Acting Deputy Solicitor General McLeese*, and *John F. De Pue*.

Jamesa J. Drake argued the cause for respondent. With her on the brief were *Jeffrey T. Green* and *Sarah O'Rourke Schrup*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Indiana et al. by *Gregory F. Zoeller*, Attorney General of Indiana, *Thomas M. Fisher*, Solicitor General, and *Heather L. Hagan* and *Ashley Tatman Harwel*, Deputy Attorneys General, and by the Attorneys General for their respective States as follows: *Troy King* of Alabama, *Terry Goddard* of Arizona, *John W. Suthers* of Colorado, *Joseph R. Biden III* of Delaware, *Bill McCollum* of Florida, *Mark J. Bennett* of Hawaii, *Lawrence G. Was-*

JUSTICE ALITO delivered the opinion of the Court.

It is well established that "exigent circumstances," including the need to prevent the destruction of evidence, permit police officers to conduct an otherwise permissible search without first obtaining a warrant. In this case, we consider whether this rule applies when police, by knocking on the door of a residence and announcing their presence, cause the occupants to attempt to destroy evidence. The Kentucky Supreme Court held that the exigent circumstances rule does not apply in the case at hand because the police should have foreseen that their conduct would prompt the occupants to attempt to destroy evidence. We reject this interpretation of the exigent circumstances rule. The conduct of the police prior to their entry into the apartment was entirely lawful. They did not violate the Fourth Amendment or threaten to do so. In such a situation, the exigent circumstances rule applies.

I

A

This case concerns the search of an apartment in Lexington, Kentucky. Police officers set up a controlled buy of crack cocaine outside an apartment complex. Undercover

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den of Idaho, *Lisa Madigan* of Illinois, *Tom Miller* of Iowa, *Steve Six* of Kansas, *James D. "Buddy" Caldwell* of Louisiana, *Douglas F. Gansler* of Maryland, *Martha Coakley* of Massachusetts, *Michael A. Cox* of Michigan, *Steve Bullock* of Montana, *Catherine Cortez Masto* of Nevada, *Paula T. Dow* of New Jersey, *Gary King* of New Mexico, *Wayne Stenehjem* of North Dakota, *Richard Cordray* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *John R. Kroger* of Oregon, *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 Sorrell* of Vermont, *Kenneth T. Cuccinelli II* of Virginia, *Robert M. McKenna* of Washington, *J. B. Van Hollen* of Wisconsin, and *Bruce A. Salzburg* of Wyoming; and for Americans for Effective Law Enforcement, Inc., et al. by *Wayne W. Schmidt*, *James P. Manak*, *Richard Weintraub*, and *Eric P. Daigle*.

Officer Gibbons watched the deal take place from an unmarked car in a nearby parking lot. After the deal occurred, Gibbons radioed uniformed officers to move in on the suspect. He told the officers that the suspect was moving quickly toward the breezeway of an apartment building, and he urged them to "hurry up and get there" before the suspect entered an apartment. App. 20.

In response to the radio alert, the uniformed officers drove into the nearby parking lot, left their vehicles, and ran to the breezeway. Just as they entered the breezeway, they heard a door shut and detected a very strong odor of burnt marijuana. At the end of the breezeway, the officers saw two apartments, one on the left and one on the right, and they did not know which apartment the suspect had entered. Gibbons had radioed that the suspect was running into the apartment on the right, but the officers did not hear this statement because they had already left their vehicles. Because they smelled marijuana smoke emanating from the apartment on the left, they approached the door of that apartment.

Officer Steven Cobb, one of the uniformed officers who approached the door, testified that the officers banged on the left apartment door "as loud as [they] could" and announced, "'This is the police'" or "'Police, police, police.'" *Id.*, at 22–23. Cobb said that "[a]s soon as [the officers] started banging on the door," they "could hear people inside moving," and "[i]t sounded as [though] things were being moved inside the apartment." *Id.*, at 24. These noises, Cobb testified, led the officers to believe that drug-related evidence was about to be destroyed.

At that point, the officers announced that they "were going to make entry inside the apartment." *Ibid.* Cobb then kicked in the door, the officers entered the apartment, and they found three people in the front room: respondent Hollis King, respondent's girlfriend, and a guest who was smoking

marijuana.[1] The officers performed a protective sweep of the apartment during which they saw marijuana and powder cocaine in plain view. In a subsequent search, they also discovered crack cocaine, cash, and drug paraphernalia.

Police eventually entered the apartment on the right. Inside, they found the suspected drug dealer who was the initial target of their investigation.

B

In the Fayette County Circuit Court, a grand jury charged respondent with trafficking in marijuana, first-degree trafficking in a controlled substance, and second-degree persistent felony offender status. Respondent filed a motion to suppress the evidence from the warrantless search, but the Circuit Court denied the motion. The Circuit Court concluded that the officers had probable cause to investigate the marijuana odor and that the officers "properly conducted [the investigation] by initially knocking on the door of the apartment unit and awaiting the response or consensual entry." App. to Pet. for Cert. 9a. Exigent circumstances justified the warrantless entry, the court held, because "there was no response at all to the knocking," and because "Officer Cobb heard movement in the apartment which he reasonably concluded were persons in the act of destroying evidence, particularly narcotics because of the smell." *Ibid.* Respondent then entered a conditional guilty plea, reserving his right to appeal the denial of his suppression motion. The court sentenced respondent to 11 years' imprisonment.

The Kentucky Court of Appeals affirmed. It held that exigent circumstances justified the warrantless entry be-

[1] Respondent's girlfriend leased the apartment, but respondent stayed there part of the time, and his child lived there. Based on these facts, Kentucky conceded in state court that respondent has Fourth Amendment standing to challenge the search. See App. to Pet. for Cert. 7a; see also 302 S. W. 3d 649, 652 (Ky. 2010).

cause the police reasonably believed that evidence would be destroyed. The police did not impermissibly create the exigency, the court explained, because they did not deliberately evade the warrant requirement.

The Supreme Court of Kentucky reversed. 302 S. W. 3d 649 (2010). As a preliminary matter, the court observed that there was "certainly some question as to whether the sound of persons moving [inside the apartment] was sufficient to establish that evidence was being destroyed." *Id.*, at 655. But the court did not answer that question. Instead, it "assume[d] for the purpose of argument that exigent circumstances existed." *Ibid.*

To determine whether police impermissibly created the exigency, the Supreme Court of Kentucky announced a two-part test. First, the court held, police cannot "deliberately creat[e] the exigent circumstances with the bad faith intent to avoid the warrant requirement." *Id.*, at 656 (internal quotation marks omitted). Second, even absent bad faith, the court concluded, police may not rely on exigent circumstances if "it was reasonably foreseeable that the investigative tactics employed by the police would create the exigent circumstances." *Ibid.* (internal quotation marks omitted). Although the court found no evidence of bad faith, it held that exigent circumstances could not justify the search because it was reasonably foreseeable that the occupants would destroy evidence when the police knocked on the door and announced their presence. *Ibid.*

We granted certiorari. 561 U. S. 1057 (2010).[2]

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[2] After we granted certiorari, respondent filed a motion to dismiss the petition as improvidently granted, which we denied. 562 U. S. 1042 (2010). Respondent's principal argument was that the case was moot because, after the Kentucky Supreme Court reversed his conviction, the Circuit Court dismissed the charges against him. Respondent's argument is foreclosed by *United States* v. *Villamonte-Marquez*, 462 U. S. 579, 581, n. 2 (1983). As we explained in *Villamonte-Marquez*, our reversal of the Kentucky Supreme Court's decision "would reinstate the judgment of conviction and the sentence entered" by the Circuit Court. *Ibid.* The absence

II

A

The Fourth Amendment provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The text of the Amendment thus expressly imposes two requirements. First, all searches and seizures must be reasonable. Second, a warrant may not be issued unless probable cause is properly established and the scope of the authorized search is set out with particularity. See *Payton* v. *New York*, 445 U. S. 573, 584 (1980).

Although the text of the Fourth Amendment does not specify when a search warrant must be obtained, this Court has inferred that a warrant must generally be secured. "It is a 'basic principle of Fourth Amendment law,'" we have often said, "'that searches and seizures inside a home without a warrant are presumptively unreasonable.'" *Brigham City* v. *Stuart*, 547 U. S. 398, 403 (2006) (quoting *Groh* v. *Ramirez*, 540 U. S. 551, 559 (2004)). But we have also recognized that this presumption may be overcome in some circumstances because "the ultimate touchstone of the Fourth Amendment is 'reasonableness.'" *Brigham City*, *supra*, at 403; see also *Michigan* v. *Fisher*, 558 U. S. 45, 47 (2009) *(per curiam)*. Accordingly, the warrant requirement is subject to certain reasonable exceptions. *Brigham City*, *supra*, at 403.

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of an indictment does not change matters. See *ibid.* ("Upon respondents' conviction and sentence, the indictment that was returned against them was merged into their convictions and sentences").

One well-recognized exception applies when "'the exigencies of the situation' make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment." *Mincey* v. *Arizona*, 437 U. S. 385, 394 (1978); see also *Payton*, *supra*, at 590 ("[T]he Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant").

This Court has identified several exigencies that may justify a warrantless search of a home. See *Brigham City*, 547 U. S., at 403. Under the "emergency aid" exception, for example, "officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury." *Ibid.;* see also, *e. g.*, *Fisher*, *supra*, at 49 (upholding warrantless home entry based on emergency aid exception). Police officers may enter premises without a warrant when they are in hot pursuit of a fleeing suspect. See *United States* v. *Santana*, 427 U. S. 38, 42–43 (1976). And—what is relevant here—the need "to prevent the imminent destruction of evidence" has long been recognized as a sufficient justification for a warrantless search. *Brigham City*, *supra*, at 403; see also *Georgia* v. *Randolph*, 547 U. S. 103, 116, n. 6 (2006); *Minnesota* v. *Olson*, 495 U. S. 91, 100 (1990).[3]

[3] Preventing the destruction of evidence may also justify dispensing with Fourth Amendment requirements in other contexts. See, *e. g.*, *Richards* v. *Wisconsin*, 520 U. S. 385, 395–396 (1997) (failure to comply with the knock-and-announce requirement was justified because "the circumstances . . . show[ed] that the officers had a reasonable suspicion that [a suspect] might destroy evidence if given further opportunity to do so"); *Schmerber* v. *California*, 384 U. S. 757, 770–771 (1966) (warrantless testing for blood-alcohol content was justified based on potential destruction of evidence); cf. *United States* v. *Banks*, 540 U. S. 31, 37–40 (2003) (15 to 20 seconds was a reasonable time for officers to wait after knocking and announcing their presence where there was a risk that suspect would dispose of cocaine).

B

Over the years, lower courts have developed an exception to the exigent circumstances rule, the so-called "police-created exigency" doctrine. Under this doctrine, police may not rely on the need to prevent destruction of evidence when that exigency was "created" or "manufactured" by the conduct of the police. See, *e. g.*, *United States* v. *Chambers*, 395 F. 3d 563, 566 (CA6 2005) ("[F]or a warrantless search to stand, law enforcement officers must be responding to an unanticipated exigency rather than simply creating the exigency for themselves"); *United States* v. *Gould*, 364 F. 3d 578, 590 (CA5 2004) (en banc) ("[A]lthough exigent circumstances may justify a warrantless probable cause entry into the home, they will not do so if the exigent circumstances were manufactured by the agents" (internal quotation marks omitted)).

In applying this exception for the "creation" or "manufacturing" of an exigency by the police, courts require something more than mere proof that fear of detection by the police caused the destruction of evidence. An additional showing is obviously needed because, as the Eighth Circuit has recognized, "in some sense the police always create the exigent circumstances." *United States* v. *Duchi*, 906 F. 2d 1278, 1284 (1990). That is to say, in the vast majority of cases in which evidence is destroyed by persons who are engaged in illegal conduct, the reason for the destruction is fear that the evidence will fall into the hands of law enforcement. Destruction of evidence issues probably occur most frequently in drug cases because drugs may be easily destroyed by flushing them down a toilet or rinsing them down a drain. Persons in possession of valuable drugs are unlikely to destroy them unless they fear discovery by the police. Consequently, a rule that precludes the police from making a warrantless entry to prevent the destruction of evidence whenever their conduct causes the exigency would

unreasonably shrink the reach of this well-established exception to the warrant requirement.

Presumably for the purpose of avoiding such a result, the lower courts have held that the police-created exigency doctrine requires more than simple causation, but the lower courts have not agreed on the test to be applied. Indeed, the petition in this case maintains that "[t]here are currently five different tests being used by the United States Courts of Appeals," Pet. for Cert. 11, and that some state courts have crafted additional tests, *id.*, at 19–20.

III

A

Despite the welter of tests devised by the lower courts, the answer to the question presented in this case follows directly and clearly from the principle that permits warrantless searches in the first place. As previously noted, warrantless searches are allowed when the circumstances make it reasonable, within the meaning of the Fourth Amendment, to dispense with the warrant requirement. Therefore, the answer to the question before us is that the exigent circumstances rule justifies a warrantless search when the conduct of the police preceding the exigency is reasonable in the same sense. Where, as here, the police did not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment, warrantless entry to prevent the destruction of evidence is reasonable and thus allowed.[4]

We have taken a similar approach in other cases involving warrantless searches. For example, we have held that law

[4] There is a strong argument to be made that, at least in most circumstances, the exigent circumstances rule should not apply where the police, without a warrant or any legally sound basis for a warrantless entry, threaten that they will enter without permission unless admitted. In this case, however, no such actual threat was made, and therefore we have no need to reach that question.

enforcement officers may seize evidence in plain view, provided that they have not violated the Fourth Amendment in arriving at the spot from which the observation of the evidence is made. See *Horton* v. *California*, 496 U. S. 128, 136–140 (1990). As we put it in *Horton*, "[i]t is . . . an essential predicate to any valid warrantless seizure of incriminating evidence that the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed." *Id.*, at 136. So long as this prerequisite is satisfied, however, it does not matter that the officer who makes the observation may have gone to the spot from which the evidence was seen with the hope of being able to view and seize the evidence. See *id.*, at 138 ("The fact that an officer is interested in an item of evidence and fully expects to find it in the course of a search should not invalidate its seizure"). Instead, the Fourth Amendment requires only that the steps preceding the seizure be lawful. See *id.*, at 136–137.

Similarly, officers may seek consent-based encounters if they are lawfully present in the place where the consensual encounter occurs. See *INS* v. *Delgado*, 466 U. S. 210, 217, n. 5 (1984) (noting that officers who entered into consent-based encounters with employees in a factory building were "lawfully present [in the factory] pursuant to consent or a warrant"). If consent is freely given, it makes no difference that an officer may have approached the person with the hope or expectation of obtaining consent. See *id.*, at 216 ("While most citizens will respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response").

B

Some lower courts have adopted a rule that is similar to the one that we recognize today. See *United States* v. *MacDonald*, 916 F. 2d 766, 772 (CA2 1990) (en banc) (law enforcement officers "do not impermissibly create exigent circum-

stances" when they "act in an entirely lawful manner"); *State* v. *Robinson*, 2010 WI 80, ¶ 32, 327 Wis. 2d 302, 326–328, 786 N. W. 2d 463, 475–476 (2010). But others, including the Kentucky Supreme Court, have imposed additional requirements that are unsound and that we now reject.

Bad faith. Some courts, including the Kentucky Supreme Court, ask whether law enforcement officers "'deliberately created the exigent circumstances with the bad faith intent to avoid the warrant requirement.'" 302 S. W. 3d, at 656 (quoting *Gould*, 364 F. 3d, at 590); see also, *e. g.*, *Chambers*, 395 F. 3d, at 566; *United States* v. *Socey*, 846 F. 2d 1439, 1448 (CADC 1988); *United States* v. *Rengifo*, 858 F. 2d 800, 804 (CA1 1988).

This approach is fundamentally inconsistent with our Fourth Amendment jurisprudence. "Our cases have repeatedly rejected" a subjective approach, asking only whether "the circumstances, viewed *objectively*, justify the action." *Brigham City*, 547 U. S., at 404 (alteration and internal quotation marks omitted); see also *Fisher*, 558 U. S., at 47–49. Indeed, we have never held, outside limited contexts such as an "inventory search or administrative inspection . . . , that an officer's motive invalidates objectively justifiable behavior under the Fourth Amendment." *Whren* v. *United States*, 517 U. S. 806, 812 (1996); see also *Brigham City*, *supra*, at 405.

The reasons for looking to objective factors, rather than subjective intent, are clear. Legal tests based on reasonableness are generally objective, and this Court has long taken the view that "evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer." *Horton*, *supra*, at 138.

Reasonable foreseeability. Some courts, again including the Kentucky Supreme Court, hold that police may not rely on an exigency if "'it was reasonably foreseeable that the investigative tactics employed by the police would create the

exigent circumstances.'" 302 S. W. 3d, at 656 (quoting *Mann* v. *State*, 357 Ark. 159, 172, 161 S. W. 3d 826, 834 (2004)); see also, *e. g.*, *United States* v. *Mowatt*, 513 F. 3d 395, 402 (CA4 2008). Courts applying this test have invalidated warrantless home searches on the ground that it was reasonably foreseeable that police officers, by knocking on the door and announcing their presence, would lead a drug suspect to destroy evidence. See, *e. g.*, *id.*, at 402–403; 302 S. W. 3d, at 656.

Contrary to this reasoning, however, we have rejected the notion that police may seize evidence without a warrant only when they come across the evidence by happenstance. In *Horton*, as noted, we held that the police may seize evidence in plain view even though the officers may be "interested in an item of evidence and fully expec[t] to find it in the course of a search." 496 U. S., at 138.

Adoption of a reasonable foreseeability test would also introduce an unacceptable degree of unpredictability. For example, whenever law enforcement officers knock on the door of premises occupied by a person who may be involved in the drug trade, there is *some* possibility that the occupants may possess drugs and may seek to destroy them. Under a reasonable foreseeability test, it would be necessary to quantify the degree of predictability that must be reached before the police-created exigency doctrine comes into play.

A simple example illustrates the difficulties that such an approach would produce. Suppose that the officers in the present case did not smell marijuana smoke and thus knew only that there was a 50% chance that the fleeing suspect had entered the apartment on the left rather than the apartment on the right. Under those circumstances, would it have been reasonably foreseeable that the occupants of the apartment on the left would seek to destroy evidence upon learning that the police were at the door? Or suppose that the officers knew only that the suspect had disappeared into one of the apartments on a floor with 3, 5, 10, or even 20

units? If the police chose a door at random and knocked for the purpose of asking the occupants if they knew a person who fit the description of the suspect, would it have been reasonably foreseeable that the occupants would seek to destroy evidence?

We have noted that "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving." *Graham* v. *Connor*, 490 U. S. 386, 396–397 (1989). The reasonable foreseeability test would create unacceptable and unwarranted difficulties for law enforcement officers who must make quick decisions in the field, as well as for judges who would be required to determine after the fact whether the destruction of evidence in response to a knock on the door was reasonably foreseeable based on what the officers knew at the time.

Probable cause and time to secure a warrant. Some courts, in applying the police-created exigency doctrine, fault law enforcement officers if, after acquiring evidence that is sufficient to establish probable cause to search particular premises, the officers do not seek a warrant but instead knock on the door and seek either to speak with an occupant or to obtain consent to search. See, *e. g.*, *Chambers*, *supra*, at 569 (citing "[t]he failure to seek a warrant in the face of plentiful probable cause" as a factor indicating that the police deliberately created the exigency).

This approach unjustifiably interferes with legitimate law enforcement strategies. There are many entirely proper reasons why police may not want to seek a search warrant as soon as the bare minimum of evidence needed to establish probable cause is acquired. Without attempting to provide a comprehensive list of these reasons, we note a few.

First, the police may wish to speak with the occupants of a dwelling before deciding whether it is worthwhile to seek authorization for a search. They may think that a short and simple conversation may obviate the need to apply for and

execute a warrant. See *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 228 (1973). Second, the police may want to ask an occupant of the premises for consent to search because doing so is simpler, faster, and less burdensome than applying for a warrant. A consensual search also "may result in considerably less inconvenience" and embarrassment to the occupants than a search conducted pursuant to a warrant. *Ibid.* Third, law enforcement officers may wish to obtain more evidence before submitting what might otherwise be considered a marginal warrant application. Fourth, prosecutors may wish to wait until they acquire evidence that can justify a search that is broader in scope than the search that a judicial officer is likely to authorize based on the evidence then available. And finally, in many cases, law enforcement may not want to execute a search that will disclose the existence of an investigation because doing so may interfere with the acquisition of additional evidence against those already under suspicion or evidence about additional but as yet unknown participants in a criminal scheme.

We have said that "[l]aw enforcement officers are under no constitutional duty to call a halt to criminal investigation the moment they have the minimum evidence to establish probable cause." *Hoffa* v. *United States*, 385 U. S. 293, 310 (1966). Faulting the police for failing to apply for a search warrant at the earliest possible time after obtaining probable cause imposes a duty that is nowhere to be found in the Constitution.

Standard or good investigative tactics. Finally, some lower court cases suggest that law enforcement officers may be found to have created or manufactured an exigency if the court concludes that the course of their investigation was "contrary to standard or good law enforcement practices (or to the policies or practices of their jurisdictions)." *Gould*, 364 F. 3d, at 591. This approach fails to provide clear guidance for law enforcement officers and authorizes courts to make judgments on matters that are the province of those

who are responsible for federal and state law enforcement agencies.

C

Respondent argues for a rule that differs from those discussed above, but his rule is also flawed. Respondent contends that law enforcement officers impermissibly create an exigency when they "engage in conduct that would cause a reasonable person to believe that entry is imminent and inevitable." Brief for Respondent 24. In respondent's view, relevant factors include the officers' tone of voice in announcing their presence and the forcefulness of their knocks. But the ability of law enforcement officers to respond to an exigency cannot turn on such subtleties.

Police officers may have a very good reason to announce their presence loudly and to knock on the door with some force. A forceful knock may be necessary to alert the occupants that someone is at the door. Cf. *United States* v. *Banks*, 540 U. S. 31, 33 (2003) (Police "rapped hard enough on the door to be heard by officers at the back door" and announced their presence, but defendant "was in the shower and testified that he heard nothing"). Furthermore, unless police officers identify themselves loudly enough, occupants may not know who is at their doorstep. Officers are permitted—indeed, encouraged—to identify themselves to citizens, and "in many circumstances this is cause for assurance, not discomfort." *United States* v. *Drayton*, 536 U. S. 194, 204 (2002). Citizens who are startled by an unexpected knock on the door or by the sight of unknown persons in plain clothes on their doorstep may be relieved to learn that these persons are police officers. Others may appreciate the opportunity to make an informed decision about whether to answer the door to the police.

If respondent's test were adopted, it would be extremely difficult for police officers to know how loudly they may announce their presence or how forcefully they may knock on a door without running afoul of the police-created exigency

rule. And in most cases, it would be nearly impossible for a court to determine whether that threshold had been passed. The Fourth Amendment does not require the nebulous and impractical test that respondent proposes.[5]

D

For these reasons, we conclude that the exigent circumstances rule applies when the police do not gain entry to premises by means of an actual or threatened violation of the Fourth Amendment. This holding provides ample protection for the privacy rights that the Amendment protects.

When law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do. And whether the person who knocks on the door and requests the opportunity to speak is a police officer or a private citizen, the occupant has no obligation to

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[5] Contrary to respondent's argument, see Brief for Respondent 13–18, *Johnson* v. *United States*, 333 U. S. 10 (1948), does not require affirmance in this case. In *Johnson*, officers noticed the smell of burning opium emanating from a hotel room. They then knocked on the door and demanded entry. Upon seeing that Johnson was the only occupant of the room, they placed her under arrest, searched the room, and discovered opium and drug paraphernalia. *Id.*, at 11.

Defending the legality of the search, the Government attempted to justify the warrantless search of the room as a valid search incident to a lawful arrest. See Brief for United States in *Johnson* v. *United States*, O. T. 1947, No. 329, pp. 13, 16, 36. The Government did not contend that the officers entered the room in order to prevent the destruction of evidence. Although the officers said that they heard a "'shuffling'" noise inside the room after they knocked on the door, 333 U. S., at 12, the Government did not claim that this particular noise was a noise that would have led a reasonable officer to think that evidence was about to be destroyed. Thus, *Johnson* is simply not a case about exigent circumstances. See *id.*, at 14–15 (noting that if "exceptional circumstances" existed—for example, if a "suspect was fleeing or likely to take flight" or if "evidence or contraband was threatened with removal or destruction"—then "it may be contended that a magistrate's warrant for search may be dispensed with").

open the door or to speak. Cf. *Florida* v. *Royer*, 460 U. S. 491, 497–498 (1983) ("[H]e may decline to listen to the questions at all and may go on his way"). When the police knock on a door but the occupants choose not to respond or to speak, "the investigation will have reached a conspicuously low point," and the occupants "will have the kind of warning that even the most elaborate security system cannot provide." *Chambers*, 395 F. 3d, at 577 (Sutton, J., dissenting). And even if an occupant chooses to open the door and speak with the officers, the occupant need not allow the officers to enter the premises and may refuse to answer any questions at any time.

Occupants who choose not to stand on their constitutional rights but instead elect to attempt to destroy evidence have only themselves to blame for the warrantless exigent circumstances search that may ensue.

IV

We now apply our interpretation of the police-created exigency doctrine to the facts of this case.

A

We need not decide whether exigent circumstances existed in this case. Any warrantless entry based on exigent circumstances must, of course, be supported by a genuine exigency. See *Brigham City*, 547 U. S., at 406. The trial court and the Kentucky Court of Appeals found that there was a real exigency in this case, but the Kentucky Supreme Court expressed doubt on this issue, observing that there was "certainly some question as to whether the sound of persons moving [inside the apartment] was sufficient to establish that evidence was being destroyed." 302 S. W. 3d, at 655. The Kentucky Supreme Court "assum[ed] for the purpose of argument that exigent circumstances existed," *ibid.*, and it held that the police had impermissibly manufactured the exigency.

We, too, assume for purposes of argument that an exigency existed. We decide only the question on which the Kentucky Supreme Court ruled and on which we granted certiorari: Under what circumstances do police impermissibly create an exigency? Any question about whether an exigency actually existed is better addressed by the Kentucky Supreme Court on remand. See *Kirk* v. *Louisiana*, 536 U. S. 635, 638 (2002) *(per curiam)* (reversing state-court judgment that exigent circumstances were not required for warrantless home entry and remanding for state court to determine whether exigent circumstances were present).

B

In this case, we see no evidence that the officers either violated the Fourth Amendment or threatened to do so prior to the point when they entered the apartment. Officer Cobb testified without contradiction that the officers "banged on the door as loud as [they] could" and announced either "'Police, police, police'" or "'This is the police.'" App. 22–23. This conduct was entirely consistent with the Fourth Amendment, and we are aware of no other evidence that might show that the officers either violated the Fourth Amendment or threatened to do so (for example, by announcing that they would break down the door if the occupants did not open the door voluntarily).

Respondent argues that the officers "demanded" entry to the apartment, but he has not pointed to any evidence in the record that supports this assertion. He relies on a passing statement made by the trial court in its opinion denying respondent's motion to suppress. See App. to Pet. for Cert. 3a–4a. In recounting the events that preceded the search, the judge wrote that the officers "banged on the door of the apartment on the back left of the breezeway identifying themselves as police officers and *demanding* that the door be opened by the persons inside." *Ibid.* (emphasis added and deleted). However, at a later point in this opinion, the

judge stated that the officers "initially knock[ed] on the door of the apartment unit and await[ed] the response or consensual entry." *Id.*, at 9a. This later statement is consistent with the testimony at the suppression hearing and with the findings of the state appellate courts. See 302 S. W. 3d, at 651 (The officers "knocked loudly on the back left apartment door and announced 'police'"); App. to Pet. for Cert. 14a (The officers "knock[ed] on the door and announc[ed] themselves as police"); App. 22–24. There is no evidence of a "demand" of any sort, much less a demand that amounts to a threat to violate the Fourth Amendment. If there is contradictory evidence that has not been brought to our attention, the state court may elect to address that matter on remand.

Finally, respondent claims that the officers "explained to [the occupants that the officers] were going to make entry inside the apartment," *id.*, at 24, but the record is clear that the officers did not make this statement until after the exigency arose. As Officer Cobb testified, the officers "knew that there was possibly something that was going to be destroyed inside the apartment," and "*[a]t that point*, . . . [they] explained . . . [that they] were going to make entry." *Ibid.* (emphasis added). Given that this announcement was made *after* the exigency arose, it could not have created the exigency.

* * *

Like the court below, we assume for purposes of argument that an exigency existed. Because the officers in this case did not violate or threaten to violate the Fourth Amendment prior to the exigency, we hold that the exigency justified the warrantless search of the apartment.

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

It is so ordered.

JUSTICE GINSBURG, dissenting.

The Court today arms the police with a way routinely to dishonor the Fourth Amendment's warrant requirement in drug cases. In lieu of presenting their evidence to a neutral magistrate, police officers may now knock, listen, then break the door down, never mind that they had ample time to obtain a warrant. I dissent from the Court's reduction of the Fourth Amendment's force.

The Fourth Amendment guarantees to the people "[t]he right . . . to be secure in their . . . houses . . . against unreasonable searches and seizures." Warrants to search, the Amendment further instructs, shall issue only upon a showing of "probable cause" to believe criminal activity is afoot. These complementary provisions are designed to ensure that police will seek the authorization of a neutral magistrate before undertaking a search or seizure. Exceptions to the warrant requirement, this Court has explained, must be "few in number and carefully delineated," if the main rule is to remain hardy. *United States* v. *United States Dist. Court for Eastern Dist. of Mich.*, 407 U. S. 297, 318 (1972); see *Kyllo* v. *United States*, 533 U. S. 27, 31 (2001).

This case involves a principal exception to the warrant requirement, the exception applicable in "exigent circumstances." See *ante*, at 460. "[C]arefully delineated," the exception should govern only in genuine emergency situations. Circumstances qualify as "exigent" when there is an imminent risk of death or serious injury, or danger that evidence will be immediately destroyed, or that a suspect will escape. *Brigham City* v. *Stuart*, 547 U. S. 398, 403 (2006). The question presented: May police, who could pause to gain the approval of a neutral magistrate, dispense with the need to get a warrant by themselves creating exigent circumstances? I would answer no, as did the Kentucky Supreme Court. The urgency must exist, I would rule, when the police come on the scene, not subsequent to their arrival, prompted by their own conduct.

I

Two pillars of our Fourth Amendment jurisprudence should have controlled the Court's ruling: First, "whenever practical, [the police must] obtain advance judicial approval of searches and seizures through the warrant procedure," *Terry* v. *Ohio*, 392 U. S. 1, 20 (1968); second, unwarranted "searches and seizures inside a home" bear heightened scrutiny, *Payton* v. *New York*, 445 U. S. 573, 586 (1980). The warrant requirement, Justice Jackson observed, ranks among the "fundamental distinctions between our form of government, where officers are under the law, and the police-state where they are the law." *Johnson* v. *United States*, 333 U. S. 10, 17 (1948). The Court has accordingly declared warrantless searches, in the main, "*per se* unreasonable." *Mincey* v. *Arizona*, 437 U. S. 385, 390 (1978); see also *Groh* v. *Ramirez*, 540 U. S. 551, 559 (2004). "[T]he police bear a heavy burden," the Court has cautioned, "when attempting to demonstrate an urgent need that might justify warrantless searches." *Welsh* v. *Wisconsin*, 466 U. S. 740, 749–750 (1984).

That heavy burden has not been carried here. There was little risk that drug-related evidence would have been destroyed had the police delayed the search pending a magistrate's authorization. As the Court recognizes, "[p]ersons in possession of valuable drugs are unlikely to destroy them unless they fear discovery by the police." *Ante*, at 461. Nothing in the record shows that, prior to the knock at the apartment door, the occupants were apprehensive about police proximity.

In no quarter does the Fourth Amendment apply with greater force than in our homes, our most private space which, for centuries, has been regarded as " 'entitled to special protection.' " *Georgia* v. *Randolph*, 547 U. S. 103, 115, and n. 4 (2006); *Minnesota* v. *Carter*, 525 U. S. 83, 99 (1998) (KENNEDY, J., concurring). Home intrusions, the Court has said, are indeed "the chief evil against which . . . the Fourth

Amendment is directed." *Payton*, 445 U. S., at 585 (internal quotation marks omitted); see *Silverman* v. *United States*, 365 U. S. 505, 511 (1961) ("At [the Fourth Amendment's] very core stands the right of a man to retreat to his own home and there be free from unreasonable governmental intrusion."). "'[S]earches and seizures inside a home without a warrant are [therefore] presumptively unreasonable.'" *Brigham City*, 547 U. S., at 403 (quoting *Groh*, 540 U. S., at 559). How "secure" do our homes remain if police, armed with no warrant, can pound on doors at will and, on hearing sounds indicative of things moving, forcibly enter and search for evidence of unlawful activity?

II

As above noted, to justify the police activity in this case, Kentucky invoked the once-guarded exception for emergencies "in which the delay necessary to obtain a warrant . . . threaten[s] 'the destruction of evidence.'" *Schmerber* v. *California*, 384 U. S. 757, 770 (1966) (quoting *Preston* v. *United States*, 376 U. S. 364, 367 (1964)). To fit within this exception, "police action literally must be [taken] 'now or never' to preserve the evidence of the crime." *Roaden* v. *Kentucky*, 413 U. S. 496, 505 (1973).

The existence of a genuine emergency depends not only on the state of necessity at the time of the warrantless search; it depends, first and foremost, on "actions taken by the police *preceding* the warrantless search." *United States* v. *Coles*, 437 F. 3d 361, 367 (CA3 2006). See also *United States* v. *Chambers*, 395 F. 3d 563, 565 (CA6 2005) ("[O]fficers must seek a warrant based on probable cause when they believe in advance they will find contraband or evidence of a crime."). "[W]asting a clear opportunity to obtain a warrant," therefore, "disentitles the officer from relying on subsequent exigent circumstances." S. Saltzburg & D. Capra, American Criminal Procedure 376 (8th ed. 2007).

Under an appropriately reined-in "emergency" or "exigent circumstances" exception, the result in this case should not

be in doubt. The target of the investigation's entry into the building, and the smell of marijuana seeping under the apartment door into the hallway, the Kentucky Supreme Court rightly determined, gave the police "probable cause . . . sufficient . . . to obtain a warrant to search the . . . apartment." 302 S. W. 3d 649, 653 (2010). As that court observed, nothing made it impracticable for the police to post officers on the premises while proceeding to obtain a warrant authorizing their entry. *Id.*, at 654. Before this Court, Kentucky does not urge otherwise. See Brief for Petitioner 35, n. 13 (asserting "[i]t should be of no importance whether police could have obtained a warrant").

In *Johnson*, the Court confronted this scenario: standing outside a hotel room, the police smelled burning opium and heard "some shuffling or noise" coming from the room. 333 U. S., at 12 (internal quotation marks omitted). Could the police enter the room without a warrant? The Court answered no. Explaining why, the Court said:

> "The right of officers to thrust themselves into a home is . . . a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman . . . .
>
> . . . . . .
>
> "If the officers in this case were excused from the constitutional duty of presenting their evidence to a magistrate, it is difficult to think of [any] case in which [a warrant] should be required." *Id.*, at 14–15.

I agree, and would not allow an expedient knock to override the warrant requirement.* Instead, I would accord that

*The Court in *Johnson* was informed that "when [the officer] knocked on [Johnson's] door the 'first thing that naturally struck [her]' was to conceal the opium and the equipment for smoking it." See Brief for United

core requirement of the Fourth Amendment full respect. When possible, "a warrant must generally be secured," the Court acknowledges. *Ante*, at 459. There is every reason to conclude that securing a warrant was entirely feasible in this case, and no reason to contract the Fourth Amendment's dominion.

States in *Johnson* v. *United States*, O. T. 1947, No. 329, p. 17, n. 6. Had the Government in *Johnson* urged that the "shuffling or noise" indicated evidence was at risk, would the result have changed? Justice Jackson's recognition of the primacy of the warrant requirement suggests not. But see *ante*, at 469, n. 5 (distinguishing *Johnson* on the ground that the Government did not contend "that the officers entered the room in order to prevent the destruction of evidence").

Syllabus

GENERAL DYNAMICS CORP. *v.* UNITED STATES

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

No. 09–1298. Argued January 18, 2011—Decided May 23, 2011*

After petitioners fell behind schedule in developing a stealth aircraft (A–12) for the Navy, the contracting officer terminated their $4.8 billion fixed-price contract for default and ordered petitioners to repay approximately $1.35 billion in progress payments for work the Government never accepted. Petitioners filed suit in the Court of Federal Claims (CFC), challenging the termination decision under the Contract Disputes Act of 1978. They argued that Federal Circuit precedent permitted their default to be excused because the Government had failed to share its "superior knowledge" about how to design and manufacture stealth aircraft. Uncovering the extent of such knowledge proved difficult because the design, materials, and manufacturing process for prior stealth aircraft, operated by the Air Force, are closely guarded military secrets. After military secrets were disclosed during discovery, the Acting Secretary of the Air Force warned the CFC that further discovery into the extent of the Government's superior knowledge would risk disclosing classified information. The CFC terminated such discovery and found the superior-knowledge question nonjusticiable. The CFC subsequently converted the termination into a less-Government-friendly termination for convenience and awarded petitioners $1.2 billion. The Federal Circuit reversed. On remand, the CFC sustained the default termination and reaffirmed that petitioners' superior-knowledge affirmative defense could not be litigated. The Federal Circuit again reversed, but it found that the state-secrets privilege prevented adjudicating petitioners' superior-knowledge defense. On remand, the CFC again found petitioners had defaulted, and the Federal Circuit affirmed.

Held: When, to protect state secrets, a court dismisses a Government contractor's prima facie valid affirmative defense to the Government's allegations of contractual breach, the proper remedy is to leave the parties where they were on the day they filed suit. Pp. 484–492.

(a) The CFC held that, since invocation of the state-secrets privilege obscured too many of the facts relevant to the superior-knowledge defense, the issue of that defense was nonjusticiable, even though petition-

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*Together with No. 09–1302, *Boeing Co., Successor to McDonnell Douglas Corp.* v. *United States*, also on certiorari to the same court.

ers had brought forward enough unprivileged evidence for a prima facie showing. In this situation, the Court must exercise its common-law authority to fashion contractual remedies in Government-contracting disputes. The relevant state-secrets jurisprudence comes not from *United States* v. *Reynolds*, 345 U. S. 1, which deals with the Government's evidentiary privilege against court-ordered disclosure of state and military secrets, but from *Totten* v. *United States*, 92 U. S. 105, and *Tenet* v. *Doe*, 544 U. S. 1, two cases dealing with alleged contracts to spy.

Where liability depends on the validity of a plausible superior-knowledge defense, and when full litigation of that defense "would inevitably lead to the disclosure of" state secrets, *Totten, supra,* at 107, neither party can obtain judicial relief. It seems unrealistic to separate the claim from the defense, allowing the former to proceed while barring the latter. Claims and defenses together establish the justification, or lack of justification, for judicial relief; and when public policy precludes judicial intervention for the one it should also preclude judicial intervention for the other. Suit on the contract, or for performance rendered or funds paid under the contract, will not lie, and courts should leave the parties to the agreement where they stood on the day they filed suit. The Government suggests that at the time of suit, petitioners had been held in default by the contracting officer and were liable for the ensuing consequences. But that was merely one step in the parties' contractual regime. The "position of the parties" at the time of suit is not their position with regard to legal burdens and the legal consequences of contract-related determinations, but their position with regard to possession of funds and property. Pp. 484–489.

(b) Neither side will be entirely happy with this resolution. General Dynamics (but not Boeing) wants to turn the termination into one for convenience and reinstate the CFC's $1.2 billion award, but that is not an option under the A–12 agreement. Moreover, state secrets would make it impossible to calculate petitioners' damages. The Government wants a return of the $1.35 billion it paid petitioners for work never accepted, but the validity of that claim depends on the nonjusticiable issue whether petitioners are in default. As in *Totten*, see 92 U. S., at 106, the Court's refusal to enforce this contract captures what the *ex ante* expectations of the parties were or reasonably ought to have been. They must have assumed the risk that state secrets would prevent the adjudication of inadequate performance claims. Moreover, this ruling's impact here is likely much more significant than its impact in future cases, except to the extent that it renders the law more predictable and hence more subject to accommodation by contracting parties. Whether the Government had an obligation to share its superior knowledge about

stealth technology is left for the Federal Circuit to address on remand. Pp. 489–492.

567 F. 3d 1340, vacated and remanded.

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

Carter G. Phillips argued the cause for petitioners in both cases. On the briefs in No. 09–1298 were *Paul M. Smith*, *David A. Churchill*, *Elaine J. Goldenberg*, and *Joshua M. Segal*. On the briefs in No. 09–1302 were *Charles J. Cooper*, *Michael W. Kirk*, *David Lehn*, *Grant M. Dixton*, and *Lynda Guild Simpson*.

Acting Solicitor General Katyal argued the cause for the United States in both cases. With him on the brief were *Assistant Attorney General West*, *Deputy Solicitor General Stewart*, *Pratik A. Shah*, *Bryant G. Snee*, *Douglas Letter*, *Sydney Foster*, and *Thomas N. Ledvina*.†

JUSTICE SCALIA delivered the opinion of the Court.

We consider what remedy is proper when, to protect state secrets, a court dismisses a Government contractor's prima facie valid affirmative defense to the Government's allegations of contractual breach.

I

In 1988, the Navy awarded petitioners a $4.8 billion fixed-price contract to research and develop the A–12 Avenger carrier-based, stealth aircraft. The A–12 proved unexpectedly difficult to design and manufacture, and by De-

† Briefs of *amici curiae* urging reversal in both cases were filed for the Chamber of Commerce of the United States of America by *Mr. Phillips*, *Richard D. Klingler*, *Kathleen M. Mueller*, and *Robin S. Conrad;* for the Constitution Project by *David M. Gossett* and *Sharon Bradford Franklin;* and for the National Defense Industrial Association by *Deanne E. Maynard* and *Brian R. Matsui*.

Jon B. Eisenberg, *Cindy A. Cohn*, *Kurt Opsahl*, *James S. Tyre*, *Richard R. Wiebe*, *Thomas H. Nelson*, and *Lisa R. Jaskol* filed a brief in both cases for the Al-Haramain Islamic Foundation, Inc., et al. as *amici curiae*.

cember 1990, petitioners were almost two years behind schedule and spending $120 to $150 million each month to develop the A–12.

Petitioners informed the Government that the cost of completing the contract would exceed the contract price by an "'unacceptable'" amount. *McDonnell Douglas Corp.* v. *United States*, 567 F. 3d 1340, 1343 (CA Fed. 2009); see *McDonnell Douglas Corp.* v. *United States*, 182 F. 3d 1319, 1323 (CA Fed. 1999). They proposed restructuring the contract as a cost-reimbursement agreement and offered to absorb a $1.5 billion loss. The Department of Defense had lost faith in the project, however, and Rear Admiral William Morris, the Navy's contracting officer for the A–12 agreement, terminated the contract for default on January 7, 1991.

By that point, petitioners had spent $3.88 billion attempting to develop the A–12, and the Government had provided $2.68 billion in progress payments. A few weeks after terminating the contract, the Navy sent petitioners a letter demanding the return of approximately $1.35 billion in progress payments for work never accepted by the Government. The parties later entered into a deferred payment agreement covering this amount.

Petitioners filed suit in the Court of Federal Claims (CFC) to challenge Admiral Morris's termination decision under the Contract Disputes Act of 1978, 92 Stat. 2388, as amended, 41 U. S. C. § 609(a)(1). The Federal Circuit has recognized a governmental obligation not to mislead contractors about, or silently withhold, its "superior knowledge" of difficult-to-discover information "vital" to contractual performance. *GAF Corp.* v. *United States*, 932 F. 2d 947, 949 (1991). Petitioners asserted that the Government's failure to share its "superior knowledge" about how to design and manufacture stealth aircraft excused their default (and also asserted other claims not relevant here).

Uncovering the extent of the Government's prior experience with stealth technology proved difficult. The design,

materials, and manufacturing process for two prior stealth aircraft operated by the Air Force—the B–2 and the F–117A—are some of the Government's most closely guarded military secrets. "'[N]eed-to-know' or [special] access controls beyond those normally provided for access to Confidential, Secret, or Top Secret information" apply. 32 CFR § 154.3(x) (2010); see App. 384–385. The Government nevertheless granted 10 members of petitioners' litigation team "access to the Secret/Special Access level of the B–2 and F–117A programs." *Id.*, at 385. Four of those ten individuals received access to even the most sensitive aspects of the programs. See *ibid.*

That neither satisfied petitioners' thirst for discovery nor prevented the unauthorized disclosure of military secrets. In March 1993, Acting Secretary of the Air Force Michael Donley asserted the state-secrets privilege to bar discovery into certain aspects of stealth technology beyond petitioners' "need-to-know" authorizations. At a deposition that month, a former Navy official's responses to questions by petitioners and the Government revealed military secrets neither side's litigation team was authorized to know. Copies of the unclassified deposition were widely distributed and quoted in unsealed court filings until Government security officials discovered the breach a month later. A July 1993 deposition caused further unauthorized disclosures of military secrets.

These disclosures led Acting Secretary of the Air Force Merrill McPeak to file a declaration with the CFC. He warned that further discovery into the extent of the Government's superior knowledge "would present a continuing threat of disclosure of . . . military and state secrets" surrounding the "weight, profile or signature, and materials involved in the design and construction of 'stealt[h]' . . . aircraft and weapons systems." *Id.*, at 633, 635. Even relatively straightforward and innocuous questions, in his opinion, "would pose unacceptable risks of disclosure of classified, special access information," *id.*, at 636, including the

potential disclosure of covert Government programs, *id.*, at 637.

The CFC took Secretary McPeak's concerns seriously and terminated discovery relating to superior knowledge. It later decided that the extent of the Government's superior knowledge was a nonjusticiable question. Both sides had enough evidence to "present a persuasive case" on the superior-knowledge issue, but the CFC worried that, "wit[h] numerous layers of potentially dispositive facts" hidden by the privilege, its superior-knowledge rulings "would be a sham," *McDonnell Douglas Corp.* v. *United States*, 37 Fed. Cl. 270, 280, 284–285 (1996), and one that would threaten national security, see *id.*, at 281–282.

In 1996, for reasons not relevant here, the CFC converted the termination into a less-Government-friendly termination for convenience and awarded petitioners $1.2 billion. *McDonnell Douglas Corp.* v. *United States*, 35 Fed. Cl. 358. The Federal Circuit reversed, 182 F. 3d, at 1332, and left it for the CFC to reconsider on remand whether the need to protect military secrets precluded discovery into the superior-knowledge issue, *id.*, at 1329–1330.

After a 6-week trial, the CFC sustained the default termination, *McDonnell Douglas Corp.* v. *United States*, 50 Fed. Cl. 311, 326 (2001), and reaffirmed that the parties could not safely litigate whether the Government's superior knowledge excused petitioners' default, *id.*, at 325. The Court of Appeals reversed the default termination, but agreed that the state-secrets privilege prevented adjudicating whether the Government's superior knowledge excused the default. See *McDonnell Douglas Corp.* v. *United States*, 323 F. 3d 1006, 1024 (CA Fed. 2003). It rejected petitioners' assertion that the Government could not pursue a claim against a party and then use the state-secrets privilege to completely pre-empt defenses to that claim; the Court of Appeals believed *United States* v. *Reynolds*, 345 U. S. 1, 12 (1953), had already "rejected" this "very argument." 323 F. 3d, at 1023. Litigants cannot complain, the Court of Appeals held,

when the state-secrets privilege trumps a defense "in [a] purely civil matter, suing the sovereign on the limited terms to which it has consented." *Ibid.*

On remand, the CFC again found petitioners had defaulted. *McDonnell Douglas Corp.* v. *United States*, 76 Fed. Cl. 385, 430 (2007). The Court of Appeals affirmed, see 567 F. 3d, at 1356, and we granted certiorari to review its state-secrets holding, 561 U. S. 1057 (2010).

II

Many of the Government's efforts to protect our national security are well known. It publicly acknowledges the size of our military, the location of our military bases, and the names of our ambassadors to Moscow and Beijing. But protecting our national security sometimes requires keeping information about our military, intelligence, and diplomatic efforts secret. See *Haig* v. *Agee*, 453 U. S. 280, 307 (1981); *Martin* v. *Mott*, 12 Wheat. 19, 30–31 (1827). We have recognized the sometimes-compelling necessity of governmental secrecy by acknowledging a Government privilege against court-ordered disclosure of state and military secrets.

In *Reynolds*, three civilian contractors died during a test flight of a B–29 bomber. Their widows filed wrongful-death suits against the Government and sought discovery of the Air Force's accident-investigation report. Federal discovery rules, then as now, did not require production of documents protected by an evidentiary privilege. See 345 U. S., at 6; Fed. Rule Civ. Proc. 26(b)(1). We held that documents that would disclose state secrets enjoyed such a privilege; the state-secrets privilege, we said, had a "well established" pedigree "in the law of evidence." 345 U. S., at 6–7.

The penultimate paragraph of *Reynolds* rejected the widows' assertion that if the Government invoked the state-secrets privilege it had to abandon the claim to which the thereby privileged evidence was relevant. That was, the widows observed, the price paid in criminal cases. If the

Government refuses to provide state-secret information that the accused reasonably asserts is necessary to his defense, the prosecution must be dismissed. See *id.*, at 12; *Jencks* v. *United States*, 353 U. S. 657, 672 (1957). The penultimate paragraph of *Reynolds* said that this was a false analogy. A like abandonment of the Government's claim is not the consequence "in a civil forum where the Government is not the moving party, but is a defendant only on terms to which it has consented." 345 U. S., at 12. Both petitioners and the Court of Appeals rely upon this statement to support their differing positions.

We think that *Reynolds* has less to do with these cases than the parties believe—and its dictum (of course), less still. *Reynolds* was about the admission of evidence. It decided a purely evidentiary dispute by applying evidentiary rules: The privileged information is excluded, and the trial goes on without it. That was to the detriment, of course, of the widows, whom the evidence would have favored. But the Court did not order judgment in favor of the Government. Here, by contrast, the CFC decreed the substantive result that since invocation of the state-secrets privilege obscured too many of the facts relevant to the superior-knowledge defense, the issue of that defense was nonjusticiable, and the defense thus not available. See 37 Fed. Cl., at 284–285. And that was so even though petitioners had brought forward enough unprivileged evidence to "make a *prima facie* showing." *Id.*, at 280.

While we disagree, for reasons set forth below, with the CFC's disposition of the remainder of the case, its perception that in the present context the state-secrets issue raises something quite different from a mere evidentiary point seems to us sound. What we are called upon to exercise is not our power to determine the procedural rules of evidence, but our common-law authority to fashion contractual remedies in Government-contracting disputes. See *Priebe & Sons, Inc.* v. *United States*, 332 U. S. 407, 411 (1947). And

our state-secrets jurisprudence bearing upon that authority is not *Reynolds*, but two cases dealing with alleged contracts to spy.

In *Totten* v. *United States*, 92 U. S. 105 (1876), the administrator of a self-styled Civil War spy's estate brought a breach-of-contract suit against the United States. He alleged that his testator had entered into a contract with President Lincoln to spy on the Confederacy in exchange for $200 a month. After the war ended, the United States reimbursed expenses but did not pay the monthly salary. We recognized that the estate had a potentially valid breach-of-contract claim but dismissed the suit. The contract was for "a secret service," and litigating the details of that service would risk exposing secret operations and other clandestine operatives "to the serious detriment of the public." *Id.*, at 106–107. "[P]ublic policy," we held, "forbids the maintenance of any suit . . . the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated." *Id.*, at 107.

Six years ago, we reaffirmed that "public policy forb[ids]" suits "based on covert espionage agreements." *Tenet* v. *Doe*, 544 U. S. 1, 3 (2005). Such suits threaten to undermine ongoing intelligence-gathering and covert operations—two vital aspects of national security—through inadvertent exposure of espionage relationships. *Id.*, at 11. Rather than tempt fate, we leave the parties to an espionage agreement where we found them the day they filed suit.

We think a similar situation obtains here, and that the same consequence should follow. Where liability depends upon the validity of a plausible superior-knowledge defense, and when full litigation of that defense "would inevitably lead to the disclosure of" state secrets, *Totten*, *supra*, at 107, neither party can obtain judicial relief. As the CFC concluded, that is the situation here. Disclosure of state secrets occurred twice before the CFC terminated discovery. See

37 Fed. Cl., at 277–278. Every document request or question to a witness would risk further disclosure, since both sides have an incentive to probe up to the boundaries of state secrets. State secrets can also be indirectly disclosed. Each assertion of the privilege can provide another clue about the Government's covert programs or capabilities. See *Fitzgerald* v. *Penthouse International, Ltd.*, 776 F. 2d 1236, 1243, and n. 10 (CA4 1985). For instance, the fact that the Government had to continue asserting the privilege after granting petitioners access to B–2 and F–117A program information suggests it had other, possibly covert, stealth programs in the 1980's and early 1990's.

It seems to us unrealistic to separate, as the CFC did, the claim from the defense, and to allow the former to proceed while the latter is barred. It is claims and defenses *together* that establish the justification, or lack of justification, for judicial relief; and when public policy precludes judicial intervention for the one it should preclude judicial intervention for the other as well.* If, in *Totten*, it had been the Government seeking return of funds that the estate claimed had been received in payment for espionage activities, it would have been the height of injustice to deny the defense because of the Government's invocation of state-secret protection, but to maintain jurisdiction over the Government's claim and award it judgment. Judicial refusal to enforce promises contrary to public policy (here, the Government's alleged promise to provide superior knowledge, which we could not determine was breached without penetrating several layers of state secrets) is not unknown to the common law, and the traditional course is to leave the parties where they stood when they knocked on the courthouse door.

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*Of course, this does not mean the nonjusticiability of one aspect of a case will necessarily end the entire litigation. If, for example, the Government asserts two justifications for its default termination, and if state secrets deprive the contractor of a prima facie valid defense to only one of those claims, the court can still adjudicate the validity of the other.

"In general, if a court will not, on grounds of public policy, aid a promisee by enforcing the promise, it will not aid him by granting him restitution for performance that he has rendered in return for the unenforceable promise. Neither will it aid the promisor by allowing a claim in restitution for performance that he has rendered under the unenforceable promise. It will simply leave both parties as it finds them, even though this may result in one of them retaining a benefit that he has received as a result of the transaction." 2 Restatement (Second) of Contracts § 197, Comment *a*, p. 71 (1979); see, *e. g.*, *Worlton* v. *Davis*, 73 Idaho 217, 222–223, 249 P. 2d 810, 814 (1952).

These cases differ from the common-law cases that we know, in that the unenforceability did not exist at the time the contract was formed, see 2 Restatement (Second) of Contracts § 179, Comment *d*, at 18, but arose because of the Government's assertion of the state-secrets privilege that rendered the promise of superior knowledge unadjudicable. We do not see why that should affect the remedy. Suit on the contract, or for performance rendered or funds paid under the contract, will not lie, and the parties will be left where they are.

The law of contracts contains another doctrine that relates to the CFC's concern about the reliability of its judgment "without numerous layers of potentially dispositive facts," 37 Fed. Cl., at 284–285. The Statute of Frauds, which has been with us since the 17th century, reflects concerns about the reliability of oral evidence. See *Valdez Fisheries Development Assn., Inc.* v. *Alyeska Pipeline Serv. Co.*, 45 P. 3d 657, 669 (Alaska 2002); 9 R. Lord, Williston on Contracts § 21:1, pp. 170–172 (4th ed. 1999 and 2010 Supp.). It assumes a valid, enforceable agreement between the parties but nevertheless leaves them without a remedy absent reliable evidence—a writing. See 1 *id.*, § 1:21, at 82 (4th ed. 2007 and 2010 Supp.); 9 *id.*, § 21:5, at 192. So also here, it is preferable to leave the parties without a remedy rather than risk the

"potential injustice," *Valdez Fisheries, supra,* at 669, of misjudging the superior-knowledge issue based on a distorted evidentiary record.

The Government suggested at oral argument that where the parties stood at the time of suit was that petitioners had been held in default, liable for the ensuing consequences. See Tr. of Oral Arg. 48–49; see also Brief for United States 32, n. 9, 34–35. That had been the declaration of the contracting officer, pursuant to Chapter 9 (entitled "Contract Disputes") of Title 41 (entitled "Public Contracts"). See 41 U. S. C. § 605. It was "final and conclusive . . . unless an appeal or suit is timely commenced." § 605(b). We regard that, however, as merely one step in the contractual regime to which the parties had agreed. It has no more bearing upon the question we are discussing than would a provision in a private contract that declaration of default by one of the parties is final unless contested in court. The "position of the parties" in which we will leave them is not their position with regard to legal burdens and the legal consequences of contract-related determinations, but with regard to possession of funds and property.

III

Neither side will be entirely happy with the resolution we reach today. General Dynamics (but not Boeing) wants us to convert the termination into one for convenience and reinstate the CFC's $1.2 billion damages award. See Brief for Petitioner in No. 09–1298, pp. 58–61. The language of the A–12 agreement does not give us that option. It authorizes a court to convert a default termination into a termination for convenience only if it "determine[s] that the Contractor was not in default, or that the default was excusable." 48 CFR § 52.249–9(g) (2010). Our opinion does not express a view on those issues. It holds them nonjusticiable.

Moreover, state secrets would make it impossible to calculate petitioners' damages. A termination for convenience

ordinarily entitles a contractor to recover its incurred costs of performance, reasonable termination expenses, and a reasonable profit on the work performed (or an offset to account for the contractor's expected losses had the contract been performed to completion). See § 52.249–2(g). The CFC's $1.2 billion award to petitioners in 1996 simply reflected their actual costs incurred minus progress payments received. The CFC decided it could not calculate petitioners' expected losses (or profits) without deciding the extent to which the Government's alleged failure to share its superior knowledge contributed to petitioners' cost overruns—a nonjusticiable question. See 37 Fed. Cl., at 285. Absent proof of the Government's superior knowledge, and of how the sharing of that would have made this a profitable contract, the $1.2 billion award might represent an undeserved windfall.

The Government, for its part, wants a return of the $1.35 billion it paid petitioners in progress payments for work which it says it never approved. But the validity of that claim depends upon whether petitioners are in default on their contract. If they are not, termination for convenience of the Government would entitle them to retain those progress payments (unless, of course, they would have incurred a loss on the entire contract). Neither the question whether they are in default nor the question whether performance of the entire contract would have left them with a loss can be judicially determined because of the valid assertion of the state-secrets privilege.

We leave the parties where they are. As in *Totten*, see 92 U. S., at 106, our refusal to enforce this contract captures what the *ex ante* expectations of the parties were or reasonably ought to have been. Both parties "must have understood," *ibid.*, that state secrets would prevent courts from resolving many possible disputes under the A–12 agreement. The Government asked petitioners to develop an aircraft the design, materials, and manufacturing process for which would be closely guarded military secrets. See Contract

Schedule H–1, App. 73–75; Contract Security Classified Specification, *id.*, at 129–135. The contract itself was a classified document at one point. See Contract Schedule H–1, ¶ 8, *id.*, at 75. Both parties—the Government no less than petitioners—must have assumed the risk that state secrets would prevent the adjudication of claims of inadequate performance.

We believe, moreover, that the impact of our ruling on these particular cases (which we think produces rough, very rough, equity) is probably much more significant than its impact in future cases, except to the extent that it renders the law more predictable and hence more subject to accommodation by contracting parties. They can negotiate, for example, the timing and amount of progress payments to account for the possibility that state secrets may ultimately render the contract unenforceable. The Government's concern that contractors will raise frivolous superior-knowledge defenses designed to goad the Government into asserting the state-secrets privilege is misplaced. To begin with, the rule we announce today applies only when the superior-knowledge defense is supported by enough evidence to make out a prima facie case. Moreover, Government contractors—especially cutting-edge defense contractors of the sort likely to operate in the state-secrets field—are repeat players. Even apart from the judicial sanctions available to punish bad conduct, see Fed. Rules Civ. Proc. 11, 26(g), they have strong incentive to behave rather than risk missing out on the next multibillion-dollar defense contract. And finally, while we anticipate that the rule we set forth will ordinarily control Government-contracting disputes that become nonjusticiable because of state secrets, what we promulgate today is not a statute but a common-law opinion, which, after the fashion of the common law, is subject to further refinement where relevant factors significantly different from those before us here counsel a different outcome.

The foregoing analysis assumes that the Government generally has an obligation to share its superior knowledge, see *GAF Corp.*, 932 F. 2d, at 949; the parties have not challenged that assumption. The Government argued below, however, that it does not have that obligation with respect to "highly classified information," and does not have it when (as was the case here) the agreement specifically identifies information that must be shared. Brief for United States 52. The Court of Appeals did not address those questions (it had no reason to, given its disposition of petitioners' appeals), and we did not grant certiorari to decide them. Those issues (and whether they can safely be litigated without endangering state secrets) therefore remain for the Court of Appeals to address on remand.

* * *

In *Reynolds*, we warned that the state-secrets evidentiary privilege "is not to be lightly invoked." 345 U. S., at 7. Courts should be even more hesitant to declare a Government contract unenforceable because of state secrets. It is the option of last resort, available in a very narrow set of circumstances. Our decision today clarifies the consequences of its use only where it precludes a valid defense in Government-contracting disputes, and only where both sides have enough evidence to survive summary judgment but too many of the relevant facts remain obscured by the state-secrets privilege to enable a reliable judgment.

We vacate the judgment of the Court of Appeals and remand the cases for further proceedings consistent with this opinion.

It is so ordered.

Syllabus

BROWN, GOVERNOR OF CALIFORNIA, ET AL. *v.* PLATA ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURTS FOR THE EASTERN AND NORTHERN DISTRICTS OF CALIFORNIA

No. 09–1233. Argued November 30, 2010—Decided May 23, 2011

California's prisons are designed to house a population just under 80,000, but at the time of the decision under review the population was almost double that. The resulting conditions are the subject of two federal class actions. In *Coleman* v. *Brown*, filed in 1990, the District Court found that prisoners with serious mental illness do not receive minimal, adequate care. A Special Master appointed to oversee remedial efforts reported 12 years later that the state of mental health care in California's prisons was deteriorating due to increased overcrowding. In *Plata* v. *Brown*, filed in 2001, the State conceded that deficiencies in prison medical care violated prisoners' Eighth Amendment rights and stipulated to a remedial injunction. But when the State had not complied with the injunction by 2005, the court appointed a Receiver to oversee remedial efforts. Three years later, the Receiver described continuing deficiencies caused by overcrowding. Believing that a remedy for unconstitutional medical and mental health care could not be achieved without reducing overcrowding, the *Coleman* and *Plata* plaintiffs moved their respective District Courts to convene a three-judge court empowered by the Prison Litigation Reform Act of 1995 (PLRA) to order reductions in the prison population. The judges in both actions granted the request, and the cases were consolidated before a single three-judge court. After hearing testimony and making extensive findings of fact, the court ordered California to reduce its prison population to 137.5% of design capacity within two years. Finding that the prison population would have to be reduced if capacity could not be increased through new construction, the court ordered the State to formulate a compliance plan and submit it for court approval.

Held:

1. The court-mandated population limit is necessary to remedy the violation of prisoners' constitutional rights and is authorized by the PLRA. Pp. 510–538.

(a) If a prison deprives prisoners of basic sustenance, including adequate medical care, the courts have a responsibility to remedy the resulting Eighth Amendment violation. See *Hutto* v. *Finney*, 437 U. S. 678, 687, n. 9. They must consider a range of options, including the

appointment of special masters or receivers, the possibility of consent decrees, and orders limiting a prison's population. Under the PLRA, only a three-judge court may limit a prison population. 18 U. S. C. § 3626(a)(3). Before convening such a court, a district court must have entered an order for less intrusive relief that failed to remedy the constitutional violation and must have given the defendant a reasonable time to comply with its prior orders. § 3626(a)(3)(A). Once convened, the three-judge court must find by clear and convincing evidence that "crowding is the primary cause of the violation" and "no other relief will remedy the violation," § 3626(a)(3)(E); and that the relief is "narrowly drawn, extends no further than necessary . . . , and is the least intrusive means necessary to correct the violation," § 3626(a)(1)(A). The court must give "substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief." *Ibid.* Its legal determinations are reviewed *de novo*, but its factual findings are reviewed for clear error. Pp. 510–513.

(b) The *Coleman* and *Plata* courts acted reasonably in convening a three-judge court. Pp. 513–516.

(1) The merits of the decision to convene are properly before this Court, which has exercised its 28 U. S. C. § 1253 jurisdiction to determine the authority of a court below, including whether a three-judge court was properly constituted. *Gonzalez* v. *Automatic Employees Credit Union*, 419 U. S. 90, 95, n. 12. Pp. 513–514.

(2) Section 3626(a)(3)(A)(i)'s previous order requirement was satisfied in *Coleman* by the Special Master's 1995 appointment and in *Plata* by the 2002 approval of a consent decree and stipulated injunction. Both orders were intended to remedy constitutional violations and were given ample time to succeed—12 years in *Coleman*, and 5 years in *Plata*. Contrary to the State's claim, § 3626(a)(3)(A)(ii)'s reasonable time requirement did not require the District Courts to give more time for subsequent remedial efforts to succeed. Such a reading would in effect require courts to impose a moratorium on new remedial orders before issuing a population limit, which would delay an eventual remedy, prolong the courts' involvement, and serve neither the State nor the prisoners. The *Coleman* and *Plata* courts had a solid basis to doubt that additional efforts to build new facilities and hire new staff would achieve a remedy, given the ongoing deficiencies recently reported by both the Special Master and the Receiver. Pp. 514–516.

(c) The three-judge court did not err in finding that "crowding [was] the primary cause of the violation," § 3626(a)(3)(E)(i). Pp. 517–526.

(1) The trial record documents the severe impact of burgeoning demand on the provision of care. The evidence showed that there were high vacancy rates for medical and mental health staff, *e. g.*, 20% for

surgeons and 54.1% for psychiatrists; that these numbers understated the severity of the crisis because the State has not budgeted sufficient staff to meet demand; and that even if vacant positions could be filled, there would be insufficient space for the additional staff. Such a shortfall contributes to significant delays in treating mentally ill prisoners, who are housed in administrative segregation for extended periods while awaiting transfer to scarce mental health treatment beds. There are also backlogs of up to 700 prisoners waiting to see a doctor for physical care. Crowding creates unsafe and unsanitary conditions that hamper effective delivery of medical and mental health care. It also promotes unrest and violence and can cause prisoners with latent mental illnesses to worsen and develop overt symptoms. Increased violence requires increased reliance on lockdowns to keep order, and lockdowns further impede the effective delivery of care. Overcrowding's effects are particularly acute in prison reception centers, which process 140,000 new or returning prisoners annually, and which house some prisoners for their entire incarceration period. Numerous experts testified that crowding is the primary cause of the constitutional violations. Pp. 517–522.

(2) Contrary to the State's claim, the three-judge court properly admitted, cited, and considered evidence of current prison conditions as relevant to the issues before it. Expert witnesses based their conclusions on recent observations of prison conditions; the court admitted recent reports on prison conditions by the Receiver and Special Master; and both parties presented testimony related to current conditions. The court's orders cutting off discovery a few months before trial and excluding evidence not pertinent to the issue whether a population limit is appropriate under the PLRA were within the court's sound discretion. Orderly trial management may require discovery deadlines and a clean distinction between litigation of the merits and the remedy. The State points to no significant evidence that it was unable to present and that would have changed the outcome here. Pp. 522–524.

(3) It was permissible for the three-judge court to conclude that overcrowding was the "primary," but not the only, cause of the violations, and that reducing crowding would not entirely cure the violations. This understanding of the primary cause requirement is consistent with the PLRA. Had Congress intended to require that crowding be the only cause, the PLRA would have said so. Pp. 524–526.

(d) The evidence supports the three-judge court's finding that "no other relief [would] remedy the violation," § 3626(a)(3)(E)(ii). The State's claim that out-of-state transfers provide a less restrictive alternative to a population limit must fail because requiring transfers is a population limit under the PLRA. Even if they could be regarded as a

less restrictive alternative, the three-judge court found no evidence of plans for transfers in numbers sufficient to relieve overcrowding. The court also found no realistic possibility that California could build itself out of this crisis, particularly given the State's ongoing fiscal problems. Further, it rejected additional hiring as a realistic alternative, since the prison system was chronically understaffed and would have insufficient space were adequate personnel retained. The court also did not err when it concluded that, absent a population reduction, the Receiver's and Special Master's continued efforts would not achieve a remedy. Their reports are persuasive evidence that, with no reduction, any remedy might prove unattainable and would at the very least require vast expenditures by the State. The State asserts that these measures would succeed if combined, but a long history of failed remedial orders, together with substantial evidence of overcrowding's deleterious effects on the provision of care, compels a different conclusion here. Pp. 526–530.

(e) The prospective relief ordered here was narrowly drawn, extended no further than necessary to correct the violation, and was the least intrusive means necessary to correct the violation. Pp. 530–538.

(1) The population limit does not fail narrow tailoring simply because prisoners beyond the plaintiff class will have to be released through parole or sentencing reform in order to meet the required reduction. While narrow tailoring requires a "'"fit" between the [remedy's] ends and the means chosen to accomplish those ends,'" *Board of Trustees of State Univ. of N. Y.* v. *Fox*, 492 U. S. 469, 480, a narrow and otherwise proper remedy for a constitutional violation is not invalid simply because it will have collateral effects. Nor does the PLRA require that result. The order gives the State flexibility to determine who should be released, and the State could move the three-judge court to modify its terms. The order also is not overbroad because it encompasses the entire prison system, rather than separately assessing each institution's need for a population limit. The *Coleman* court found a systemwide violation, and the State stipulated to systemwide relief in *Plata.* Assuming no constitutional violation results, some facilities may retain populations in excess of the 137.5% limit provided others fall sufficiently below it so the system as a whole remains in compliance with the order. This will afford the State flexibility to accommodate differences between institutions. The order may shape or control the State's authority in the realm of prison administration, but it leaves much to the State's discretion. The order's limited scope is necessary to remedy a constitutional violation. The State may move the three-judge court to modify its order, but it has proposed no realistic alternative remedy at this time. Pp. 530–534.

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(2) The three-judge court gave "substantial weight" to any potential adverse impact on public safety from its order. The PLRA's "substantial weight" requirement does not require the court to certify that its order has no possible adverse impact on the public. Here, statistical evidence showed that prison populations had been lowered without adversely affecting public safety in some California counties, several States, and Canada. The court found that various available methods of reducing overcrowding—good-time credits and diverting low-risk offenders to community programs—would have little or no impact on public safety, and its order took account of such concerns by giving the State substantial flexibility to select among the means of reducing overcrowding. The State complains that the court approved the State's population-reduction plan without considering whether its specific measures would substantially threaten public safety. But the court left state officials the choice of how best to comply and was not required to second-guess their exercise of discretion. Developments during the pendency of this appeal, when the State has begun to reduce the prison population, support the conclusion that a reduction can be accomplished without an undue negative effect on public safety. Pp. 534–538.

2. The three-judge court's order, subject to the State's right to seek its modification in appropriate circumstances, must be affirmed. Pp. 538–545.

(a) To comply with the PLRA, a court must set a population limit at the highest level consistent with an efficacious remedy, and it must order the population reduction to be achieved in the shortest period of time reasonably consistent with public safety. Pp. 538–539.

(b) The three-judge court's conclusion that the prison population should be capped at 137.5% of design capacity was not clearly erroneous. The court concluded that the evidence supported a limit between the 130% limit supported by expert testimony and the Federal Bureau of Prisons and the 145% limit recommended by the State Corrections Independent Review Panel. The PLRA's narrow tailoring requirement is satisfied so long as such equitable, remedial judgments are made with the objective of releasing the fewest possible prisoners consistent with an efficacious remedy. Pp. 539–541.

(c) The three-judge court did not err in providing a 2-year deadline for relief, especially in light of the State's failure to contest the issue at trial. The State has not asked this Court to extend the deadline, but the three-judge court has the authority, and responsibility, to amend its order as warranted by the exercise of sound discretion. Proper respect for the State and for its governmental processes require that court to exercise its jurisdiction to accord the State considerable latitude to find mechanisms and make plans that will promptly and effectively correct

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the violations consistent with public safety. The court may, *e. g.*, grant a motion to extend the deadline if the State meets appropriate preconditions designed to ensure that the plan will be implemented without undue delay. Such observations reflect the fact that the existing order, like all ongoing equitable relief, must remain open to appropriate modification, and are not intended to cast doubt on the validity of the order's basic premise. Pp. 541–545.

Affirmed.

KENNEDY, J., delivered the opinion of the Court, in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. SCALIA, J., filed a dissenting opinion, in which THOMAS, J., joined, *post*, p. 550. ALITO, J., filed a dissenting opinion, in which ROBERTS, C. J., joined, *post*, p. 565.

Carter G. Phillips argued the cause for appellants. With him on the briefs were *Edmund G. Brown, Jr.*, Attorney General of California, *James M. Humes*, Chief Deputy Attorney General, *Manuel M. Medeiros*, State Solicitor General, *Gordon Burns*, Deputy Solicitor General, *Jonathan L. Wolff* and *Rochelle C. East*, Senior Assistant Attorneys General, *Kyle A. Lewis* and *Danielle F. O'Bannon*, Deputy Attorneys General, *Eamon P. Joyce*, *Jerrold C. Schaefer*, *Paul B. Mello*, *S. Anne Johnson*, *Samantha D. Wolff*, and *Renju P. Jacob*. *Steven S. Kaufhold*, *Chad A. Stegeman*, *Thomas C. Goldstein*, *Troy D. Cahill*, *Gary S. Olson*, *Charles V. Fennessey*, *Rod Pacheco*, *William E. Mitchell*, *Alan D. Tate*, and *Martin J. Mayer* filed briefs for California State Republican Legislators et al., appellees under this Court's Rule 18.2, urging reversal.

Donald Specter argued the cause for appellees. With him on the briefs for Plata appellees was *Rebekah Evenson*. *Paul D. Clement*, *Ashley C. Parrish*, *Michael W. Bien*, *Jane E. Kahn*, *Ernest Galvan*, *Amy Whelan*, *Lisa Ells*, *Mr. Specter*, and *Ms. Evenson* filed a brief for Coleman appellees. *Laurie J. Hepler*, *Gregg McLean Adam*, *Gonzalo C. Martinez*, *Jeffrey L. Fisher*, *Pamela S. Karlan*, *Daniel M. Lindsay*, and *David A. Sanders* filed a brief for California

Correctional Peace Officers' Association, appellee under this Court's Rule 18.2, urging affirmance.*

JUSTICE KENNEDY delivered the opinion of the Court.

This case arises from serious constitutional violations in California's prison system. The violations have persisted for years. They remain uncorrected. The appeal comes to this Court from a three-judge District Court order directing California to remedy two ongoing violations of the Cruel and Unusual Punishments Clause, a guarantee binding on the States by the Due Process Clause of the Fourteenth Amend-

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*A brief of *amici curiae* urging reversal was filed for the State of Louisiana et al. by *James D. "Buddy" Caldwell*, Attorney General of Louisiana, *James Trey Phillips*, First Assistant Attorney General, *S. Kyle Duncan*, Appellate Chief, *Sarah Vandenbraak Hart*, and *Ronald Eisenberg*, and by the Attorneys General for their respective States as follows: *Troy King* of Alabama, *Daniel S. Sullivan* of Alaska, *Dustin McDaniel* of Arkansas, *John W. Suthers* of Colorado, *Joseph R. Biden III* of Delaware, *Lisa Madigan* of Illinois, *Martha Coakley* of Massachusetts, *Michael A. Cox* of Michigan, *Jim Hood* of Mississippi, *Gary King* of New Mexico, *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, and *Kenneth T. Cuccinelli II* of Virginia. A brief of *amici curiae* urging vacation was filed for the Criminal Justice Legal Foundation by *Kent S. Scheidegger*.

Briefs of *amici curiae* urging affirmance were filed for the American Bar Association by *Stephen N. Zack*, *Pierre H. Bergeron*, *George H. Kendall*, and *Margaret Colgate Love;* for the American Civil Liberties Union et al. by *David C. Fathi*, *David M. Shapiro*, *Steven R. Shapiro*, *Wade Henderson*, *Alvin J. Bronstein*, *Alan Schlosser*, *Peter J. Eliasberg*, and *David Blair-Loy;* for the American Psychiatric Association et al. by *Aaron M. Panner*, *Nathalie F. P. Gilfoyle*, and *Ira A. Burnim;* for the American Public Health Association et al. by *Lisa S. Blatt* and *Beth H. Parker;* for the Center on the Administration of Criminal Law et al. by *J. C. Rozendaal* and *Anthony S. Barkow;* for Corrections and Law Enforcement Personnel by *William A. Burck;* and for Prison Fellowship et al. by *James Stewart*, *Catherine Weiss*, and *Kenneth H. Zimmerman*.

Briefs of *amici curiae* were filed for the Greater Stockton Chamber of Commerce by *Steven A. Herum* and *Brett S. Jolley;* and for J. Clark Kelso by *George C. Harris*, *Deanne E. Maynard*, and *Brian R. Matsui*.

ment. The violations are the subject of two class actions in two Federal District Courts. The first involves the class of prisoners with serious mental disorders. That case is *Coleman* v. *Brown.* The second involves prisoners with serious medical conditions. That case is *Plata* v. *Brown.* The order of the three-judge District Court is applicable to both cases.

After years of litigation, it became apparent that a remedy for the constitutional violations would not be effective absent a reduction in the prison system population. The authority to order release of prisoners as a remedy to cure a systemic violation of the Eighth Amendment is a power reserved to a three-judge district court, not a single-judge district court. 18 U. S. C. § 3626(a). In accordance with that rule, the *Coleman* and *Plata* District Judges independently requested that a three-judge court be convened. The Chief Judge of the Court of Appeals for the Ninth Circuit convened a three-judge court composed of the *Coleman* and *Plata* District Judges and a third, Ninth Circuit Judge. Because the two cases are interrelated, their limited consolidation for this purpose has a certain utility in avoiding conflicting decrees and aiding judicial consideration and enforcement. The State in this Court has not objected to consolidation, although the State does argue that the three-judge court was prematurely convened. The State also objects to the substance of the three-judge court order, which requires the State to reduce overcrowding in its prisons.

The appeal presents the question whether the remedial order issued by the three-judge court is consistent with requirements and procedures set forth in a congressional statute, the Prison Litigation Reform Act of 1995 (PLRA). 18 U. S. C. § 3626; see Appendix A, *infra.* The order leaves the choice of means to reduce overcrowding to the discretion of state officials. But absent compliance through new construction, out-of-state transfers, or other means—or modification of the order upon a further showing by the State—

the State will be required to release some number of prisoners before their full sentences have been served. High recidivism rates must serve as a warning that mistaken or premature release of even one prisoner can cause injury and harm. The release of prisoners in large numbers—assuming the State finds no other way to comply with the order—is a matter of undoubted, grave concern.

At the time of trial, California's correctional facilities held some 156,000 persons. This is nearly double the number that California's prisons were designed to hold, and California has been ordered to reduce its prison population to 137.5% of design capacity. By the three-judge court's own estimate, the required population reduction could be as high as 46,000 persons. Although the State has reduced the population by at least 9,000 persons during the pendency of this appeal, this means a further reduction of 37,000 persons could be required. As will be noted, the reduction need not be accomplished in an indiscriminate manner or in these substantial numbers if satisfactory, alternative remedies or means for compliance are devised. The State may employ measures, including good-time credits and diversion of low-risk offenders and technical parole violators to community-based programs, that will mitigate the order's impact. The population reduction potentially required is nevertheless of unprecedented sweep and extent.

Yet so too is the continuing injury and harm resulting from these serious constitutional violations. For years the medical and mental health care provided by California's prisons has fallen short of minimum constitutional requirements and has failed to meet prisoners' basic health needs. Needless suffering and death have been the well-documented result. Over the whole course of years during which this litigation has been pending, no other remedies have been found to be sufficient. Efforts to remedy the violation have been frustrated by severe overcrowding in California's prison system. Short-term gains in the provision of care have been

eroded by the long-term effects of severe and pervasive overcrowding.

Overcrowding has overtaken the limited resources of prison staff; imposed demands well beyond the capacity of medical and mental health facilities; and created unsanitary and unsafe conditions that make progress in the provision of care difficult or impossible to achieve. The overcrowding is the "primary cause of the violation of a Federal right," 18 U. S. C. § 3626(a)(3)(E)(i), specifically the severe and unlawful mistreatment of prisoners through grossly inadequate provision of medical and mental health care.

This Court now holds that the PLRA does authorize the relief afforded in this case and that the court-mandated population limit is necessary to remedy the violation of prisoners' constitutional rights. The order of the three-judge court, subject to the right of the State to seek its modification in appropriate circumstances, must be affirmed.

I

A

The degree of overcrowding in California's prisons is exceptional. California's prisons are designed to house a population just under 80,000, but at the time of the three-judge court's decision the population was almost double that. The State's prisons had operated at around 200% of design capacity for at least 11 years. Prisoners are crammed into spaces neither designed nor intended to house inmates. As many as 200 prisoners may live in a gymnasium, monitored by as few as two or three correctional officers. App. 1337–1338, 1350; see Appendix B, *infra*. As many as 54 prisoners may share a single toilet. App. 1337.

The Corrections Independent Review Panel, a body appointed by the Governor and composed of correctional consultants and representatives from state agencies, concluded that California's prisons are "'severely overcrowded, imperiling the safety of both correctional employees and in-

mates.'"[1] App. to Juris. Statement, O. T. 2009, No. 09–416, p. 56a (hereinafter Juris. App.). In 2006, then-Governor Schwarzenegger declared a state of emergency in the prisons, as "'immediate action is necessary to prevent death and harm caused by California's severe prison overcrowding.'" *Id.*, at 61a. The consequences of overcrowding identified by the Governor include "'increased, substantial risk for transmission of infectious illness'" and a suicide rate "'approaching an average of one per week.'" *Ibid.*

Prisoners in California with serious mental illness do not receive minimal, adequate care. Because of a shortage of treatment beds, suicidal inmates may be held for prolonged periods in telephone-booth-sized cages without toilets. See

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[1] A similar conclusion was reached by the Little Hoover Commission, a bipartisan and independent state body, which stated that "[o]vercrowded conditions inside the prison walls are unsafe for inmates and staff," Solving California's Corrections Crisis: Time Is Running Out 17 (Jan. 2007), and that "California's correctional system Is in a tailspin," *id.*, at i.

At trial, current and former California prison officials also testified to the degree of overcrowding. Jeanne Woodford, who recently administered California's prison system, stated that "'[o]vercrowding in the [California Department of Corrections and Rehabilitation (CDCR)] is extreme, its effects are pervasive and it is preventing the Department from providing adequate mental and medical health care to prisoners.'" Juris. App. 84a. Matthew Cate, the head of the California prison system, stated that "'overpopulation makes everything we do more difficult.'" *Ibid.* And Robin Dezember, chief deputy secretary of Correctional Healthcare Services, stated that "we are terribly overcrowded in our prison system" and "overcrowding has negative effects on everybody in the prison system." Tr. 853, 856.

Experts from outside California offered similar assessments. Doyle Wayne Scott, the former head of corrections in Texas, described conditions in California's prisons as "appalling," "inhumane," and "unacceptable" and stated that "[i]n more than 35 years of prison work experience, I have never seen anything like it." App. 1337. Joseph Lehman, the former head of correctional systems in Washington, Maine, and Pennsylvania, concluded that "[t]here is no question that California's prisons are overcrowded" and that "this is an emergency situation; it calls for drastic and immediate action." *Id.*, at 1312.

Appendix C, *infra.* A psychiatric expert reported observing an inmate who had been held in such a cage for nearly 24 hours, standing in a pool of his own urine, unresponsive and nearly catatonic. Prison officials explained they had "'no place to put him.'" App. 593. Other inmates awaiting care may be held for months in administrative segregation, where they endure harsh and isolated conditions and receive only limited mental health services. Wait times for mental health care range as high as 12 months. *Id.*, at 704. In 2006, the suicide rate in California's prisons was nearly 80% higher than the national average for prison populations; and a court-appointed Special Master found that 72.1% of suicides involved "some measure of inadequate assessment, treatment, or intervention, and were therefore most probably foreseeable and/or preventable."[2] *Id.*, at 1781.

Prisoners suffering from physical illness also receive severely deficient care. California's prisons were designed to meet the medical needs of a population at 100% of design capacity and so have only half the clinical space needed to treat the current population. *Id.*, at 1024. A correctional officer testified that, in one prison, up to 50 sick inmates may be held together in a 12- by 20-foot cage for up to five hours awaiting treatment. Tr. 597–599. The number of staff is

[2] At the time of the three-judge court's decision, 2006 was the most recent year for which the Special Master had conducted a detailed study of suicides in the California prisons. The Special Master later issued an analysis for the year 2007. This report concluded that the 2007 suicide rate was "a continuation of the CDCR's pattern of exceeding the national prison suicide rate." Record in No. 2:90–cv–00520–LKK–JFM (ED Cal.), Doc. 3677, p. 1. The report found that the rate of suicides involving inadequate assessment, treatment, or intervention had risen to 82% and concluded that "[t]hese numbers clearly indicate no improvement in this area during the past several years, and possibly signal a trend of ongoing deterioration." *Id.*, at 12. No detailed study has been filed since then, but in September 2010 the Special Master filed a report stating that "the data for 2010 so far is not showing improvement in suicide prevention." App. 868.

inadequate, and prisoners face significant delays in access to care. A prisoner with severe abdominal pain died after a 5-week delay in referral to a specialist; a prisoner with "'constant and extreme'" chest pain died after an 8-hour delay in evaluation by a doctor; and a prisoner died of testicular cancer after a "failure of MDs to work up for cancer in a young man with 17 months of testicular pain."[3] California Prison Health Care Receivership Corp., K. Imai, Analysis of CDCR Death Reviews 2006, pp. 6–7 (Aug. 2007). Doctor Ronald Shansky, former medical director of the Illinois state prison system, surveyed death reviews for California prisoners. He concluded that extreme departures from the standard of care were "widespread," Tr. 430, and that the proportion of "possibly preventable or preventable" deaths was "extremely high," *id.*, at 429.[4] Many more prisoners, suffering

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[3] Because plaintiffs do not base their case on deficiencies in care provided on any one occasion, this Court has no occasion to consider whether these instances of delay—or any other particular deficiency in medical care complained of by the plaintiffs—would violate the Constitution under *Estelle* v. *Gamble*, 429 U. S. 97, 104–105 (1976), if considered in isolation. Plaintiffs rely on systemwide deficiencies in the provision of medical and mental health care that, taken as a whole, subject sick and mentally ill prisoners in California to "substantial risk of serious harm" and cause the delivery of care in the prisons to fall below the evolving standards of decency that mark the progress of a maturing society. *Farmer* v. *Brennan*, 511 U. S. 825, 834 (1994).

[4] In 2007, the last year for which the three-judge court had available statistics, an analysis of deaths in California's prisons found 68 preventable or possibly preventable deaths. California Prison Health Care Receivership Corp., K. Imai, Analysis of Year 2007 Death Reviews 18 (Nov. 2008). This was essentially unchanged from 2006, when an analysis found 66 preventable or possibly preventable deaths. *Ibid.* These statistics mean that, during 2006 and 2007, a preventable or possibly preventable death occurred once every five to six days.

Both preventable and possibly preventable deaths involve major lapses in medical care and are a serious cause for concern. In one typical case classified as a possibly preventable death, an analysis revealed the following lapses: "16 month delay in evaluating abnormal liver mass; 8 month delay in receiving regular chemotherapy . . . ; multiple providers fail to

from severe but not life-threatening conditions, experience prolonged illness and unnecessary pain.

B

These conditions are the subject of two federal cases. The first to commence, *Coleman* v. *Brown*, was filed in 1990. *Coleman* involves the class of seriously mentally ill persons in California prisons. Over 15 years ago, in 1995, after a 39-day trial, the *Coleman* District Court found "overwhelming evidence of the systemic failure to deliver necessary care to mentally ill inmates" in California prisons. *Coleman* v. *Wilson*, 912 F. Supp. 1282, 1316 (ED Cal.). The prisons were "seriously and chronically understaffed," *id.*, at 1306, and had "no effective method for ensuring . . . the competence of their staff," *id.*, at 1308. The prisons had failed to implement necessary suicide-prevention procedures, "due in large measure to the severe understaffing." *Id.*, at 1315. Mentally ill inmates "languished for months, or even years, without access to necessary care." *Id.*, at 1316. "They suffer from severe hallucinations, [and] they decompensate into catatonic states." *Ibid.* The court appointed a Special Master to oversee development and implementation of a remedial plan of action.

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respond to jaundice and abnormal liver function tests causing 17 month delay in diagnosis." California Prison Health Care Receivership Corp., K. Imai, Analysis of Year 2009 Inmate Death Reviews—California Prison Health Care System 12 (Sept. 2010) (hereinafter 2009 Death Reviews).

The three-judge court did not have access to statistics for 2008, but in that year the number of preventable or possibly preventable deaths held steady at 66. California Prison Health Care Receivership Corp., K. Imai, Analysis of Year 2008 Death Reviews 9 (Dec. 2009). In 2009, the number of preventable or possibly preventable deaths dropped to 46. 2009 Death Reviews 11, 13. The three-judge court could not have anticipated this development, and it would be inappropriate for this Court to evaluate its significance for the first time on appeal. The three-judge court should, of course, consider this and any other evidence of improved conditions when considering future requests by the State for modification of its order. See *infra*, at 543–545.

In 2007, 12 years after his appointment, the Special Master in *Coleman* filed a report stating that, after years of slow improvement, the state of mental health care in California's prisons was deteriorating. App. 489. The Special Master ascribed this change to increased overcrowding. The rise in population had led to greater demand for care, and existing programming space and staffing levels were inadequate to keep pace. Prisons had retained more mental health staff, but the "growth of the resource [had] not matched the rise in demand." *Id.*, at 482. At the very time the need for space was rising, the need to house the expanding population had also caused a "reduction of programming space now occupied by inmate bunks." *Id.*, at 479. The State was "facing a four to five-year gap in the availability of sufficient beds to meet the treatment needs of many inmates/patients." *Id.*, at 481. "[I]ncreasing numbers of truly psychotic inmate/patients are trapped in [lower levels of treatment] that cannot meet their needs." *Ibid.* The Special Master concluded that many early "achievements have succumbed to the inexorably rising tide of population, leaving behind growing frustration and despair." *Id.*, at 489.

C

The second action, *Plata* v. *Brown*, involves the class of state prisoners with serious medical conditions. After this action commenced in 2001, the State conceded that deficiencies in prison medical care violated prisoners' Eighth Amendment rights. The State stipulated to a remedial injunction. The State failed to comply with that injunction, and in 2005 the court appointed a Receiver to oversee remedial efforts. The court found that "the California prison medical care system is broken beyond repair," resulting in an "unconscionable degree of suffering and death." App. 917. The court found: "[I]t is an uncontested fact that, on average, an inmate in one of California's prisons needlessly dies every six to seven days due to constitutional deficiencies in the

[California prisons'] medical delivery system." *Ibid.* And the court made findings regarding specific instances of neglect, including the following:

> "[A] San Quentin prisoner with hypertension, diabetes and renal failure was prescribed two different medications that actually served to exacerbate his renal failure. An optometrist noted the patient's retinal bleeding due to very high blood pressure and referred him for immediate evaluation, but this evaluation never took place. It was not until a year later that the patient's renal failure was recognized, at which point he was referred to a nephrologist on an urgent basis; he should have been seen by the specialist within 14 days but the consultation never happened and the patient died three months later." *Id.*, at 928 (citations omitted).

Prisons were unable to retain sufficient numbers of competent medical staff, *id.*, at 937, and would "hire any doctor who had 'a license, a pulse and a pair of shoes,'" *id.*, at 926. Medical facilities lacked "necessary medical equipment" and did "not meet basic sanitation standards." *Id.*, at 944. "Exam tables and counter tops, where prisoners with . . . communicable diseases are treated, [were] not routinely disinfected." *Ibid.*

In 2008, three years after the District Court's decision, the Receiver described continuing deficiencies in the health care provided by California prisons:

> "Timely access is not assured. The number of medical personnel has been inadequate, and competence has not been assured. . . . Adequate housing for the disabled and aged does not exist. The medical facilities, when they exist at all, are in an abysmal state of disrepair. Basic medical equipment is often not available or used. Medications and other treatment options are too often not available when needed. . . . Indeed, it is a misnomer to call the existing chaos a 'medical delivery system'—it is

> more an act of desperation than a system." Record in No. 3:01–cv–01351–TEH (ND Cal.), Doc. 1136, p. 9.

A report by the Receiver detailed the impact of overcrowding on efforts to remedy the violation. The Receiver explained that "overcrowding, combined with staffing shortages, has created a culture of cynicism, fear, and despair which makes hiring and retaining competent clinicians extremely difficult." App. 1031. "[O]vercrowding, and the resulting day to day operational chaos of the [prison system], creates regular 'crisis' situations which . . . take time [and] energy . . . away from important remedial programs." *Id.*, at 1035. Overcrowding had increased the incidence of infectious disease, *id.*, at 1037–1038, and had led to rising prison violence and greater reliance by custodial staff on lockdowns, which "inhibit the delivery of medical care and increase the staffing necessary for such care," *id.*, at 1037. "Every day," the Receiver reported, "California prison wardens and health care managers make the difficult decision as to which of the class actions, *Coleman* . . . or *Plata* they will fail to comply with because of staff shortages and patient loads." *Id.*, at 1038.

D

The *Coleman* and *Plata* plaintiffs, believing that a remedy for unconstitutional medical and mental health care could not be achieved without reducing overcrowding, moved their respective District Courts to convene a three-judge court empowered under the PLRA to order reductions in the prison population. The judges in both actions granted the request, and the cases were consolidated before a single three-judge court. The State has not challenged the validity of the consolidation in proceedings before this Court, so its propriety is not presented by this appeal.

The three-judge court heard 14 days of testimony and issued a 184-page opinion, making extensive findings of fact. The court ordered California to reduce its prison population

to 137.5% of the prisons' design capacity within two years. Assuming the State does not increase capacity through new construction, the order requires a population reduction of 38,000 to 46,000 persons. Because it appears all but certain that the State cannot complete sufficient construction to comply fully with the order, the prison population will have to be reduced to at least some extent. The court did not order the State to achieve this reduction in any particular manner. Instead, the court ordered the State to formulate a plan for compliance and submit its plan for approval by the court.

The State appealed to this Court pursuant to 28 U. S. C. § 1253, and the Court postponed consideration of the question of jurisdiction to the hearing on the merits. *Schwarzenegger* v. *Plata*, 560 U. S. 964 (2010).

II

As a consequence of their own actions, prisoners may be deprived of rights that are fundamental to liberty. Yet the law and the Constitution demand recognition of certain other rights. Prisoners retain the essence of human dignity inherent in all persons. Respect for that dignity animates the Eighth Amendment prohibition against cruel and unusual punishment. "'The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.'" *Atkins* v. *Virginia*, 536 U. S. 304, 311 (2002) (quoting *Trop* v. *Dulles*, 356 U. S. 86, 100 (1958) (plurality opinion)).

To incarcerate, society takes from prisoners the means to provide for their own needs. Prisoners are dependent on the State for food, clothing, and necessary medical care. A prison's failure to provide sustenance for inmates "may actually produce physical 'torture or a lingering death.'" *Estelle* v. *Gamble*, 429 U. S. 97, 103 (1976) (quoting *In re Kemmler*, 136 U. S. 436, 447 (1890)); see generally A. Elsner, Gates of Injustice: The Crisis in America's Prisons (2004). Just as a prisoner may starve if not fed, he or she may suffer or die if

not provided adequate medical care. A prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society.

If government fails to fulfill this obligation, the courts have a responsibility to remedy the resulting Eighth Amendment violation. See *Hutto* v. *Finney*, 437 U. S. 678, 687, n. 9 (1978). Courts must be sensitive to the State's interest in punishment, deterrence, and rehabilitation, as well as the need for deference to experienced and expert prison administrators faced with the difficult and dangerous task of housing large numbers of convicted criminals. See *Bell* v. *Wolfish*, 441 U. S. 520, 547–548 (1979). Courts nevertheless must not shrink from their obligation to "enforce the constitutional rights of all 'persons,' including prisoners." *Cruz* v. *Beto*, 405 U. S. 319, 321 (1972) *(per curiam)*. Courts may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration.

Courts faced with the sensitive task of remedying unconstitutional prison conditions must consider a range of available options, including appointment of special masters or receivers and the possibility of consent decrees. When necessary to ensure compliance with a constitutional mandate, courts may enter orders placing limits on a prison's population. By its terms, the PLRA restricts the circumstances in which a court may enter an order "that has the purpose or effect of reducing or limiting the prison population." 18 U. S. C. § 3626(g)(4). The order in this case does not necessarily require the State to release any prisoners. The State may comply by raising the design capacity of its prisons or by transferring prisoners to county facilities or facilities in other States. Because the order limits the prison population as a percentage of design capacity, it nonetheless has the "effect of reducing or limiting the prison population." *Ibid.*

Under the PLRA, only a three-judge court may enter an order limiting a prison population. § 3626(a)(3)(B). Before a three-judge court may be convened, a district court first must have entered an order for less intrusive relief that failed to remedy the constitutional violation and must have given the defendant a reasonable time to comply with its prior orders. § 3626(a)(3)(A). The party requesting a three-judge court must then submit "materials sufficient to demonstrate that [these requirements] have been met." § 3626(a)(3)(C). If the district court concludes that the materials are, in fact, sufficient, a three-judge court may be convened. *Ibid.;* see also 28 U. S. C. § 2284(b)(1) (stating that a three-judge court may not be convened if the district court "determines that three judges are not required"); 17A C. Wright, A. Miller, E. Cooper, & V. Amar, Federal Practice and Procedure § 4235 (3d ed. 2007).

The three-judge court must then find by clear and convincing evidence that "crowding is the primary cause of the violation of a Federal right" and that "no other relief will remedy the violation of the Federal right." 18 U. S. C. § 3626(a)(3)(E). As with any award of prospective relief under the PLRA, the relief "shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs." § 3626(a)(1)(A). The three-judge court must therefore find that the relief is "narrowly drawn, extends no further than necessary . . . , and is the least intrusive means necessary to correct the violation of the Federal right." *Ibid.* In making this determination, the three-judge court must give "substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief." *Ibid.* Applying these standards, the three-judge court found a population limit appropriate, necessary, and authorized in this case.

This Court's review of the three-judge court's legal determinations is *de novo,* but factual findings are reviewed for clear error. See *Anderson* v. *Bessemer City,* 470 U. S. 564,

573–574 (1985). Deference to trial court factfinding reflects an understanding that "[t]he trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise." *Id.*, at 574. The three-judge court oversaw two weeks of trial and heard at considerable length from California prison officials, as well as experts in the field of correctional administration. The judges had the opportunity to ask relevant questions of those witnesses. Two of the judges had overseen the ongoing remedial efforts of the Receiver and Special Master. The three-judge court was well situated to make the difficult factual judgments necessary to fashion a remedy for this complex and intractable constitutional violation. The three-judge court's findings of fact may be reversed only if this Court is left with a "'definite and firm conviction that a mistake has been committed.'" *Id.*, at 573 (quoting *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 395 (1948)).

A

The State contends that it was error to convene the three-judge court without affording it more time to comply with the prior orders in *Coleman* and *Plata*.

1

The parties dispute this Court's jurisdiction to review the determinations of the *Coleman* and *Plata* District Courts that a three-judge court should be convened. Plaintiffs claim the State was required to raise this issue first in the Court of Appeals by appealing the orders of the District Courts. When exercising jurisdiction under 28 U. S. C. §1253, however, this Court "has not hesitated to exercise jurisdiction 'to determine the authority of the court below,'" including whether the three-judge court was properly constituted. *Gonzalez* v. *Automatic Employees Credit Union*, 419 U. S. 90, 95, n. 12 (1974) (quoting *Bailey* v. *Patterson*, 369 U. S. 31, 34 (1962) *(per curiam)*); see also *Gully* v. *Interstate*

Natural Gas Co., 292 U. S. 16, 18 (1934) *(per curiam)* ("The case is analogous to those in which this Court, finding that the court below has acted without jurisdiction, exercises its appellate jurisdiction to correct the improper action"). The merits of the decision to convene the three-judge court, therefore, are properly before this Court.

2

Before a three-judge court may be convened to consider whether to enter a population limit, the PLRA requires that the court have "previously entered an order for less intrusive relief that has failed to remedy the deprivation of the Federal right sought to be remedied." 18 U. S. C. § 3626(a)(3)(A)(i). This provision refers to "an order." It is satisfied if the court has entered one order, and this single order has "failed to remedy" the constitutional violation. The defendant must also have had "a reasonable amount of time to comply with the previous court orders." § 3626(a)(3)(A)(ii). This provision refers to the court's "orders." It requires that the defendant have been given a reasonable time to comply with all of the court's orders. Together, these requirements ensure that the "'last resort remedy'" of a population limit is not imposed "'as a first step.'" *Inmates of Occoquan* v. *Barry*, 844 F. 2d 828, 843 (CADC 1988).

The first of these conditions, the previous order requirement of § 3626(a)(3)(A)(i), was satisfied in *Coleman* by appointment of a Special Master in 1995, and it was satisfied in *Plata* by approval of a consent decree and stipulated injunction in 2002. Both orders were intended to remedy the constitutional violations. Both were given ample time to succeed. When the three-judge court was convened, 12 years had passed since the appointment of the *Coleman* Special Master, and 5 years had passed since the approval of the *Plata* consent decree. The State does not claim that either

order achieved a remedy. Although the PLRA entitles a State to terminate remedial orders such as these after two years unless the district court finds that the relief "remains necessary to correct a current and ongoing violation of the Federal right," § 3626(b)(3), California has not attempted to obtain relief on this basis.

The State claims instead that the second condition, the reasonable time requirement of § 3626(a)(3)(A)(ii), was not met because other, later remedial efforts should have been given more time to succeed. In 2006, the *Coleman* District Judge approved a revised plan of action calling for construction of new facilities, hiring of new staff, and implementation of new procedures. That same year, the *Plata* District Judge selected and appointed a Receiver to oversee the State's ongoing remedial efforts. When the three-judge court was convened, the Receiver had filed a preliminary plan of action calling for new construction, hiring of additional staff, and other procedural reforms.

Although both the revised plan of action in *Coleman* and the appointment of the Receiver in *Plata* were new developments in the courts' remedial efforts, the basic plan to solve the crisis through construction, hiring, and procedural reforms remained unchanged. These efforts had been ongoing for years; the failed consent decree in *Plata* had called for implementation of new procedures and hiring of additional staff; and the *Coleman* Special Master had issued over 70 orders directed at achieving a remedy through construction, hiring, and procedural reforms. The *Coleman* Special Master and *Plata* Receiver were unable to provide assurance that further, substantially similar efforts would yield success absent a population reduction. Instead, the *Coleman* Special Master explained that "many of the clinical advances . . . painfully accomplished over the past decade are slip-sliding away" as a result of overcrowding. App. 481–482. And the *Plata* Receiver indicated that, absent a reduction in over-

crowding, a successful remedial effort could "all but bankrupt" the State of California. App. 1053.

Having engaged in remedial efforts for 5 years in *Plata* and 12 in *Coleman*, the District Courts were not required to wait to see whether their more recent efforts would yield equal disappointment. When a court attempts to remedy an entrenched constitutional violation through reform of a complex institution, such as this statewide prison system, it may be necessary in the ordinary course to issue multiple orders directing and adjusting ongoing remedial efforts. Each new order must be given a reasonable time to succeed, but reasonableness must be assessed in light of the entire history of the court's remedial efforts. A contrary reading of the reasonable time requirement would in effect require district courts to impose a moratorium on new remedial orders before issuing a population limit. This unnecessary period of inaction would delay an eventual remedy and would prolong the courts' involvement, serving neither the State nor the prisoners. Congress did not require this unreasonable result when it used the term "reasonable."

The *Coleman* and *Plata* courts had a solid basis to doubt that additional efforts to build new facilities and hire new staff would achieve a remedy. Indeed, although five years have now passed since the appointment of the *Plata* Receiver and approval of the revised plan of action in *Coleman*, there is no indication that the constitutional violations have been cured. A report filed by the *Coleman* Special Master in July 2009 describes ongoing violations, including an "absence of timely access to appropriate levels of care at every point in the system." App. 807. A report filed by the *Plata* Receiver in October 2010 likewise describes ongoing deficiencies in the provision of medical care and concludes that there are simply "too many prisoners for the health-care infrastructure." App. 1655. The *Coleman* and *Plata* courts acted reasonably when they convened a three-judge court without further delay.

B

Once a three-judge court has been convened, the court must find additional requirements satisfied before it may impose a population limit. The first of these requirements is that "crowding is the primary cause of the violation of a Federal right." 18 U. S. C. § 3626(a)(3)(E)(i).

1

The three-judge court found the primary cause requirement satisfied by the evidence at trial. The court found that overcrowding strains inadequate medical and mental health facilities; overburdens limited clinical and custodial staff; and creates violent, unsanitary, and chaotic conditions that contribute to the constitutional violations and frustrate efforts to fashion a remedy. The three-judge court also found that "until the problem of overcrowding is overcome it will be impossible to provide constitutionally compliant care to California's prison population." Juris. App. 141a.

The parties dispute the standard of review applicable to this determination. With respect to the three-judge court's factual findings, this Court's review is necessarily deferential. It is not this Court's place to "duplicate the role" of the trial court. *Anderson*, 470 U. S., at 573. The ultimate issue of primary cause presents a mixed question of law and fact; but there, too, "the mix weighs heavily on the 'fact' side." *Lilly* v. *Virginia*, 527 U. S. 116, 148 (1999) (Rehnquist, C. J., concurring in judgment). Because the "district court is 'better positioned' . . . to decide the issue," our review of the three-judge court's primary cause determination is deferential. *Salve Regina College* v. *Russell*, 499 U. S. 225, 233 (1991).

The record documents the severe impact of burgeoning demand on the provision of care. At the time of trial, vacancy rates for medical and mental health staff ranged as high as 20% for surgeons, 25% for physicians, 39% for nurse prac-

titioners, and 54.1% for psychiatrists. Juris. App. 105a, 108a. These percentages are based on the number of positions budgeted by the State. Dr. Ronald Shansky, former medical director of the Illinois prison system, concluded that these numbers understate the severity of the crisis because the State has not budgeted sufficient staff to meet demand.[5] According to Dr. Shansky, "even if the prisons were able to fill all of their vacant health care positions, which they have not been able to do to date, . . . the prisons would still be unable to handle the level of need given the current overcrowding." Record in No. 2:90–cv–00520–LKK–JFM (ED Cal.), Doc. 3231–13, p. 19 (hereinafter Doc. 3231–13). Dr. Craig Haney, a professor of psychology, reported that mental health staff are "managing far larger caseloads than is appropriate or effective." App. 596. A prison psychiatrist told Dr. Haney that "'we are doing about 50% of what we should be doing.'" *Ibid.* In the context of physical care Dr. Shansky agreed that "demand for care, particularly for the high priority cases, continues to overwhelm the resources available." *Id.*, at 1408.

Even on the assumption that vacant positions could be filled, the evidence suggested there would be insufficient space for the necessary additional staff to perform their jobs. The *Plata* Receiver, in his report on overcrowding, concluded that even the "newest and most modern prisons" had been "designed with clinic space which is only one-half that necessary for the real-life capacity of the prisons." App. 1023 (emphasis deleted). Dr. Haney reported that "[e]ach one of the facilities I toured was short of significant amounts of space needed to perform otherwise critical tasks and re-

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[5] Dr. Craig Haney likewise testified that the State had "significantly *underestimated* the staffing needed to implement critical portions of the *Coleman* Program Guide requirements," that "key tasks were omitted when determining staffing workloads," and that estimates were based on "key assumptions" that caused the State to underestimate demand for mental health care. App. 596–597.

sponsibilities." *Id.*, at 597–598. In one facility, staff cared for 7,525 prisoners in space designed for one-third as many. Juris. App. 93a. Staff operate out of converted storage rooms, closets, bathrooms, shower rooms, and visiting centers. These makeshift facilities impede the effective delivery of care and place the safety of medical professionals in jeopardy, compounding the difficulty of hiring additional staff.

This shortfall of resources relative to demand contributes to significant delays in treatment. Mentally ill prisoners are housed in administrative segregation while awaiting transfer to scarce mental health treatment beds for appropriate care. One correctional officer indicated that he had kept mentally ill prisoners in segregation for "'6 months or more.'" App. 594. Other prisoners awaiting care are held in tiny, phone-booth-sized cages. The record documents instances of prisoners committing suicide while awaiting treatment.[6]

Delays are no less severe in the context of physical care. Prisons have backlogs of up to 700 prisoners waiting to see a doctor. Doc. 3231–13, at 21. A review of referrals for urgent specialty care at one prison revealed that only 105 of 316 pending referrals had a scheduled appointment, and only 2 had an appointment scheduled to occur within 14 days. *Id.*, at 25–26. Urgent specialty referrals at one prison had been pending for six months to a year. *Id.*, at 30.

Crowding also creates unsafe and unsanitary living conditions that hamper effective delivery of medical and mental health care. A medical expert described living quarters in converted gymnasiums or dayrooms, where large numbers of prisoners may share just a few toilets and showers, as

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[6] For instance, Dr. Pablo Stewart reported that one prisoner was referred to a crisis bed but, "[a]fter learning that the restraint room was not available and that there were no crisis beds open, staff moved [the prisoner] back to his administrative segregation cell without any prescribed observation." App. 736. The prisoner "hanged himself that night in his cell." *Ibid.;* see also Juris. App. 99a.

"'breeding grounds for disease.'"[7] Juris. App. 102a. Cramped conditions promote unrest and violence, making it difficult for prison officials to monitor and control the prison population. On any given day, prisoners in the general prison population may become ill, thus entering the plaintiff class; and overcrowding may prevent immediate medical attention necessary to avoid suffering, death, or spread of disease. After one prisoner was assaulted in a crowded gymnasium, prison staff did not even learn of the injury until the prisoner had been dead for several hours. Tr. 382. Living in crowded, unsafe, and unsanitary conditions can cause prisoners with latent mental illnesses to worsen and develop overt symptoms. Crowding may also impede efforts to improve delivery of care. Two prisoners committed suicide by hanging after being placed in cells that had been identified as requiring a simple fix to remove attachment points that could support a noose. The repair was not made because doing so would involve removing prisoners from the cells, and there was no place to put them. *Id.*, at 769–777. More generally, Jeanne Woodford, the former acting secretary of California's prisons, testified that there "'are simply too many issues that arise from such a large number of prisoners,'" and that, as a result, "'management spends virtually all of its time fighting fires instead of engaging in thoughtful decision-making and planning'" of the sort needed to fashion an effective remedy for these constitutional violations. Juris. App. 82a.

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[7] Correctional officials at trial described several outbreaks of disease. One officer testified that antibiotic-resistant staph infections spread widely among the prison population and described prisoners "bleeding, oozing with pus that is soaking through their clothes when they come in to get the wound covered and treated." Tr. 601, 604–605. Another witness testified that inmates with influenza were sent back from the infirmary due to a lack of beds and that the disease quickly spread to "more than half" the 340 prisoners in the housing unit, with the result that the unit was placed on lockdown for a week. *Id.*, at 720–721.

Increased violence also requires increased reliance on lockdowns to keep order, and lockdowns further impede the effective delivery of care. In 2006, prison officials instituted 449 lockdowns. *Id.*, at 116a. The average lockdown lasted 12 days, and 20 lockdowns lasted 60 days or longer. *Ibid.* During lockdowns, staff must either escort prisoners to medical facilities or bring medical staff to the prisoners. Either procedure puts additional strain on already overburdened medical and custodial staff. Some programming for the mentally ill even may be canceled altogether during lockdowns, and staff may be unable to supervise the delivery of psychotropic medications.

The effects of overcrowding are particularly acute in the prisons' reception centers, intake areas that process 140,000 new or returning prisoners every year. *Id.*, at 85a. Crowding in these areas runs as high as 300% of design capacity. *Id.*, at 86a. Living conditions are "'toxic,'" and a lack of treatment space impedes efforts to identify inmate medical or mental health needs and provide even rudimentary care. *Id.*, at 92a. The former warden of San Quentin reported that doctors in that prison's reception center "'were unable to keep up with physicals or provid[e] any kind of chronic care follow-up.'" *Id.*, at 90a. Inmates spend long periods of time in these areas awaiting transfer to the general population. Some prisoners are held in the reception centers for their entire period of incarceration.

Numerous experts testified that crowding is the primary cause of the constitutional violations. The former warden of San Quentin and former acting secretary of the California prisons concluded that crowding "makes it 'virtually impossible for the organization to develop, much less implement, a plan to provide prisoners with adequate care.'" *Id.*, at 83a. The former executive director of the Texas Department of Criminal Justice testified that "'[e]verything revolves around overcrowding'" and that "'overcrowding is the primary cause of the medical and mental health care viola-

tions.'" *Id.*, at 127a. The former head of corrections in Pennsylvania, Washington, and Maine testified that overcrowding is "'overwhelming the system both in terms of sheer numbers, in terms of the space available, in terms of providing healthcare.'" *Ibid.* And the current secretary of the Pennsylvania Department of Corrections testified that "'"the biggest inhibiting factor right now in California being able to deliver appropriate mental health and medical care is the severe overcrowding.'" *Id.*, at 82a.

2

The State attempts to undermine the substantial evidence presented at trial, and the three-judge court's findings of fact, by complaining that the three-judge court did not allow it to present evidence of current prison conditions. This suggestion lacks a factual basis.

The three-judge court properly admitted evidence of current conditions as relevant to the issues before it. The three-judge court allowed discovery until a few months before trial; expert witnesses based their conclusions on recent observations of prison conditions; the court admitted recent reports on prison conditions by the *Plata* Receiver and *Coleman* Special Master; and both parties presented testimony related to current conditions, including understaffing, inadequate facilities, and unsanitary and unsafe living conditions. See *supra*, at 504–507, 517–521 and this page. Dr. Craig Haney, for example, based his expert report on tours of eight California prisons. App. 539. These tours occurred as late as August 2008, two weeks before Dr. Haney submitted his report and less than four months before the first day of trial. *Id.*, at 585; see also *id.*, at 563, 565, 580 (July tours). Other experts submitted reports based on similar observations. See, *e. g.*, Doc. 3231–13, at 9 (Dr. Shansky); App. 646 (Dr. Stewart); *id.*, at 1245 (Austin); *id.*, at 1312 (Lehman).

The three-judge court's opinion cited and relied on this evidence of current conditions. The court relied extensively

on the expert witness reports. See generally Juris. App. 85a–143a. The court cited the most current data available on suicides and preventable deaths in the California prisons. *Id.*, at 123a, 125a. The court relied on statistics on staff vacancies that dated to three months before trial, *id.*, at 105a, 108a, and statistics on shortages of treatment beds for the same period, *id.*, at 97a. These are just examples of the extensive evidence of current conditions that informed every aspect of the judgment of the three-judge court. The three-judge court did not abuse its discretion when it also cited findings made in earlier decisions of the *Plata* and *Coleman* District Courts. Those findings remained relevant to establish the nature of these longstanding, continuing constitutional violations.

It is true that the three-judge court established a cutoff date for discovery a few months before trial. The order stated that site inspections of prisons would be allowed until that date, and that evidence of "changed prison conditions" after that date would not be admitted. App. 1190. The court also excluded evidence not pertinent to the issue whether a population limit is appropriate under the PLRA, including evidence relevant solely to the existence of an ongoing constitutional violation. The court reasoned that its decision was limited to the issue of remedy and that the merits of the constitutional violation had already been determined. The three-judge court made clear that all such evidence would be considered "[t]o the extent that it illuminates questions that are properly before the court." *Id.*, at 2339.

Both rulings were within the sound discretion of the three-judge court. Orderly trial management may require discovery deadlines and a clean distinction between litigation of the merits and the remedy. The State in fact represented to the three-judge court that it would be "appropriate" to cut off discovery before trial because "like plaintiffs, we, too, are really gearing up and going into a pretrial mode." *Id.*, at 1683. And if the State truly believed there was no longer

a violation, it could have argued to the *Coleman* and *Plata* District Courts that a three-judge court should not be convened because the District Courts' prior orders had not "failed to remedy the deprivation" of prisoners' constitutional rights. 18 U. S. C. § 3626(a)(3)(A)(i); see also *supra*, at 514–515. Once the three-judge court was convened, that court was not required to reconsider the merits. Its role was solely to consider the propriety and necessity of a population limit.

The State does not point to any significant evidence that it was unable to present and that would have changed the outcome of the proceedings. To the contrary, the record and opinion make clear that the decision of the three-judge court was based on current evidence pertaining to ongoing constitutional violations.

3

The three-judge court acknowledged that the violations were caused by factors in addition to overcrowding and that reducing crowding in the prisons would not entirely cure the violations. This is consistent with the reports of the *Coleman* Special Master and *Plata* Receiver, both of whom concluded that even a significant reduction in the prison population would not remedy the violations absent continued efforts to train staff, improve facilities, and reform procedures. App. 487, 1054.[8] The three-judge court nevertheless found

[8] The *Plata* Receiver concluded that those who believed a population reduction would be a panacea were "simply wrong." App. 1054–1055. The Receiver nevertheless made clear that "the time this process will take, and the cost and the scope of intrusion by the Federal Court cannot help but increase, and increase in a very significant manner, if the scope and characteristics of [California prison] overcrowding continue." *Id.*, at 1053. The *Coleman* Special Master likewise found that a large release of prisoners, without other relief, would leave the violation "largely unmitigated" even though deficiencies in care "are unquestionably exacerbated by overcrowding" and "defendants' ability to provide required mental health services would be enhanced considerably by a reduction in the overall census" of the prisons. App. 486–487.

that overcrowding was the primary cause in the sense of being the foremost cause of the violation.

This understanding of the primary cause requirement is consistent with the text of the PLRA. The State in fact concedes that it proposed this very definition of primary cause to the three-judge court. "Primary" is defined as "[f]irst or highest in rank, quality, or importance; principal." American Heritage Dictionary 1393 (4th ed. 2000); see also Webster's Third New International Dictionary 1800 (2002) (defining "primary" as "first in rank or importance"); 12 Oxford English Dictionary 472 (2d ed. 1989) (defining "primary" as "[o]f the first or highest rank or importance; that claims the first consideration; principal, chief"). Overcrowding need only be the foremost, chief, or principal cause of the violation. If Congress had intended to require that crowding be the only cause, it would have said so, assuming in its judgment that definition would be consistent with constitutional limitations.

As this case illustrates, constitutional violations in conditions of confinement are rarely susceptible of simple or straightforward solutions. In addition to overcrowding the failure of California's prisons to provide adequate medical and mental health care may be ascribed to chronic and worsening budget shortfalls, a lack of political will in favor of reform, inadequate facilities, and systemic administrative failures. The *Plata* District Judge, in his order appointing the Receiver, compared the problem to "'a spider web, in which the tension of the various strands is determined by the relationship among all the parts of the web, so that if one pulls on a single strand, the tension of the entire web is redistributed in a new and complex pattern.'" App. 966–967 (quoting Fletcher, The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy, 91 Yale L. J. 635, 645 (1982)); see also *Hutto*, 437 U. S., at 688 (noting "the interdependence of the conditions producing the violation," in-

cluding overcrowding). Only a multifaceted approach aimed at many causes, including overcrowding, will yield a solution.

The PLRA should not be interpreted to place undue restrictions on the authority of federal courts to fashion practical remedies when confronted with complex and intractable constitutional violations. Congress limited the availability of limits on prison populations, but it did not forbid these measures altogether. See 18 U. S. C. § 3626. The House Report accompanying the PLRA explained:

> "While prison caps must be the remedy of last resort, a court still retains the power to order this remedy despite its intrusive nature and harmful consequences to the public if, but only if, it is truly necessary to prevent an actual violation of a prisoner's federal rights." H. R. Rep. No. 104–21, p. 25 (1995).

Courts should presume that Congress was sensitive to the real-world problems faced by those who would remedy constitutional violations in the prisons and that Congress did not leave prisoners without a remedy for violations of their constitutional rights. A reading of the PLRA that would render population limits unavailable in practice would raise serious constitutional concerns. See, *e. g.*, *Bowen* v. *Michigan Academy of Family Physicians*, 476 U. S. 667, 681, n. 12 (1986). A finding that overcrowding is the "primary cause" of a violation is therefore permissible, despite the fact that additional steps will be required to remedy the violation.

C

The three-judge court was also required to find by clear and convincing evidence that "no other relief will remedy the violation of the Federal right." § 3626(a)(3)(E)(ii).

The State argues that the violation could have been remedied through a combination of new construction, transfers of prisoners out of State, hiring of medical personnel, and continued efforts by the *Plata* Receiver and *Coleman* Spe-

cial Master. The order in fact permits the State to comply with the population limit by transferring prisoners to county facilities or facilities in other States, or by constructing new facilities to raise the prisons' design capacity. And the three-judge court's order does not bar the State from undertaking any other remedial efforts. If the State does find an adequate remedy other than a population limit, it may seek modification or termination of the three-judge court's order on that basis. The evidence at trial, however, supports the three-judge court's conclusion that an order limited to other remedies would not provide effective relief.

The State's argument that out-of-state transfers provide a less restrictive alternative to a population limit must fail because requiring out-of-state transfers itself qualifies as a population limit under the PLRA.[9] Such an order "has the purpose or effect of reducing or limiting the prison population, or . . . directs the release from or nonadmission of prisoners to a prison." § 3626(g)(4). The same is true of transfers to county facilities. Transfers provide a means to reduce the prison population in compliance with the three-judge court's order. They are not a less restrictive alternative to that order.

Even if out-of-state transfers could be regarded as a less restrictive alternative, the three-judge court found no evidence of plans for transfers in numbers sufficient to relieve overcrowding. The State complains that the *Coleman* District Court slowed the rate of transfer by requiring inspections to ensure that the receiving institutions were in compliance with the Eighth Amendment, but the State has made no effort to show that it has the resources and the capacity

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[9] A program of voluntary transfers by the State would, of course, be less restrictive than an order mandating a reduction in the prison population. In light of the State's longstanding failure to remedy these serious constitutional violations, the three-judge court was under no obligation to consider voluntary population-reduction measures by the State as a workable alternative to injunctive relief.

to transfer significantly larger numbers of prisoners absent that condition.

Construction of new facilities, in theory, could alleviate overcrowding, but the three-judge court found no realistic possibility that California would be able to build itself out of this crisis. At the time of the court's decision the State had plans to build new medical and housing facilities, but funding for some plans had not been secured and funding for other plans had been delayed by the legislature for years. Particularly in light of California's ongoing fiscal crisis, the three-judge court deemed "chimerical" any "remedy that requires significant additional spending by the state." Juris. App. 151a. Events subsequent to the three-judge court's decision have confirmed this conclusion. In October 2010, the State notified the *Coleman* District Court that a substantial component of its construction plans had been delayed indefinitely by the legislature. And even if planned construction were to be completed, the *Plata* Receiver found that many so-called "expansion" plans called for cramming more prisoners into existing prisons without expanding administrative and support facilities. Juris. App. 151a–152a. The former acting secretary of the California prisons explained that these plans would "'compound the burdens imposed on prison administrators and line staff'" by adding to the already overwhelming prison population, creating new barriers to achievement of a remedy. *Id.*, at 152a.

The three-judge court also rejected additional hiring as a realistic means to achieve a remedy. The State for years had been unable to fill positions necessary for the adequate provision of medical and mental health care, and the three-judge court found no reason to expect a change. Although the State points to limited gains in staffing between 2007 and 2008, the record shows that the prison system remained chronically understaffed through trial in 2008. See *supra*, at 517–518. The three-judge court found that violence and other negative conditions caused by crowding made it diffi-

cult to hire and retain needed staff. The court also concluded that there would be insufficient space for additional staff to work even if adequate personnel could somehow be retained. Additional staff cannot help to remedy the violation if they have no space in which to see and treat patients.

The three-judge court also did not err, much less commit clear error, when it concluded that, absent a population reduction, continued efforts by the Receiver and Special Master would not achieve a remedy. Both the Receiver and the Special Master filed reports stating that overcrowding posed a significant barrier to their efforts. The *Plata* Receiver stated that he was determined to achieve a remedy even without a population reduction, but he warned that such an effort would "all but bankrupt" the State. App. 1053. The *Coleman* Special Master noted even more serious concerns, stating that previous remedial efforts had "succumbed to the inexorably rising tide of population." App. 489. Both reports are persuasive evidence that, absent a reduction in overcrowding, any remedy might prove unattainable and would at the very least require vast expenditures of resources by the State. Nothing in the long history of the *Coleman* and *Plata* actions demonstrates any real possibility that the necessary resources would be made available.

The State claims that, even if each of these measures were unlikely to remedy the violation, they would succeed in doing so if combined together. Aside from asserting this proposition, the State offers no reason to believe it is so. Attempts to remedy the violations in *Plata* have been ongoing for nine years. In *Coleman*, remedial efforts have been ongoing for 16. At one time, it may have been possible to hope that these violations would be cured without a reduction in overcrowding. A long history of failed remedial orders, together with substantial evidence of overcrowding's deleterious effects on the provision of care, compels a different conclusion today.

The common thread connecting the State's proposed remedial efforts is that they would require the State to expend large amounts of money absent a reduction in overcrowding. The Court cannot ignore the political and fiscal reality behind this case. California's Legislature has not been willing or able to allocate the resources necessary to meet this crisis absent a reduction in overcrowding. There is no reason to believe it will begin to do so now, when the State of California is facing an unprecedented budgetary shortfall. As noted above, the legislature recently failed to allocate funds for planned new construction. *Supra*, at 528. Without a reduction in overcrowding, there will be no efficacious remedy for the unconstitutional care of the sick and mentally ill in California's prisons.

D

The PLRA states that no prospective relief shall issue with respect to prison conditions unless it is narrowly drawn, extends no further than necessary to correct the violation of a federal right, and is the least intrusive means necessary to correct the violation. 18 U. S. C. § 3626(a). When determining whether these requirements are met, courts must "give substantial weight to any adverse impact on public safety or the operation of a criminal justice system." *Ibid.*

1

The three-judge court acknowledged that its order "is likely to affect inmates without medical conditions or serious mental illness." Juris. App. 172a. This is because reducing California's prison population will require reducing the number of prisoners outside the class through steps such as parole reform, sentencing reform, use of good-time credits, or other means to be determined by the State. Reducing overcrowding will also have positive effects beyond facilitating timely and adequate access to medical care, including reducing the incidence of prison violence and ameliorating unsafe living conditions. According to the State, these collateral

consequences are evidence that the order sweeps more broadly than necessary.

The population limit imposed by the three-judge court does not fail narrow tailoring simply because it will have positive effects beyond the plaintiff class. Narrow tailoring requires a "'"fit" between the [remedy's] ends and the means chosen to accomplish those ends.'" *Board of Trustees of State Univ. of N. Y.* v. *Fox*, 492 U. S. 469, 480 (1989). The scope of the remedy must be proportional to the scope of the violation, and the order must extend no further than necessary to remedy the violation. This Court has rejected remedial orders that unnecessarily reach out to improve prison conditions other than those that violate the Constitution. *Lewis* v. *Casey*, 518 U. S. 343, 357 (1996). But the precedents do not suggest that a narrow and otherwise proper remedy for a constitutional violation is invalid simply because it will have collateral effects.

Nor does anything in the text of the PLRA require that result. The PLRA states that a remedy shall extend no further than necessary to remedy the violation of the rights of a "particular plaintiff or plaintiffs." 18 U. S. C. § 3626(a)(1)(A). This means only that the scope of the order must be determined with reference to the constitutional violations established by the specific plaintiffs before the court.

This case is unlike cases where courts have impermissibly reached out to control the treatment of persons or institutions beyond the scope of the violation. See *Dayton Bd. of Ed.* v. *Brinkman*, 433 U. S. 406, 420 (1977). Even prisoners with no present physical or mental illness may become afflicted, and all prisoners in California are at risk so long as the State continues to provide inadequate care. Prisoners in the general population will become sick, and will become members of the plaintiff classes, with routine frequency; and overcrowding may prevent the timely diagnosis and care necessary to provide effective treatment and to prevent fur-

ther spread of disease. Relief targeted only at present members of the plaintiff classes may therefore fail to adequately protect future class members who will develop serious physical or mental illness. Prisoners who are not sick or mentally ill do not yet have a claim that they have been subjected to care that violates the Eighth Amendment, but in no sense are they remote bystanders in California's medical care system. They are that system's next potential victims.

A release order limited to prisoners within the plaintiff classes would, if anything, unduly limit the ability of state officials to determine which prisoners should be released. As the State acknowledges in its brief, "release of seriously mentally ill inmates [would be] likely to create special dangers because of their recidivism rates." Consolidated Reply Brief for Appellants 34. The order of the three-judge court gives the State substantial flexibility to determine who should be released. If the State truly believes that a release order limited to sick and mentally ill inmates would be preferable to the order entered by the three-judge court, the State can move the three-judge court for modification of the order on that basis. The State has not requested this relief from this Court.

The order also is not overbroad because it encompasses the entire prison system, rather than separately assessing the need for a population limit at every institution. The *Coleman* court found a systemwide violation when it first afforded relief, and in *Plata* the State stipulated to systemwide relief when it conceded the existence of a violation. Both the *Coleman* Special Master and the *Plata* Receiver have filed numerous reports detailing systemwide deficiencies in medical and mental health care. California's medical care program is run at a systemwide level, and resources are shared among the correctional facilities.

Although the three-judge court's order addresses the entire California prison system, it affords the State flexibility

to accommodate differences between institutions. There is no requirement that every facility comply with the 137.5% limit. Assuming no constitutional violation results, some facilities may retain populations in excess of the limit provided other facilities fall sufficiently below it so the system as a whole remains in compliance with the order. This will allow prison officials to shift prisoners to facilities that are better able to accommodate overcrowding, or out of facilities where retaining sufficient medical staff has been difficult. The alternative—a series of institution-specific population limits—would require federal judges to make these choices. Leaving this discretion to state officials does not make the order overbroad.

Nor is the order overbroad because it limits the State's authority to run its prisons, as the State urges in its brief. While the order does in some respects shape or control the State's authority in the realm of prison administration, it does so in a manner that leaves much to the State's discretion. The State may choose how to allocate prisoners between institutions; it may choose whether to increase the prisons' capacity through construction or reduce the population; and, if it does reduce the population, it may decide what steps to take to achieve the necessary reduction. The order's limited scope is necessary to remedy a constitutional violation.

As the State implements the order of the three-judge court, time and experience may reveal targeted and effective remedies that will end the constitutional violations even without a significant decrease in the general prison population. The State will be free to move the three-judge court for modification of its order on that basis, and these motions would be entitled to serious consideration. See *infra*, at 543–545. At this time, the State has not proposed any realistic alternative to the order. The State's desire to avoid a population limit, justified as according respect to state authority, creates a certain and unacceptable risk of continuing

violations of the rights of sick and mentally ill prisoners, with the result that many more will die or needlessly suffer. The Constitution does not permit this wrong.

2

In reaching its decision, the three-judge court gave "substantial weight" to any potential adverse impact on public safety from its order. The court devoted nearly 10 days of trial to the issue of public safety, and it gave the question extensive attention in its opinion. Ultimately, the court concluded that it would be possible to reduce the prison population "in a manner that preserves public safety and the operation of the criminal justice system." Juris. App. 247a–248a.

The PLRA's requirement that a court give "substantial weight" to public safety does not require the court to certify that its order has no possible adverse impact on the public. A contrary reading would depart from the statute's text by replacing the word "substantial" with "conclusive." Whenever a court issues an order requiring the State to adjust its incarceration and criminal justice policy, there is a risk that the order will have some adverse impact on public safety in some sectors. This is particularly true when the order requires release of prisoners before their sentence has been served. Persons incarcerated for even one offense may have committed many other crimes prior to arrest and conviction, and some number can be expected to commit further crimes upon release. Yet the PLRA contemplates that courts will retain authority to issue orders necessary to remedy constitutional violations, including authority to issue population limits when necessary. See *supra*, at 527. A court is required to consider the public safety consequences of its order and to structure, and monitor, its ruling in a way that mitigates those consequences while still achieving an effective remedy of the constitutional violation.

This inquiry necessarily involves difficult predictive judgments regarding the likely effects of court orders. Although these judgments are normally made by state officials, they necessarily must be made by courts when those courts fashion injunctive relief to remedy serious constitutional violations in the prisons. These questions are difficult and sensitive, but they are factual questions and should be treated as such. Courts can, and should, rely on relevant and informed expert testimony when making factual findings. It was proper for the three-judge court to rely on the testimony of prison officials from California and other States. Those experts testified on the basis of empirical evidence and extensive experience in the field of prison administration.

The three-judge court credited substantial evidence that prison populations can be reduced in a manner that does not increase crime to a significant degree. Some evidence indicated that reducing overcrowding in California's prisons could even improve public safety. Then-Governor Schwarzenegger, in his emergency proclamation on overcrowding, acknowledged that "'overcrowding causes harm to people and property, leads to inmate unrest and misconduct, . . . and increases recidivism as shown within this state and in others.'" Juris. App. 191a–192a. The former warden of San Quentin and acting secretary of the California prison system testified that she "'absolutely believe[s] that we make people worse, and that we are not meeting public safety by the way we treat people.'"[10] *Id.*, at 129a. And the head of

[10] The former head of correctional systems in Washington, Maine, and Pennsylvania likewise referred to California's prisons as "'criminogenic.'" Juris. App. 191a. The Yolo County chief probation officer testified that "'it seems like [the prisons] produce additional criminal behavior.'" *Id.*, at 190a. A former professor of sociology at George Washington University reported that California's present recidivism rate is among the highest in the Nation. App. 1246. And the three-judge court noted the report of California's Little Hoover Commission, which stated that "'[e]ach year, California communities are burdened with absorbing 123,000 offenders re-

Pennsylvania's correctional system testified that measures to reduce prison population may "actually improve on public safety because they address the problems that brought people to jail." Tr. 1552–1553.

Expert witnesses produced statistical evidence that prison populations had been lowered without adversely affecting public safety in a number of jurisdictions, including certain counties in California, as well as Wisconsin, Illinois, Texas, Colorado, Montana, Michigan, Florida, and Canada. Juris. App. 245a.[11] Washington's former secretary of corrections testified that his State had implemented population-reduction methods, including parole reform and expansion of good-time credits, without any "deleterious effect on crime." Tr. 2008–2009. In light of this evidence, the three-judge court concluded that any negative impact on public safety

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turning from prison, often more dangerous than when they left.'" Juris. App. 191a.

[11] Philadelphia's experience in the early 1990's with a federal-court order mandating reductions in the prison population was less positive, and that history illustrates the undoubted need for caution in this area. One congressional witness testified that released prisoners committed 79 murders and multiple other offenses. See Hearing on S. 3 et al. before the Senate Committee on the Judiciary, 104th Cong., 1st Sess., 45 (1995) (statement of Lynne Abraham, District Attorney of Philadelphia). Lead counsel for the plaintiff class in that case responded that "[t]his inflammatory assertion has never been documented." *Id.*, at 212 (statement of David Richman). The Philadelphia decree was also different from the order entered in this case. Among other things, it "prohibited the City from admitting to its prisons any additional inmates, except for persons charged with, or convicted of, murder, forcible rape, or a crime involving the use of a gun or knife in the commission of an aggravated assault or robbery." *Harris* v. *Reeves,* 761 F. Supp. 382, 384–385 (ED Pa. 1991); see also Crime and Justice Research Institute, J. Goldkamp & M. White, Restoring Accountability in Pretrial Release: The Philadelphia Pretrial Release Supervision Experiments 6–8 (1998). The difficulty of determining the precise relevance of Philadelphia's experience illustrates why appellate courts defer to the trier of fact. The three-judge court had the opportunity to hear testimony on population-reduction measures in other jurisdictions and to ask relevant questions of informed expert witnesses.

would be "substantially offset, and perhaps entirely eliminated, by the public safety benefits" of a reduction in overcrowding. Juris. App. 248a.

The court found that various available methods of reducing overcrowding would have little or no impact on public safety. Expansion of good-time credits would allow the State to give early release to only those prisoners who pose the least risk of reoffending. Diverting low-risk offenders to community programs such as drug treatment, day reporting centers, and electronic monitoring would likewise lower the prison population without releasing violent convicts.[12] The State now sends large numbers of persons to prison for violating a technical term or condition of their parole, and it could reduce the prison population by punishing technical parole violations through community-based programs. This last measure would be particularly beneficial as it would reduce crowding in the reception centers, which are especially hard hit by overcrowding. See *supra*, at 521. The court's order took account of public safety concerns by giving the State substantial flexibility to select among these and other means of reducing overcrowding.

The State submitted a plan to reduce its prison population in accordance with the three-judge court's order, and it complains that the three-judge court approved that plan without considering whether the specific measures contained within it would substantially threaten public safety. The three-judge court, however, left the choice of how best to comply with its population limit to state prison officials. The court

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[12] Expanding such community-based measures may require an expenditure of resources by the State to fund new programs or expand existing ones. The State complains that the order therefore requires it to "divert" savings that will be achieved by reducing the prison population and that setting budgetary priorities in this manner is a "severe, unlawful intrusion on the State authority." Brief for Appellants 55. This argument is not convincing. The order does not require the State to use any particular approach to reduce its prison population or allocate its resources.

was not required to second-guess the exercise of that discretion. Courts should presume that state officials are in a better position to gauge how best to preserve public safety and balance competing correctional and law enforcement concerns. The decision to leave details of implementation to the State's discretion protected public safety by leaving sensitive policy decisions to responsible and competent state officials.

During the pendency of this appeal, the State in fact began to implement measures to reduce the prison population. See Supp. Brief for Appellants 1. These measures will shift "thousands" of prisoners from the state prisons to the county jails by "mak[ing] certain felonies punishable by imprisonment in county jail" and "requir[ing] that individuals returned to custody for violating their conditions of parole 'serve any custody term in county jail.'" *Ibid.* These developments support the three-judge court's conclusion that the prison population can be reduced in a manner calculated to avoid an undue negative effect on public safety.

III

Establishing the population at which the State could begin to provide constitutionally adequate medical and mental health care, and the appropriate timeframe within which to achieve the necessary reduction, requires a degree of judgment. The inquiry involves uncertain predictions regarding the effects of population reductions, as well as difficult determinations regarding the capacity of prison officials to provide adequate care at various population levels. Courts have substantial flexibility when making these judgments. "'Once invoked, "the scope of a district court's equitable powers . . . is broad, for breadth and flexibility are inherent in equitable remedies."'" *Hutto*, 437 U. S., at 687, n. 9 (quoting *Milliken* v. *Bradley*, 433 U. S. 267, 281 (1977), in turn quoting *Swann* v. *Charlotte-Mecklenburg Bd. of Ed.*, 402 U. S. 1, 15 (1971)).

Nevertheless, the PLRA requires a court to adopt a remedy that is "narrowly tailored" to the constitutional violation and that gives "substantial weight" to public safety. 18 U. S. C. § 3626(a). When a court is imposing a population limit, this means the court must set the limit at the highest population consistent with an efficacious remedy. The court must also order the population reduction achieved in the shortest period of time reasonably consistent with public safety.

A

The three-judge court concluded that the population of California's prisons should be capped at 137.5% of design capacity. This conclusion is supported by the record. Indeed, some evidence supported a limit as low as 100% of design capacity. The chief deputy secretary of Correctional Healthcare Services for the California prisons testified that California's prisons "'were not designed and made no provision for any expansion of medical care space beyond the initial 100% of capacity.'" Juris. App. 176a. Other evidence supported a limit as low as 130%. The head of the State's Facilities Strike Team recommended reducing the population to 130% of design capacity as a long-term goal. *Id.*, at 179a–180a. A former head of correctional systems in Washington State, Maine, and Pennsylvania testified that a 130% limit would "'give prison officials and staff the ability to provide the necessary programs and services for California's prisoners.'" *Id.*, at 180a. A former executive director of the Texas prisons testified that a limit of 130% was "'realistic and appropriate'" and would "'ensure that [California's] prisons are safe and provide legally required services.'" *Ibid.* And a former acting secretary of the California prisons agreed with a 130% limit with the caveat that a 130% limit might prove inadequate in some older facilities. *Ibid.*

According to the State, this testimony expressed the witnesses' policy preferences, rather than their views as to what would cure the constitutional violation. Of course, courts

must not confuse professional standards with constitutional requirements. *Rhodes* v. *Chapman*, 452 U. S. 337, 348, n. 13 (1981). But expert opinion may be relevant when determining what is obtainable and what is acceptable in corrections philosophy. See *supra*, at 536–537. Nothing in the record indicates that the experts in this case imposed their own policy views or lost sight of the underlying violations. To the contrary, the witnesses testified that a 130% population limit would allow the State to remedy the constitutionally inadequate provision of medical and mental health care. When expert opinion is addressed to the question of how to remedy the relevant constitutional violations, as it was here, federal judges can give it considerable weight.

The Federal Bureau of Prisons (BOP) has set 130% as a long-term goal for population levels in the federal prison system. Brief for Appellants 43–44. The State suggests the expert witnesses impermissibly adopted this professional standard in their testimony. But courts are not required to disregard expert opinion solely because it adopts or accords with professional standards. Professional standards may be "helpful and relevant with respect to some questions." *Chapman*, *supra*, at 348, n. 13. The witnesses testified that a limit of 130% was necessary to remedy the constitutional violations, not that it should be adopted because it is a BOP standard. If anything, the fact that the BOP views 130% as a manageable population density bolsters the three-judge court's conclusion that a population limit of 130% would alleviate the pressures associated with overcrowding and allow the State to begin to provide constitutionally adequate care.

Although the three-judge court concluded that the "evidence in support of a 130% limit is strong," it found that some upward adjustment was warranted in light of "the caution and restraint required by the PLRA." Juris. App. 183a, 184a. The three-judge court noted evidence supporting a higher limit. In particular, the State's Corrections Independent Review Panel had found that 145% was the maxi-

mum "operable capacity" of California's prisons, *id.*, at 181a–182a, although the relevance of that determination was undermined by the fact that the panel had not considered the need to provide constitutionally adequate medical and mental health care, as the State itself concedes. Brief for Coleman Appellees 45. After considering, but discounting, this evidence, the three-judge court concluded that the evidence supported a limit lower than 145%, but higher than 130%. It therefore imposed a limit of 137.5%.

This weighing of the evidence was not clearly erroneous. The adversary system afforded the court an opportunity to weigh and evaluate evidence presented by the parties. The plaintiffs' evidentiary showing was intended to justify a limit of 130%, and the State made no attempt to show that any other number would allow for a remedy. There are also no scientific tools available to determine the precise population reduction necessary to remedy a constitutional violation of this sort. The three-judge court made the most precise determination it could in light of the record before it. The PLRA's narrow tailoring requirement is satisfied so long as these equitable, remedial judgments are made with the objective of releasing the fewest possible prisoners consistent with an efficacious remedy. In light of substantial evidence supporting an even more drastic remedy, the three-judge court complied with the requirement of the PLRA in this case.

B

The three-judge court ordered the State to achieve this reduction within two years. At trial and closing argument before the three-judge court, the State did not argue that reductions should occur over a longer period of time. The State later submitted a plan for court approval that would achieve the required reduction within five years, and that would reduce the prison population to 151% of design capacity in two years. The State represented that this plan would "safely reach a population level of 137.5% over time."

Juris. App. 317a. The three-judge court rejected this plan because it did not comply with the deadline set by its order.

The State first had notice that it would be required to reduce its prison population in February 2009, when the three-judge court gave notice of its tentative ruling after trial. The 2-year deadline, however, will not begin to run until this Court issues its judgment. When that happens, the State will have already had over two years to begin complying with the order of the three-judge court. The State has used the time productively. At oral argument, the State indicated it had reduced its prison population by approximately 9,000 persons since the decision of the three-judge court. After oral argument, the State filed a supplemental brief indicating that it had begun to implement measures to shift "thousands" of additional prisoners to county facilities. Supp. Brief for Appellants 1.

Particularly in light of the State's failure to contest the issue at trial, the three-judge court did not err when it established a 2-year deadline for relief. Plaintiffs proposed a 2-year deadline, and the evidence at trial was intended to demonstrate the feasibility of a 2-year deadline. See Tr. 2979. Notably, the State has not asked this Court to extend the 2-year deadline at this time.

The three-judge court, however, retains the authority, and the responsibility, to make further amendments to the existing order or any modified decree it may enter as warranted by the exercise of its sound discretion. "The power of a court of equity to modify a decree of injunctive relief is long-established, broad, and flexible." *New York State Assn. for Retarded Children, Inc.* v. *Carey*, 706 F. 2d 956, 967 (CA2 1983) (Friendly, J.). A court that invokes equity's power to remedy a constitutional violation by an injunction mandating systemic changes to an institution has the continuing duty and responsibility to assess the efficacy and consequences of its order. *Id.*, at 969–971. Experience may teach the necessity for modification or amendment of an earlier decree.

To that end, the three-judge court must remain open to a showing or demonstration by either party that the injunction should be altered to ensure that the rights and interests of the parties are given all due and necessary protection.

Proper respect for the State and for its governmental processes requires that the three-judge court exercise its jurisdiction to accord the State considerable latitude to find mechanisms and make plans to correct the violations in a prompt and effective way consistent with public safety. In order to "give substantial weight to any adverse impact on public safety," 18 U. S. C. § 3626(a)(1)(A), the three-judge court must give due deference to informed opinions as to what public safety requires, including the considered determinations of state officials regarding the time in which a reduction in the prison population can be achieved consistent with public safety. An extension of time may allow the State to consider changing political, economic, and other circumstances and to take advantage of opportunities for more effective remedies that arise as the Special Master, the Receiver, the prison system, and the three-judge court itself evaluate the progress being made to correct unconstitutional conditions. At the same time, both the three-judge court and state officials must bear in mind the need for a timely and efficacious remedy for the ongoing violation of prisoners' constitutional rights.

The State may wish to move for modification of the three-judge court's order to extend the deadline for the required reduction to five years from the entry of the judgment of this Court, the deadline proposed in the State's first population-reduction plan. The three-judge court may grant such a request provided that the State satisfies necessary and appropriate preconditions designed to ensure that measures are taken to implement the plan without undue delay. Appropriate preconditions may include a requirement that the State demonstrate that it has the authority and the resources necessary to achieve the required reduction within

a 5-year period and to meet reasonable interim directives for population reduction. The three-judge court may also condition an extension of time on the State's ability to meet interim benchmarks for improvement in provision of medical and mental health care.

The three-judge court, in its discretion, may also consider whether it is appropriate to order the State to begin without delay to develop a system to identify prisoners who are unlikely to reoffend or who might otherwise be candidates for early release. Even with an extension of time to construct new facilities and implement other reforms, it may become necessary to release prisoners to comply with the court's order. To do so safely, the State should devise systems to select those prisoners least likely to jeopardize public safety. An extension of time may provide the State a greater opportunity to refine and elaborate those systems.

The State has already made significant progress toward reducing its prison population, including reforms that will result in shifting "thousands" of prisoners to county jails. See Supp. Brief for Appellants 1. As the State makes further progress, the three-judge court should evaluate whether its order remains appropriate. If significant progress is made toward remedying the underlying constitutional violations, that progress may demonstrate that further population reductions are not necessary or are less urgent than previously believed. Were the State to make this showing, the three-judge court in the exercise of its discretion could consider whether it is appropriate to extend or modify this timeline.

Experience with the three-judge court's order may also lead the State to suggest other modifications. The three-judge court should give any such requests serious consideration. The three-judge court should also formulate its orders to allow the State and its officials the authority necessary to address contingencies that may arise during the remedial process.

These observations reflect the fact that the three-judge court's order, like all continuing equitable decrees, must remain open to appropriate modification. They are not intended to cast doubt on the validity of the basic premise of the existing order. The medical and mental health care provided by California's prisons falls below the standard of decency that inheres in the Eighth Amendment. This extensive and ongoing constitutional violation requires a remedy, and a remedy will not be achieved without a reduction in overcrowding. The relief ordered by the three-judge court is required by the Constitution and was authorized by Congress in the PLRA. The State shall implement the order without further delay.

The judgment of the three-judge court is affirmed.

It is so ordered.

APPENDIXES

A

18 U. S. C. § 3626:

"(a) REQUIREMENTS FOR RELIEF.—

"(1) PROSPECTIVE RELIEF.—(A) Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.

. . . . .

"(3) PRISONER RELEASE ORDER.—(A) In any civil action with respect to prison conditions, no court shall enter a prisoner release order unless—

"(i) a court has previously entered an order for less intrusive relief that has failed to remedy the deprivation of the Federal right sought to be remedied through the prisoner release order; and

"(ii) the defendant has had a reasonable amount of time to comply with the previous court orders.

"(B) In any civil action in Federal court with respect to prison conditions, a prisoner release order shall be entered only by a three-judge court in accordance with section 2284 of title 28, if the requirements of subparagraph (E) have been met.

"(C) A party seeking a prisoner release order in Federal court shall file with any request for such relief, a request for a three-judge court and materials sufficient to demonstrate that the requirements of subparagraph (A) have been met.

"(D) If the requirements under subparagraph (A) have been met, a Federal judge before whom a civil action with respect to prison conditions is pending who believes that a prison release order should be considered may sua sponte request the convening of a three-judge court to determine whether a prisoner release order should be entered.

"(E) The three-judge court shall enter a prisoner release order only if the court finds by clear and convincing evidence that—

"(i) crowding is the primary cause of the violation of a Federal right; and

"(ii) no other relief will remedy the violation of the Federal right.

"(F) Any State or local official including a legislator or unit of government whose jurisdiction or function includes the appropriation of funds for the construction, operation, or maintenance of prison facilities, or the prosecution or custody of persons who may be released from, or not admitted to, a prison as a result of a prisoner release order shall have standing to oppose the imposition or continuation in effect of such relief and to seek termination of such relief, and shall

have the right to intervene in any proceeding relating to such relief.

. . . . .

"(g) DEFINITIONS.—As used in this section—

. . . . .

"(4) the term 'prisoner release order' includes any order, including a temporary restraining order or preliminary injunctive relief, that has the purpose or effect of reducing or limiting the prison population, or that directs the release from or nonadmission of prisoners to a prison . . . ."

[Appendix B is on p. 548.]

Appendix B to opinion of the Court

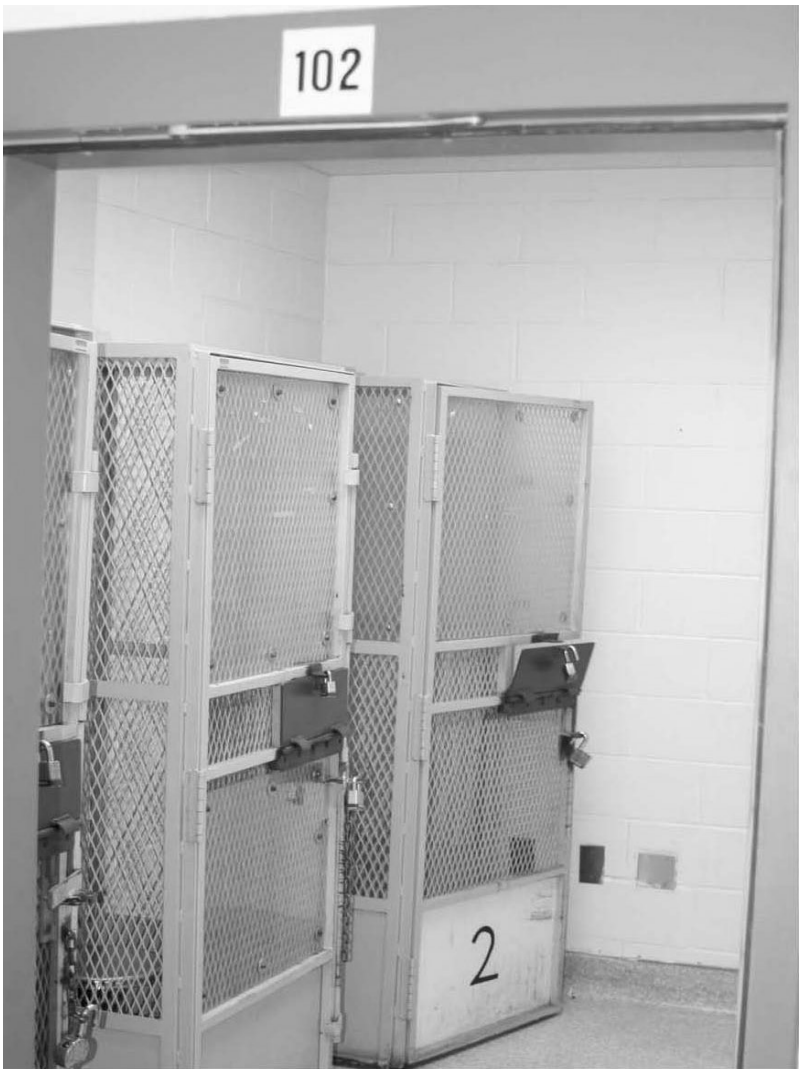
B

Mule Creek State Prison
Aug. 1, 2008

California Institution for Men
Aug. 7, 2006

Appendix C to opinion of the Court

C



Salinas Valley State Prison
July 29, 2008

Correctional Treatment Center (dry cages/holding cells for people waiting for mental health crisis bed)

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting.

Today the Court affirms what is perhaps the most radical injunction issued by a court in our Nation's history: an order requiring California to release the staggering number of 46,000 convicted criminals.

There comes before us, now and then, a case whose proper outcome is so clearly indicated by tradition and common sense, that its decision ought to shape the law, rather than vice versa. One would think that, before allowing the decree of a federal district court to release 46,000 convicted felons, this Court would bend every effort to read the law in such a way as to avoid that outrageous result. Today, quite to the contrary, the Court disregards stringently drawn provisions of the governing statute, and traditional constitutional limitations upon the power of a federal judge, in order to uphold the absurd.

The proceedings that led to this result were a judicial travesty. I dissent because the institutional reform the District Court has undertaken violates the terms of the governing statute, ignores bedrock limitations on the power of Article III judges, and takes federal courts wildly beyond their institutional capacity.

I

A

The Prison Litigation Reform Act of 1995 (PLRA) states that "[p]rospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs"; that such relief must be "narrowly drawn, [and] exten[d] no further than necessary to correct the violation of the Federal right"; and that it must be "the least intrusive means necessary to correct the violation of the Federal right." 18 U. S. C. § 3626(a)(1)(A). In deciding whether these multiple limitations have been complied with,

it is necessary to identify with precision what is the "violation of the Federal right of a particular plaintiff or plaintiffs" that has been alleged. What has been alleged here, and what the injunction issued by the court is tailored (narrowly or not) to remedy, is the running of a prison system with inadequate medical facilities. That may result in the denial of needed medical treatment to "a particular [prisoner] or [prisoners]," thereby violating (according to our cases) his or their Eighth Amendment rights. But the mere existence of the inadequate system does not subject to cruel and unusual punishment the entire prison population in need of medical care, including those who receive it.

The Court acknowledges that the plaintiffs "do not base their case on deficiencies in care provided on any one occasion"; rather, "[p]laintiffs rely on systemwide deficiencies in the provision of medical and mental health care that, taken as a whole, subject sick and mentally ill prisoners in California to 'substantial risk of serious harm' and cause the delivery of care in the prisons to fall below the evolving standards of decency that mark the progress of a maturing society." *Ante*, at 505, n. 3. But our judge-empowering "evolving standards of decency" jurisprudence (with which, by the way, I heartily disagree, see, *e. g.*, *Roper* v. *Simmons*, 543 U. S. 551, 615–616 (2005) (SCALIA, J., dissenting)) does not prescribe (or at least has not until today prescribed) rules for the "decent" running of schools, prisons, and other government institutions. It forbids "indecent" treatment of individuals—in the context of this case, the *denial of medical care* to those who need it. And the persons who have a constitutional claim for denial of medical care are those who are denied medical care—not all who face a "substantial risk" (whatever that is) of being denied medical care.

The *Coleman* litigation involves "the class of seriously mentally ill persons in California prisons," *ante*, at 506, and the *Plata* litigation involves "the class of state prisoners with serious medical conditions," *ante*, at 507. The plaintiffs

do not appear to claim—and it would be absurd to suggest—that every single one of those prisoners has personally experienced "torture or a lingering death," *ante*, at 510 (internal quotation marks omitted), as a consequence of that bad medical system. Indeed, it is inconceivable that anything more than a small proportion of prisoners in the plaintiff classes have personally received sufficiently atrocious treatment that their Eighth Amendment right was violated—which, as the Court recognizes, is why the plaintiffs do not premise their claim on "deficiencies in care provided on any one occasion." *Ante*, at 505, n. 3. Rather, the plaintiffs' claim is that they are all part of a medical system so defective that some number of prisoners will inevitably be injured by incompetent medical care, and that this number is sufficiently high so as to render the system, as a whole, unconstitutional.

But what procedural principle justifies certifying a class of plaintiffs so they may assert a claim of systemic unconstitutionality? I can think of two possibilities, both of which are untenable. The first is that although some or most plaintiffs in the class do not *individually* have viable Eighth Amendment claims, the class as a whole has collectively suffered an Eighth Amendment violation. That theory is contrary to the bedrock rule that the sole purpose of classwide adjudication is to aggregate claims that are individually viable. "A class action, no less than traditional joinder (of which it is a species), merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits. And like traditional joinder, it leaves the parties' legal rights and duties intact and the rules of decision unchanged." *Shady Grove Orthopedic Associates, P. A.* v. *Allstate Ins. Co.*, 559 U. S. 393, 408 (2010) (plurality opinion).

The second possibility is that every member of the plaintiff class *has* suffered an Eighth Amendment violation merely by virtue of being a patient in a poorly-run prison system, and the purpose of the class is merely to aggregate all those individually viable claims. This theory has the virtue of

being consistent with procedural principles, but at the cost of a gross substantive departure from our case law. Under this theory, each and every prisoner who happens to be a patient in a system that has systemic weaknesses—such as "hir[ing] any doctor who had a license, a pulse and a pair of shoes," *ante*, at 508 (internal quotation marks omitted)—has suffered cruel or unusual punishment, even if that person cannot make an individualized showing of mistreatment. Such a theory of the Eighth Amendment is preposterous. And we have said as much in the past: "If . . . a healthy inmate who had suffered no deprivation of needed medical treatment were able to claim violation of his constitutional right to medical care . . . simply on the ground that the prison medical facilities were inadequate, the essential distinction between judge and executive would have disappeared: it would have become the function of the courts to assure adequate medical care in prisons." *Lewis* v. *Casey*, 518 U. S. 343, 350 (1996).

Whether procedurally wrong or substantively wrong, the notion that the plaintiff class can allege an Eighth Amendment violation based on "systemwide deficiencies" is assuredly wrong. It follows that the remedy decreed here is also contrary to law, since the theory of systemic unconstitutionality is central to the plaintiffs' case. The PLRA requires plaintiffs to establish that the systemwide injunction entered by the District Court was "narrowly drawn" and "extends no further than necessary" to correct "the violation of the Federal right of a particular plaintiff or plaintiffs." If (as is the case) the only viable constitutional claims consist of individual instances of mistreatment, then a remedy reforming the system as a whole goes far beyond what the statute allows.

It is also worth noting the peculiarity that the vast majority of inmates most generously rewarded by the release order—the 46,000 whose incarceration will be ended—do not form part of any aggrieved class even under the Court's ex-

pansive notion of constitutional violation. Most of them will not be prisoners with medical conditions or severe mental illness; and many will undoubtedly be fine physical specimens who have developed intimidating muscles pumping iron in the prison gym.

B

Even if I accepted the implausible premise that the plaintiffs have established a systemwide violation of the Eighth Amendment, I would dissent from the Court's endorsement of a decrowding order. That order is an example of what has become known as a "structural injunction." As I have previously explained, structural injunctions are radically different from the injunctions traditionally issued by courts of equity, and presumably part of the "judicial Power" conferred on federal courts by Article III:

> "The mandatory injunctions issued upon termination of litigation usually required 'a single simple act.' H. McClintock, Principles of Equity § 15, pp. 32–33 (2d ed. 1948). Indeed, there was a 'historical prejudice of the court of chancery against rendering decrees which called for more than a single affirmative act.' *Id.*, § 61, at 160. And where specific performance of contracts was sought, it was the categorical rule that no decree would issue that required ongoing supervision. . . . Compliance with these 'single act' mandates could, in addition to being simple, be quick; and once it was achieved the contemnor's relationship with the court came to an end, at least insofar as the subject of the order was concerned. Once the document was turned over or the land conveyed, the litigant's obligation to the court, and the court's coercive power over the litigant, ceased. . . . The court did not engage in any ongoing supervision of the litigant's conduct, nor did its order continue to regulate his behavior." *Mine Workers* v. *Bagwell*, 512 U. S. 821, 841–842 (1994) (SCALIA, J., concurring).

Structural injunctions depart from that historical practice, turning judges into long-term administrators of complex social institutions such as schools, prisons, and police departments. Indeed, they require judges to play a role essentially indistinguishable from the role ordinarily played by executive officials. Today's decision not only affirms the structural injunction but vastly expands its use, by holding that an entire system is unconstitutional because it *may produce* constitutional violations.

The drawbacks of structural injunctions have been described at great length elsewhere. See, *e. g.*, *Lewis*, *supra*, at 385–393 (THOMAS, J., concurring); *Missouri* v. *Jenkins*, 515 U. S. 70, 124–133 (1995) (THOMAS, J., concurring); Horowitz, Decreeing Organizational Change: Judicial Supervision of Public Institutions, 1983 Duke L. J. 1265. This case illustrates one of their most pernicious aspects: that they force judges to engage in a form of factfinding-as-policymaking that is outside the traditional judicial role. The factfinding judges traditionally engage in involves the determination of past or present facts based (except for a limited set of materials of which courts may take "judicial notice") exclusively upon a closed trial record. That is one reason why a district judge's factual findings are entitled to clear-error review: because having viewed the trial first hand he is in a better position to evaluate the evidence than a judge reviewing a cold record. In a very limited category of cases, judges have also traditionally been called upon to make some predictive judgments: which custody will best serve the interests of the child, for example, or whether a particular one-shot injunction will remedy the plaintiff's grievance. When a judge manages a structural injunction, however, he will inevitably be required to make very broad empirical predictions necessarily based in large part upon policy views—the sort of predictions regularly made by legislators and executive officials, but inappropriate for the Third Branch.

This feature of structural injunctions is superbly illustrated by the District Court's proceeding concerning the decrowding order's effect on public safety. The PLRA requires that, before granting "[p]rospective relief in [a] civil action with respect to prison conditions," a court must "give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief." 18 U. S. C. §3626(a)(1)(A). Here, the District Court discharged that requirement by making the "factual finding" that "the state has available methods by which it could readily reduce the prison population to 137.5% design capacity or less without an adverse impact on public safety or the operation of the criminal justice system." App. to Juris. Statement, O. T. 2009, No. 09–416, p. 253a. It found the evidence "clear" that prison overcrowding would "perpetuate a criminogenic prison system that itself threatens public safety," *id.*, at 186a, and volunteered its opinion that "[t]he population could be reduced even further with the reform of California's antiquated sentencing policies and other related changes to the laws." *Id.*, at 253a. It "reject[ed] the testimony that inmates released early from prison would commit additional new crimes," *id.*, at 200a, finding that "shortening the length of stay through earned credits would give inmates incentives to participate in programming designed to lower recidivism," *id.*, at 204a, and that "slowing the flow of technical parole violators to prison, thereby substantially reducing the churning of parolees, would by itself improve both the prison and parole systems, and public safety," *id.*, at 209a. It found that "the diversion of offenders to community correctional programs has significant beneficial effects on public safety," *id.*, at 214a, and that "additional rehabilitative programming would result in a significant population reduction while improving public safety," *id.*, at 216a.

The District Court cast these predictions (and the Court today accepts them) as "factual findings," made in reliance on the procession of expert witnesses who testified at trial.

Because these "findings" have support in the record, it is difficult to reverse them under a plain-error standard of review. *Ante*, at 535. And given that the District Court devoted nearly 10 days of trial and 70 pages of its opinion to this issue, it is difficult to dispute that the District Court has discharged its statutory obligation to give "substantial weight to any adverse impact on public safety."

But the idea that the three District Judges in this case relied solely on the credibility of the testifying expert witnesses is fanciful. *Of course* they were relying largely on their own beliefs about penology and recidivism. And *of course* different district judges, of different policy views, would have "found" that rehabilitation would not work and that releasing prisoners would increase the crime rate. I am not saying that the District Judges rendered their factual findings in bad faith. I am saying that it is impossible for judges to make "factual findings" without inserting their own policy judgments, when the factual findings *are* policy judgments. What occurred here is no more judicial fact-finding in the ordinary sense than would be the factual findings that deficit spending will not lower the unemployment rate, or that the continued occupation of Iraq will decrease the risk of terrorism. Yet, because they have been branded "factual findings" entitled to deferential review, the policy preferences of three District Judges now govern the operation of California's penal system.

It is important to recognize that the dressing-up of policy judgments as factual findings is not an error peculiar to this case. It is an unavoidable concomitant of institutional-reform litigation. When a district court issues an injunction, it must make a factual assessment of the anticipated consequences of the injunction. And when the injunction undertakes to restructure a social institution, assessing the factual consequences of the injunction is necessarily the sort of predictive judgment that our system of government allocates to other government officials.

But structural injunctions do not simply invite judges to indulge policy preferences. They invite judges to indulge *incompetent* policy preferences. Three years of law school and familiarity with pertinent Supreme Court precedents give no insight whatsoever into the management of social institutions. Thus, in the proceeding below the District Court determined that constitutionally adequate medical services could be provided if the prison population was 137.5% of design capacity. This was an empirical finding it was utterly unqualified to make. Admittedly, the court did not generate that number entirely on its own; it heard the numbers 130% and 145% bandied about by various witnesses and decided to split the difference. But the ability of judges to spit back or even average out numbers spoon fed to them by expert witnesses does not render them competent decisionmakers in areas in which they are otherwise unqualified.

The District Court also relied heavily on the views of the Receiver and Special Master, and those reports play a starring role in the Court's opinion today. The Court notes that "the Receiver and the Special Master filed reports stating that overcrowding posed a significant barrier to their efforts" and deems those reports "persuasive evidence that, absent a reduction in overcrowding, any remedy might prove unattainable and would at the very least require vast expenditures of resources by the State." *Ante*, at 529. The use of these reports is even less consonant with the traditional judicial role than the District Court's reliance on the expert testimony at trial. The latter, even when, as here, it is largely the expression of policy judgments, is at least subject to cross-examination. Relying on the un-cross-examined findings of an investigator, sent into the field to prepare a factual report and give suggestions on how to improve the prison system, bears no resemblance to ordinary judicial decisionmaking. It is true that the PLRA contemplates the appointment of special masters (although not receivers), but special masters are authorized only to "conduct

hearings and prepare proposed findings of fact" and "assist in the development of remedial plans," 18 U. S. C. § 3626(f)(6). This does not authorize them to make factual findings (unconnected to hearings) that are given seemingly wholesale deference. Neither the Receiver nor the Special Master was selected by California to run its prisons, and the fact that they may be experts in the field of prison reform does not justify the judicial imposition of their perspectives on the State.

C

My general concerns associated with judges' running social institutions are magnified when they run prison systems, and doubly magnified when they force prison officials to release convicted criminals. As we have previously recognized:

> "[C]ourts are ill equipped to deal with the increasingly urgent problems of prison administration and reform. . . . [T]he problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree. . . . Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. Prison administration is, moreover, a task that has been committed to the responsibility of those branches, and separation of powers concerns counsel a policy of judicial restraint. Where a state penal system is involved, federal courts have . . . additional reason to accord deference to the appropriate prison authorities." *Turner* v. *Safley*, 482 U. S. 78, 84–85 (1987) (internal quotation marks omitted).

These principles apply doubly to a prisoner-release order. As the author of today's opinion explained earlier this Term, granting a writ of habeas corpus "'disturbs the State's sig-

nificant interest in repose for concluded litigation, denies society the right to punish some admitted offenders, and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority.'" *Harrington* v. *Richter*, 562 U. S. 86, 103 (2011) (quoting *Harris* v. *Reed*, 489 U. S. 255, 282 (1989) (KENNEDY, J., dissenting)). Recognizing that habeas relief must be granted sparingly, we have reversed the Ninth Circuit's erroneous grant of habeas relief to individual California prisoners four times this Term alone. *Cullen* v. *Pinholster*, *ante*, p. 170; *Felkner* v. *Jackson*, 562 U. S. 594 (2011) *(per curiam); Swarthout* v. *Cooke*, 562 U. S. 216 (2011) *(per curiam); Harrington*, *supra.* And yet here, the Court affirms an order granting the functional equivalent of 46,000 writs of habeas corpus, based on its paean to courts' "substantial flexibility when making these judgments." *Ante*, at 538. It seems that the Court's respect for state sovereignty has vanished in the case where it most matters.

II

The Court's opinion includes a bizarre coda noting that "[t]he State may wish to move for modification of the three-judge court's order to extend the deadline for the required reduction to five years." *Ante*, at 543. The District Court, it says, "may grant such a request provided that the State satisfies necessary and appropriate preconditions designed to ensure that measures are taken to implement the plan without undue delay"; and it gives vague suggestions of what these preconditions "may include," such as "interim benchmarks." *Ante*, at 543–544. It also invites the District Court to "consider whether it is appropriate to order the State to begin without delay to develop a system to identify prisoners who are unlikely to reoffend," and informs the State that it "should devise systems to select those prisoners least likely to jeopardize public safety." *Ante*, at 544. (What a good idea!)

The legal effect of this passage is unclear—I suspect intentionally so. If it is nothing but a polite reminder to the State and to the District Court that the injunction is subject to modification, then it is entirely unnecessary. As both the State and the District Court are undoubtedly aware, a party is *always* entitled to move to modify an equitable decree, and the PLRA contains an express provision authorizing District Courts to modify or terminate prison injunctions. See 18 U. S. C. § 3626(b).

I suspect, however, that this passage is a warning shot across the bow, telling the District Court that it had *better* modify the injunction if the State requests what we invite it to request. Such a warning, if successful, would achieve the benefit of a marginal reduction in the inevitable murders, robberies, and rapes to be committed by the released inmates. But it would achieve that at the expense of intellectual bankruptcy, as the Court's "warning" is entirely alien to ordinary principles of appellate review of injunctions. When a party moves for modification of an injunction, the district court is entitled to rule on that motion first, subject to review for abuse of discretion if it declines to modify the order. *Horne* v. *Flores*, 557 U. S. 433, 447, 456 (2009). Moreover, when a district court enters a new decree with new benchmarks, the selection of those benchmarks is also reviewed under a deferential, abuse-of-discretion standard of review—a point the Court appears to recognize. *Ante*, at 542. Appellate courts are not supposed to "affirm" injunctions while preemptively noting that the State "may" request, and the District Court "may" grant, a request to extend the State's deadline to release prisoners by three years based on some suggestions on what appropriate preconditions for such a modification "may" include.

Of course what is really happening here is that the Court, overcome by common sense, disapproves of the results reached by the District Court, but cannot remedy them (it

thinks) by applying ordinary standards of appellate review. It has therefore selected a solution unknown in our legal system: A deliberately ambiguous set of suggestions on how to modify the injunction, just deferential enough so that it can say with a straight face that it is "affirming," just stern enough to put the District Court on notice that it will likely get reversed if it does not follow them. In doing this, the Court has aggrandized itself, grasping authority that appellate courts are not supposed to have, and using it to enact a compromise solution with no legal basis other than the Court's say-so. That we are driven to engage in these extralegal activities should be a sign that the entire project of permitting district courts to run prison systems is misbegotten.

But perhaps I am being too unkind. The Court, or at least a majority of the Court's majority, must be aware that the judges of the District Court are likely to call its bluff, since they know full well it cannot possibly be an abuse of discretion to refuse to accept the State's proposed modifications in an injunction that has just been approved *(affirmed)* in its present form. An injunction, after all, does not have to be perfect; only good enough for government work, which the Court today says this *is*. So perhaps the coda is nothing more than a ceremonial washing of the hands—making it clear for all to see, that if the terrible things sure to happen as a consequence of this outrageous order do happen, they will be none of this Court's responsibility. After all, did we not want, and indeed even suggest, something better?

III

In view of the incoherence of the Eighth Amendment claim at the core of this case, the nonjudicial features of institutional-reform litigation that this case exemplifies, and the unique concerns associated with mass prisoner releases, I do not believe this Court can affirm this injunction. I will

state my approach briefly: In my view, a court may not order a prisoner's release unless it determines that the prisoner is suffering from a violation of his constitutional rights, and that his release, and no other relief, will remedy that violation. Thus, if the court determines that a particular prisoner is being denied constitutionally required medical treatment, and the release of that prisoner (and no other remedy) would enable him to obtain medical treatment, then the court can order his release; but a court may not order the release of prisoners who have suffered no violations of their constitutional rights, merely to make it less likely that that will happen to them in the future.

This view follows from the PLRA's text that I discussed at the outset, 18 U. S. C. § 3626(a)(1)(A). "[N]arrowly drawn" means that the relief applies only to the "particular [prisoner] or [prisoners]" whose constitutional rights are violated; "extends no further than necessary" means that prisoners whose rights are not violated will not obtain relief; and "least intrusive means necessary to correct the violation of the Federal right" means that no other relief is available.*

I acknowledge that this reading of the PLRA would severely limit the circumstances under which a court could issue structural injunctions to remedy allegedly unconstitutional prison conditions, although it would not eliminate them entirely. If, for instance, a class representing all prisoners in a particular institution alleged that the temperature in their cells was so cold as to violate the Eighth Amendment, or that they were deprived of all exercise time, a court could enter a prisonwide injunction ordering that the tem-

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*Any doubt on this last score, at least as far as prisoner-release orders are concerned, is eliminated by § 3626(a)(3)(E) of the statute, which provides that to enter a prisoner-release order the court must find "by clear and convincing evidence that—

"(i) crowding is the primary cause of the violation of a Federal right; and

"(ii) no other relief will remedy the violation of the Federal right."

perature be raised or exercise time be provided. Still, my approach may invite the objection that the PLRA appears to contemplate structural injunctions in general and mass prisoner-release orders in particular. The statute requires courts to "give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief" and authorizes them to appoint special masters, § 3626 (a)(1)(A), (f), provisions that seem to presuppose the possibility of a structural remedy. It also sets forth criteria under which courts may issue orders that have "the purpose or effect of reducing or limiting the prison population," § 3626(g)(4).

I do not believe that objection carries the day. In addition to imposing numerous limitations on the ability of district courts to order injunctive relief with respect to prison conditions, the PLRA states that "[n]othing in this section shall be construed to . . . repeal or detract from otherwise applicable limitations on the remedial powers of the courts." § 3626(a)(1)(C). The PLRA is therefore best understood as an attempt to constrain the discretion of courts issuing structural injunctions—not as a mandate for their use. For the reasons I have outlined, structural injunctions, especially prisoner-release orders, raise grave separation-of-powers concerns and veer significantly from the historical role and institutional capability of courts. It is appropriate to construe the PLRA so as to constrain courts from entering injunctive relief that would exceed that role and capability.

* * *

The District Court's order that California release 46,000 prisoners extends "further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs" who have been denied needed medical care. 18 U. S. C. § 3626(a)(1)(A). It is accordingly forbidden by the PLRA—besides defying all sound conception of the proper role of judges.

JUSTICE ALITO, with whom THE CHIEF JUSTICE joins, dissenting.

The decree in this case is a perfect example of what the Prison Litigation Reform Act of 1995 (PLRA), 110 Stat. 1321–66, was enacted to prevent.

The Constitution does not give federal judges the authority to run state penal systems. Decisions regarding state prisons have profound public safety and financial implications, and the States are generally free to make these decisions as they choose. See *Turner* v. *Safley*, 482 U. S. 78, 85 (1987).

The Eighth Amendment imposes an important—but limited—restraint on state authority in this field. The Eighth Amendment prohibits prison officials from depriving inmates of "the minimal civilized measure of life's necessities." *Rhodes* v. *Chapman*, 452 U. S. 337, 347 (1981). Federal courts have the responsibility to ensure that this constitutional standard is met, but undesirable prison conditions that do not violate the Constitution are beyond the federal courts' reach.

In this case, a three-judge court exceeded its authority under the Constitution and the PLRA. The court ordered a radical reduction in the California prison population without finding that the current population level violates the Constitution.

Two cases were before the three-judge court, and neither targeted the general problem of overcrowding. Indeed, the plaintiffs in one of those cases readily acknowledge that the current population level is not itself unconstitutional. Brief for Coleman Appellees 56. Both of the cases were brought not on behalf of all inmates subjected to overcrowding, but rather in the interests of much more limited classes of prisoners, namely, those needing mental health treatment and those with other serious medical needs. But these cases were used as a springboard to implement a criminal justice program far different from that chosen by the state legisla-

ture. Instead of crafting a remedy to attack the specific constitutional violations that were found—which related solely to prisoners in the two plaintiff classes—the lower court issued a decree that will at best provide only modest help to those prisoners but that is very likely to have a major and deleterious effect on public safety.

The three-judge court ordered the premature release of approximately *46,000 criminals—the equivalent of three Army divisions.*

The approach taken by the three-judge court flies in the face of the PLRA. Contrary to the PLRA, the court's remedy is not narrowly tailored to address proven and ongoing constitutional violations. And the three-judge court violated the PLRA's critical command that any court contemplating a prisoner release order must give "substantial weight to any adverse impact on public safety." 18 U. S. C. § 3626(a)(1)(A). The three-judge court would have us believe that the early release of 46,000 inmates will not imperil—and will actually improve—public safety. App. to Juris. Statement, O. T. 2009, No. 09–416, pp. 248a–249a (hereinafter Juris. App.). Common sense and experience counsel greater caution.

I would reverse the decision below for three interrelated reasons. First, the three-judge court improperly refused to consider evidence concerning present conditions in the California prison system. Second, the court erred in holding that no remedy short of a massive prisoner release can bring the California system into compliance with the Eighth Amendment. Third, the court gave inadequate weight to the impact of its decree on public safety.

I

Both the PLRA and general principles concerning injunctive relief dictate that a prisoner release order cannot properly be issued unless the relief is necessary to remedy an ongoing violation. Under the PLRA, a prisoner release may

be decreed only if crowding "*is* the primary cause" of an Eighth Amendment violation and only if no other relief "*will* remedy" the violation. § 3626(a)(3)(E) (emphasis added). This language makes it clear that proof of past violations alone is insufficient to justify a court-ordered prisoner release.

Similarly, in cases not governed by the PLRA, we have held that an inmate seeking an injunction to prevent a violation of the Eighth Amendment must show that prison officials are "knowingly and unreasonably disregarding an objectively intolerable risk of harm, and that they will continue to do so . . . into the future." *Farmer* v. *Brennan*, 511 U. S. 825, 846 (1994). The "deliberate indifference" needed to establish an Eighth Amendment violation must be examined "in light of the prison authorities' current attitudes and conduct," *Helling* v. *McKinney*, 509 U. S. 25, 36 (1993), which means "their attitudes and conduct at the time suit is brought and persisting thereafter," *Farmer*, *supra*, at 845.

For these reasons, the propriety of the relief ordered here cannot be assessed without ascertaining the nature and scope of any ongoing constitutional violations. Proof of past violations will not do; nor is it sufficient simply to establish that *some* violations continue. The scope of permissible relief depends on the scope of any continuing violations, and therefore it was essential for the three-judge court to make a reliable determination of the extent of any violations as of the time its release order was issued. Particularly in light of the radical nature of its chosen remedy, nothing less than an up-to-date assessment was tolerable.

The three-judge court, however, relied heavily on outdated information and findings and refused to permit California to introduce new evidence. Despite evidence of improvement,[1]

[1] Before requesting the appointment of a three-judge court, the District Court in *Coleman* recognized "commendable progress" in the State's effort to provide adequate mental health care, Juris. App. 294a, and the District Court in *Plata* acknowledged that "the Receiver has made much

the three-judge court relied on old findings made by the single-judge courts, see Juris. App. 76a–77a, including a finding made *14 years earlier*, see *id.*, at 170a (citing *Coleman* v. *Wilson*, 912 F. Supp. 1282, 1316, 1319 (ED Cal. 1995)). The three-judge court highlighted death statistics from 2005, see Juris. App. 9a, while ignoring the "significant and continuous decline since 2006," California Prison Health Care Receivership Corp., K. Imai, Analysis of Year 2008 Death Reviews 31 (Dec. 2009) (hereinafter 2008 Death Reviews). And the court dwelled on conditions at a facility that has since been replaced. See Juris. App. 19a–20a, 24a, 89a–90a, 94a, 107a, 111a.

Prohibiting the State from introducing evidence about conditions as of the date when the prisoner release order was under consideration, *id.*, at 76a–78a, and n. 42, the three-judge court explicitly stated that it would not "evaluate the state's continuing constitutional violations," *id.*, at 77a. Instead, it based its remedy on constitutional deficiencies that, in its own words, were found "years ago." *Ibid.*[2]

The three-judge court justified its refusal to receive up-to-date evidence on the ground that the State had not filed a motion to terminate prospective relief under a provision of the PLRA, § 3626(b). See Juris. App. 77a. Today's opinion for this Court endorses that reasoning, *ante*, at 523–524. But the State's opportunity to file such a motion did not eliminate the three-judge court's obligation to ensure that its relief was necessary to remedy ongoing violations.[3] More-

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progress since his appointment," *id.*, at 280a. The report of the Special Master to which the Court refers, *ante*, at 516, identifies a "generally positive trend." App. 803.

[2] For this reason, it is simply not the case that "evidence of current conditions . . . informed every aspect of the judgment of the three-judge court," as the majority insists, *ante*, at 522–523.

[3] Because the Ninth Circuit places the burden on the State to prove the absence of an ongoing violation when it moves to terminate prospective relief, see *Gilmore* v. *California*, 220 F. 3d 987, 1007 (CA9 2000), even if the State had unsuccessfully moved to terminate prospective relief under

over, the lower court's reasoning did not properly take into account the potential significance of the evidence that the State sought to introduce. Even if that evidence did not show that all violations had ceased—the showing needed to obtain the termination of relief under § 3626(b)—that evidence was highly relevant with respect to the nature and scope of permissible relief.[4]

The majority approves the three-judge court's refusal to receive fresh evidence based largely on the need for "[o]rderly trial management." *Ibid.* The majority reasons that the three-judge court had closed the book on the question of constitutional violations and had turned to the question of remedy. *Ibid.* As noted, however, the extent of any continuing constitutional violations was highly relevant to the question of remedy.

The majority also countenances the three-judge court's reliance on dated findings. The majority notes that the lower court considered recent reports by the Special Master and Receiver, *ante*, at 516, but the majority provides no persuasive justification for the lower court's refusal to receive hard, up-to-date evidence about any continuing violations.

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18 U. S. C. § 3626(b), there would still have been no determination that plaintiffs had carried their burden under the PLRA to establish by clear and convincing evidence that a prisoner release order is necessary to correct an ongoing rights violation.

[4] It is also no answer to say, as the Court now does, *ante*, at 523–524, that the State had the opportunity to resist the convening of the three-judge court on the ground that there were no unremedied constitutional violations as of that date. See § 3626(a)(3)(A)(i). The District Courts granted plaintiffs' motions to convene a three-judge court in 2007, three years before the remedial decree here was issued. Thus, the conditions in the prison system as of the date when the decree was issued were not necessarily the same as those that existed before the three-judge court proceedings began. Moreover, as noted above, even if all of the violations in the system had not been cured at the time of the remedial decree, an accurate assessment of conditions as of that date was essential in order to ensure that the relief did not sweep more broadly than necessary.

With the safety of the people of California in the balance, the record on this issue should not have been closed.

The majority repeats the lower court's error of reciting statistics that are clearly out of date. The Court notes the lower court's finding that as of 2005 "'an inmate in one of California's prisons needlessly dies every six to seven days.'" See *ante*, at 507. Yet by the date of the trial before the three-judge court, the death rate had been trending downward for 10 quarters, App. 2257, and the number of likely preventable deaths fell from 18 in 2006 to 3 in 2007, a decline of 83 percent.[5] Between 2001 and 2007, the California prison system had the 13th lowest average mortality rate of all 50 state systems.[6]

The majority highlights past instances in which particular prisoners received shockingly deficient medical care. See *ante*, at 503–504, 504–505, 508 (recounting five incidents). But such anecdotal evidence cannot be given undue weight in assessing the current state of the California system. The population of the California prison system (156,000 inmates

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[5] 2008 Death Reviews 22. The majority elides the improvement by combining likely preventable deaths with those that were "possibly preventable," *ante*, at 505, n. 4, that is, cases in which "[i]n the judgment of the reviewer," 2008 Death Reviews 3, "it's fifty-fifty that better care would have possibly prevented the death," App. 2277; *id.*, at 2256. As the majority acknowledges, even this class of cases is now dramatically diminished, and the three-judge court must take the current conditions into account when revising its remedy going forward. *Ante*, at 505, n. 4.

[6] Dept. of Justice, Bureau of Justice Statistics, State Prison Deaths, 2001–2007 (Table 13), online at http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=2093 (all Internet materials as visited May 20, 2011, and available in Clerk of Court's case file); see also App. 2257–2258. California had the 14th lowest "'average annual illness mortality [rate] per 100,000 state prisoners from 2001 to 2004.'" Juris. App. 125a. According to a 2007 report, state prisoners had a 19 percent lower death rate than the general U. S. adult population as of 2004. Dept. of Justice, Bureau of Justice Statistics, C. Mumola, Medical Causes of Death in State Prisons, 2001–2004, p. 1, online at http://bjs.ojp.usdoj.gov/content/pub/pdf/mcdsp04.pdf.

at the time of trial) is larger than that of many medium-sized cities,[7] and an examination of the medical care provided to the residents of many such cities would likely reveal cases in which grossly deficient treatment was provided. Instances of past mistreatment in the California system are relevant, but prospective relief must be tailored to present and future, not past, conditions.

II

Under the PLRA, a court may not grant any prospective relief unless the court finds that the relief is narrowly drawn, extends no further than necessary to correct the "violation of [a] Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." § 3626(a)(1)(A). In addition, the PLRA prohibits the issuance of a prisoner release order unless the court finds "by clear and convincing evidence that . . . crowding is the primary cause of the violation of a Federal right" and that "no other relief will remedy the violation of the Federal right." § 3626(a)(3)(E).

These statutory restrictions largely reflect general standards for injunctive relief aimed at remedying constitutional violations by state and local governments. "The power of the federal courts to restructure the operation of local and state governmental entities is not plenary. . . . Once a constitutional violation is found, a federal court is required to tailor the scope of the remedy to fit the nature and extent of the constitutional violation." *Dayton Bd. of Ed.* v. *Brinkman*, 433 U. S. 406, 419–420 (1977) (internal quotation marks omitted).

Here, the majority and the court below maintain that no remedy short of a massive release of prisoners from the general prison population can remedy the State's failure to pro-

[7] For example, the population of the California prison system exceeds that of Syracuse, New York; Bridgeport, Connecticut; Springfield, Massachusetts; Eugene, Oregon; and Savannah, Georgia.

vide constitutionally adequate health care. This argument is implausible on its face and is not supported by the requisite clear and convincing evidence.

It is instructive to consider the list of deficiencies in the California prison health care system that are highlighted in today's opinion for this Court and in the opinion of the court below. The deficiencies noted by the majority here include the following: "'[e]xam tables and counter tops, where prisoners with . . . communicable diseases are treated, [are] not routinely disinfected,'" *ante,* at 508; medical facilities "'are in an abysmal state of disrepair,'" *ibid.;* medications "'are too often not available when needed,'" *ibid.;* "'[b]asic medical equipment is often not available or used,'" *ibid.;* prisons "would 'hire any doctor who had "a license, a pulse and a pair of shoes,"'" *ibid.;* and medical and mental health staff positions have high vacancy rates, *ante,* at 517. The three-judge court pointed to similar problems. See Juris. App. 93a–121a (citing, among other things, staffing vacancies, too few beds for mentally ill prisoners, and an outmoded records management system).

Is it plausible that none of these deficiencies can be remedied without releasing 46,000 prisoners? Without taking that radical and dangerous step, exam tables and countertops cannot properly be disinfected? None of the system's dilapidated facilities can be repaired? Needed medications and equipment cannot be purchased and used? Staff vacancies cannot be filled? The qualifications of prison physicians cannot be improved? A better records management system cannot be developed and implemented?

I do not dispute that general overcrowding *contributes* to many of the California system's health care problems. But it by no means follows that reducing overcrowding is the only or the best or even a particularly good way to alleviate those problems. Indeed, it is apparent that the prisoner release ordered by the court below is poorly suited for this purpose. The release order is not limited to prisoners need-

ing substantial medical care but instead calls for a reduction in the system's overall population. Under the order issued by the court below, it is not necessary for a single prisoner in the plaintiff classes to be released. Although some class members will presumably be among those who are discharged, the decrease in the number of prisoners needing mental health treatment or other forms of extensive medical care will be much smaller than the total number of prisoners released, and thus the release will produce at best only a modest improvement in the burden on the medical care system.

The record bears this out. The Special Master stated dramatically that even releasing 100,000 inmates (two-thirds of the California system's entire inmate population!) would leave the problem of providing mental health treatment "largely unmitigated." App. 487. Similarly, the Receiver proclaimed that "'those . . . who think that population controls will solve California's prison health care problems . . . are simply wrong.'" Juris. App. 282a.

The State proposed several remedies other than a massive release of prisoners, but the three-judge court, seemingly intent on attacking the broader problem of general overcrowding, rejected all of the State's proposals. In doing so, the court made three critical errors.

First, the court did not assess those proposals and other remedies in light of conditions proved to exist at the time the release order was framed. Had more recent evidence been taken into account, a less extreme remedy might have been shown to be sufficient.

Second, the court failed to distinguish between conditions that fall below the level that may be desirable as a matter of public policy and conditions that do not meet the minimum level mandated by the Constitution. To take one example, the court criticized the California system because prison doctors must conduct intake exams in areas separated by folding screens rather than in separate rooms, creating conditions

that "do not allow for appropriate confidentiality." *Id.*, at 88a. But the legitimate privacy expectations of inmates are greatly diminished, see *Hudson* v. *Palmer*, 468 U. S. 517, 525–526 (1984), and this Court has never suggested that the failure to provide private consultation rooms in prisons amounts to cruel and unusual punishment.

Third, the court rejected alternatives that would not have provided " 'immediate' " relief. Juris. App. 148a. But nothing in the PLRA suggests that public safety may be sacrificed in order to implement an immediate remedy rather than a less dangerous one that requires a more extended but reasonable period of time.

If the three-judge court had not made these errors, it is entirely possible that an adequate but less drastic remedial plan could have been crafted. Without up-to-date information, it is not possible to specify what such a plan might provide, and in any event, that is not a task that should be undertaken in the first instance by this Court. But possible components of such a plan are not hard to identify.

Many of the problems noted above plainly could be addressed without releasing prisoners and without incurring the costs associated with a large-scale prison construction program. Sanitary procedures could be improved; sufficient supplies of medicine and medical equipment could be purchased; an adequate system of records management could be implemented; and the number of medical and other staff positions could be increased. Similarly, it is hard to believe that staffing vacancies cannot be reduced or eliminated and that the qualifications of medical personnel cannot be improved by any means short of a massive prisoner release. Without specific findings backed by hard evidence, this Court should not accept the counterintuitive proposition that these problems cannot be ameliorated by increasing salaries, improving working conditions, and providing better training and monitoring of performance.

While the cost of a large-scale construction program may well exceed California's current financial capabilities, a more targeted program, involving the repair and perhaps the expansion of current medical facilities (as opposed to general prison facilities), might be manageable. After all, any remedy in this case, including the new programs associated with the prisoner release order and other proposed relief now before the three-judge court, will necessarily involve some state expenditures.

Measures such as these might be combined with targeted reductions in critical components of the State's prison population. A certain number of prisoners in the classes on whose behalf the two cases were brought might be transferred to out-of-state facilities. The three-judge court rejected the State's proposal to transfer prisoners to out-of-state facilities in part because the number of proposed transfers was too small. See *id.*, at 160a. See also *ante*, at 527. But this reasoning rested on the court's insistence on a reduction in the State's general prison population rather than the two plaintiff classes.

When the State proposed to make a targeted transfer of prisoners in one of the plaintiff classes (*i. e.*, prisoners needing mental health treatment), one of the District Judges blocked the transfers for fear that the out-of-state facilities would not provide a sufficiently high level of care. See App. 434–440. The District Judge even refused to allow out-of-state transfers for prisoners who volunteered for relocation. See *id.*, at 437. And the court did this even though there was not even an allegation, let alone clear evidence, that the States to which these prisoners would have been sent were violating the Eighth Amendment.

The District Judge presumed that the receiving States might fail to provide constitutionally adequate care, but "'in the absence of clear evidence to the contrary, courts presume that [public officers] have properly discharged their official duties.'" *United States* v. *Armstrong*, 517 U. S. 456, 464

(1996) (quoting *United States* v. *Chemical Foundation, Inc.*, 272 U. S. 1, 14–15 (1926)); *Postal Service* v. *Gregory*, 534 U. S. 1, 10 (2001) ("[A] presumption of regularity attaches to the actions of Government agencies"); see also *McKune* v. *Lile*, 536 U. S. 24, 51 (2002) (O'Connor, J., concurring in judgment) ("[W]e may assume that the prison is capable of controlling its inmates so that respondent's personal safety is not jeopardized . . . , at least in the absence of proof to the contrary").[8]

Finally, as a last resort, a much smaller release of prisoners in the two plaintiff classes could be considered. Plaintiffs proposed not only a systemwide population cap, but also a lower population cap for inmates in specialized programs. Tr. 2915:12–15 (Feb. 3, 2009). The three-judge court rejected this proposal, and its response exemplified what went wrong in this case. One judge complained that this remedy would be deficient because it would protect only the members of the plaintiff classes. The judge stated:

> "The only thing is we would be protecting the class members. And maybe that's the appropriate thing to do. I mean, that's what this case is about, but it would be . . . difficult for me to say yes, and the hell with everybody else." *Id.*, at 2915:23–2916:2.

Overstepping his authority, the judge was not content to provide relief for the classes of plaintiffs on whose behalf the suit before him was brought. Nor was he content to remedy the only constitutional violations that were proved—which concerned the treatment of the members of those classes. Instead, the judge saw it as his responsibility to attack the general problem of overcrowding.

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[8] The Court rejects the State's argument that out-of-state transfers offer a less restrictive alternative to a prisoner release order because "requiring out-of-state transfers itself qualifies as a population limit under the PLRA." *Ante*, at 527. But the PLRA does not apply when the State voluntarily conducts such transfers, as it has sought to do.

III

Before ordering any prisoner release, the PLRA commands a court to "give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief." § 3626(a)(1)(A). This provision unmistakably reflects Congress' view that prisoner release orders are inherently risky.

In taking this view, Congress was well aware of the impact of previous prisoner release orders. The prisoner release program carried out a few years earlier in Philadelphia is illustrative. In the early 1990's, federal courts enforced a cap on the number of inmates in the Philadelphia prison system, and thousands of inmates were set free. Although efforts were made to release only those prisoners who were least likely to commit violent crimes, that attempt was spectacularly unsuccessful. During an 18-month period, the Philadelphia police rearrested thousands of these prisoners for committing 9,732 new crimes. Those defendants were charged with 79 murders, 90 rapes, 1,113 assaults, 959 robberies, 701 burglaries, and 2,748 thefts, not to mention thousands of drug offenses.[9] Members of Congress were well aware of this experience.[10]

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[9] Hearing on Prison Reform before the Senate Committee on the Judiciary, 104th Cong., 1st Sess., 49 (1995) (statement of Lynne Abraham, District Attorney of Philadelphia); Hearings before the Subcommittee on Crime of the House Committee on the Judiciary, 104th Cong., 1st Sess., 259 (1995) (same); see also Hearing before the Subcommittee on Crime, Terrorism, and Homeland Security of the House Committee on the Judiciary, 110th Cong., 2d Sess., 31 (2008) (statement of Sarah V. Hart, Assistant District Attorney, Philadelphia District Attorney's Office).

[10] Condemning the inappropriate imposition of prison population caps, Senator Dole cited "the case of Philadelphia, where a court-ordered prison cap has put thousands of violent criminals back on the city's streets, often with disastrous consequences." 141 Cong. Rec. 26549 (1995). Senator Abraham complained that "American citizens are put at risk every day by court decrees . . . that cure prison crowding by declaring that we must free dangerous criminals before they have served their time." *Id.*,

Despite the record of past prisoner release orders, the three-judge court in this case concluded that loosing 46,000 criminals would not produce a tally like that in Philadelphia and would actually improve public safety. Juris. App. 248a–249a. In reaching this debatable conclusion, the three-judge court relied on the testimony of selected experts, *id.*, at 248a, and the majority now defers to what it characterizes as the lower court's findings of fact on this controversial public policy issue, *ante*, at 512–513, 517, 522.

This is a fundamental and dangerous error. When a trial court selects between the competing views of experts on broad empirical questions such as the efficacy of preventing crime through the incapacitation of convicted criminals, the trial court's choice is very different from a classic finding of fact and is not entitled to the same degree of deference on appeal.

The particular three-judge court convened in this case was "confident" that releasing 46,000 prisoners pursuant to its plan "would in fact benefit public safety." Juris. App. 248a–249a. According to that court, "overwhelming evidence" supported this purported finding. *Id.*, at 232a. But a more cautious court, less bent on implementing its own criminal justice agenda, would have at least acknowledged that the consequences of this massive prisoner release cannot be ascertained in advance with any degree of certainty and that it is entirely possible that this release will produce results similar to those under prior court-ordered population caps. After all, the sharp increase in the California prison population that the three-judge court lamented, see *id.*, at 254a, has been accompanied by an equally sharp decrease in violent crime.[11] These California trends mirror similar develop-

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at 26448. "The most egregious example," he added, "is the city of Philadelphia." *Ibid.*

[11] From 1992 to 2009, the violent crime rate in California per 100,000 residents fell from 1,119.7 to 472—a decrease of 57.8 percent. Similarly,

ments at the national level,[12] and "[t]here is a general consensus that the decline in crime is, at least in part, due to more and longer prison sentences."[13] If increased incarceration in California has led to decreased crime, it is entirely possible that a decrease in imprisonment will have the opposite effect.

Commenting on the testimony of an expert who stated that he could not be certain about the effect of the massive prisoner discharge on public safety, the three-judge court complained that "[s]uch equivocal testimony is not helpful." *Id.*, at 247a. But testimony pointing out the difficulty of assessing the consequences of this drastic remedy would have been valued by a careful court duly mindful of the overriding need to guard public safety.

The three-judge court acknowledged that it "ha[d] not evaluated the public safety impact of each individual element" of the population reduction plan it ordered the State to implement. App. to Juris. Statement 3a. The majority argues that the three-judge court nevertheless gave substantial weight to public safety because its order left "details of implementation to the State's discretion." *Ante*, at 538. Yet the State had told the three-judge court that, after studying possible population reduction measures, it concluded that "reducing the prison population to 137.5% within

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in the United States from 1992 to 2009, the violent crime rate per 100,000 residents fell from 757.7 to 429.4—a decrease of 43.3 percent. Dept. of Justice, Federal Bureau of Investigation, Uniform Crime Reporting Statistics, http://www.ucrdatatool.gov.

[12] According to the three-judge court, California's prison population has increased by 750 percent since the mid-1970's. Juris. App. 254a. From 1970 to 2005, the Nation's prison population increased by 700 percent. Public Safety, Public Spending: Forecasting America's Prison Population 2007–2011, 19 Fed. Sentencing Rep. 234 (2007).

[13] Paternoster, How Much Do We Really Know About Criminal Deterrence? 100 J. Crim. L. & C. 765, 801 (2010) (citing research on this issue).

a two-year period cannot be accomplished without unacceptably compromising public safety." Juris. App. 317a. The State found that public safety required a 5-year period in which to achieve the ordered reduction. *Ibid.*

Thus, the three-judge court approved a population reduction plan that neither it nor the State found could be implemented without unacceptable harm to public safety. And this Court now holds that the three-judge court discharged its obligation to "give substantial weight to any adverse impact on public safety," § 3626(a)(1)(A), by deferring to officials who did not believe the reduction could be accomplished in a safe manner. I do not believe the PLRA's public-safety requirement is so trivial.

The members of the three-judge court and the experts on whom they relied may disagree with key elements of the crime-reduction program that the State of California has pursued for the past few decades, including "the shift to inflexible determinate sentencing and the passage of harsh mandatory minimum and three-strikes laws." *Id.*, at 254a. And experts such as the Receiver are entitled to take the view that the State should "re-thin[k] the place of incarceration in its criminal justice system," App. 489. But those controversial opinions on matters of criminal justice policy should not be permitted to override the reasonable policy view that is implicit in the PLRA—that prisoner release orders present an inherent risk to the safety of the public.

* * *

The prisoner release ordered in this case is unprecedented, improvident, and contrary to the PLRA. In largely sustaining the decision below, the majority is gambling with the safety of the people of California. Before putting public safety at risk, every reasonable precaution should be taken. The decision below should be reversed, and the case should be remanded for this to be done.

I fear that today's decision, like prior prisoner release orders, will lead to a grim roster of victims. I hope that I am wrong.

In a few years, we will see.

Syllabus

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA ET AL. *v.* WHITING ET AL.

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

No. 09–115. Argued December 8, 2010—Decided May 26, 2011

The Immigration Reform and Control Act (IRCA) makes it "unlawful for a person or other entity . . . to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien." 8 U. S. C. § 1324a(a)(1)(A). Employers that violate that prohibition may be subjected to federal civil and criminal sanctions. IRCA also restricts the ability of States to combat employment of unauthorized workers; the Act expressly preempts "any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." § 1324a(h)(2).

IRCA also requires employers to take steps to verify an employee's eligibility for employment. In an attempt to improve that verification process in the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Congress created E-Verify—an Internet-based system employers can use to check the work authorization status of employees.

Against this statutory background, several States have recently enacted laws attempting to impose sanctions for the employment of unauthorized aliens through, among other things, "licensing and similar laws." Arizona is one of them. The Legal Arizona Workers Act provides that the licenses of state employers that knowingly or intentionally employ unauthorized aliens may be, and in certain circumstances must be, suspended or revoked. That law also requires that all Arizona employers use E-Verify.

The Chamber of Commerce of the United States and various business and civil rights organizations (collectively Chamber) filed this federal pre-enforcement suit against those charged with administering the Arizona law, arguing that the state law's license suspension and revocation provisions were both expressly and impliedly preempted by federal immigration law, and that the mandatory use of E-Verify was impliedly preempted. The District Court found that the plain language of IRCA's preemption clause did not invalidate the Arizona law because the law did no more than impose licensing conditions on businesses operating within the State. Nor was the state law preempted with respect

to E-Verify, the court concluded, because although Congress had made the program voluntary at the national level, it had expressed no intent to prevent States from mandating participation. The Ninth Circuit affirmed.

Held: The judgment is affirmed.

558 F. 3d 856, affirmed.

THE CHIEF JUSTICE delivered the opinion of the Court with respect to Parts I and II–A, concluding that Arizona's licensing law is not expressly preempted.

Arizona's licensing law falls well within the confines of the authority Congress chose to leave to the States and therefore is not expressly preempted. While IRCA prohibits States from imposing "civil or criminal sanctions" on those who employ unauthorized aliens, it preserves state authority to impose sanctions "through licensing and similar laws." § 1324a(h)(2). That is what the Arizona law does—it instructs courts to suspend or revoke the business licenses of in-state employers that employ unauthorized aliens. The definition of "license" contained in the Arizona statute largely parrots the definition of "license" that Congress codified in the Administrative Procedure Act (APA).

The state statute also includes within its definition of "license" documents such as articles of incorporation, certificates of partnership, and grants of authority to foreign companies to transact business in the State, Ariz. Rev. Stat. Ann. § 23–211(9), each of which has clear counterparts in APA and dictionary definitions of the word "license." And even if a law regulating articles of incorporation and the like is not itself a "licensing law," it is at the very least "similar" to one, and therefore comfortably within the saving clause. The Chamber's argument that the Arizona law is not a "licensing" law because it operates only to suspend and revoke licenses rather than to grant them is without basis in law, fact, or logic.

The Chamber contends that the saving clause should apply only to certain types of licenses or only to license revocation following an IRCA adjudication because Congress, when enacting IRCA, eliminated unauthorized worker prohibitions and associated adjudication procedures in another federal statute. But no such limits are even remotely discernible in the statutory text.

The Chamber's reliance on IRCA's legislative history to bolster its textual and structural arguments is unavailing given the Court's conclusion that Arizona's law falls within the plain text of the saving clause. Pp. 594–600.

THE CHIEF JUSTICE, joined by JUSTICE SCALIA, JUSTICE KENNEDY, and JUSTICE ALITO, concluded in Part II–B:

The Arizona licensing law is not impliedly preempted by federal law. At its broadest, the Chamber's argument is that Congress intended the federal system to be exclusive. But Arizona's procedures simply implement the sanctions that Congress expressly allowed the States to pursue through licensing laws. Given that Congress specifically preserved such authority for the States, it stands to reason that Congress did not intend to prevent the States from using appropriate tools to exercise that authority.

And here Arizona's law closely tracks IRCA's provisions in all material respects. For example, it adopts the federal definition of who qualifies as an "unauthorized alien," compare 8 U. S. C. § 1324a(h)(3) with Ariz. Rev. Stat. Ann. § 23–211(11); provides that state investigators must verify the work authorization of an allegedly unauthorized alien with the Federal Government, making no independent determination of the matter, § 23–212(B); and requires a state court to "consider only the federal government's determination," § 23–212(H).

The Chamber's more general contention that the Arizona law is preempted because it upsets the balance that Congress sought to strike in IRCA also fails. The cases on which the Chamber relies in making this argument all involve uniquely federal areas of interest, see, *e. g.*, *Buckman Co.* v. *Plaintiffs' Legal Comm.*, 531 U. S. 341. Regulating in-state businesses through licensing laws is not such an area. And those cases all concern state actions that directly interfered with the operation of a federal program, see, *e. g.*, *id.*, at 351. There is no similar interference here.

The Chamber asserts that employers will err on the side of discrimination rather than risk the "'business death penalty'" by "hiring unauthorized workers." That is not the choice. License termination is not an available sanction for merely hiring unauthorized workers, but is triggered only by far more egregious violations. And because the Arizona law covers only knowing or intentional violations, an employer acting in good faith need not fear the law's sanctions. Moreover, federal and state antidiscrimination laws protect against employment discrimination and provide employers with a strong incentive not to discriminate. Employers also enjoy safe harbors from liability when using E-Verify as required by the Arizona law. The most rational path for employers is to obey both the law barring the employment of unauthorized aliens and the law prohibiting discrimination. There is no reason to suppose that Arizona employers will choose not to do so. Pp. 600–607.

THE CHIEF JUSTICE delivered the opinion of the Court with respect to Part III–A, concluding that Arizona's E-Verify mandate is not impliedly preempted.

Syllabus

Arizona's requirement that employers use E-Verify is not impliedly preempted. The IIRIRA provision setting up E-Verify contains no language circumscribing state action. It does, however, constrain federal action: Absent a prior violation of federal law, "the Secretary of Homeland Security may not require any person or . . . entity" outside the Federal Government "to participate in" E-Verify. IIRIRA §§402(a), (e). The fact that the Federal Government may require the use of E-Verify in only limited circumstances says nothing about what the States may do. The Government recently argued just that in another case and approvingly referenced Arizona's law as an example of a permissible use of E-Verify when doing so.

Moreover, Arizona's use of E-Verify does not conflict with the federal scheme. The state law requires no more than that an employer, after hiring an employee, "verify the employment eligibility of the employee" through E-Verify. Ariz. Rev. Stat. Ann. §23–214(A). And the consequences of not using E-Verify are the same under the state and federal law—an employer forfeits an otherwise available rebuttable presumption of compliance with the law. Pp. 607–609.

THE CHIEF JUSTICE, joined by JUSTICE SCALIA, JUSTICE KENNEDY, and JUSTICE ALITO, concluded in Part III–B:

Arizona's requirement that employers use E-Verify in no way obstructs achieving the aims of the federal program. In fact, the Government has consistently expanded and encouraged the use of E-Verify, and Congress has directed that E-Verify be made available in all 50 States. And the Government has expressly rejected the Chamber's claim that the Arizona law, and those like it, will overload the federal system. Pp. 609–610.

ROBERTS, C. J., delivered the opinion of the Court, except as to Parts II–B and III–B. SCALIA, KENNEDY, and ALITO, JJ., joined that opinion in full, and THOMAS, J., joined as to Parts I, II–A, and III–A and concurred in the judgment. BREYER, J., filed a dissenting opinion, in which GINSBURG, J., joined, *post*, p. 611. SOTOMAYOR, J., filed a dissenting opinion, *post*, p. 630. KAGAN, J., took no part in the consideration or decision of the case.

Carter G. Phillips argued the cause for petitioners. With him on the briefs were *Eric A. Shumsky*, *Quin M. Sorenson*, *Matthew D. Krueger*, *Robin S. Conrad*, *Shane B. Kawka*, *David A. Selden*, *Julie A. Pace*, *Heidi Nunn-Gilman*, *Burt M. Rublin*, *Daniel Pochoda*, *Lucas Guttentag*, *Jennifer Chang Newell*, *Stephen P. Berzon*, *Jonathan Weissglass*, *Ste-*

ven R. Shapiro, Omar C. Jadwat, Cynthia Valenzuela Dixon, Linton Joaquin, Karen C. Tumlin, Paul F. Eckstein, and *Joel W. Nomkin.*

Acting Solicitor General Katyal argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Assistant Attorneys General West* and *Perez, Deputy Assistant Attorney General Bagenstos, William M. Jay, Mark L. Gross,* and *Nathaniel S. Pollock.*

Mary R. O'Grady, Solicitor General of Arizona, argued the cause for respondents. With her on the brief were *Terry Goddard,* Attorney General, *Kathleen P. Sweeney* and *Christopher A. Munns,* Assistant Attorneys General, *Roger W. Hall, Eileen Gilbride,* and *Daniel S. Jurkowitz.**

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*Briefs of *amici curiae* urging reversal were filed for the Asian American Justice Center et al. by *Kevin M. Fong, Pamela S. Karlan, Karen K. Narasaki, Steven M. Freeman, Steven C. Sheinberg, Kenneth Kimerling, Cesar A. Perales, Sarah C. Crawford, Audrey Wiggins, Christopher Ho, Araceli Martínez-Olguín, Rebecca Smith,* and *Mary Bauer;* for Business Organizations by *Walter Dellinger* and *Sri Srinivasan;* for the Equal Employment Advisory Council by *Rae T. Vann* and *Judith A. Lampley;* for the National Immigrant Justice Center et al. by *Linda T. Coberly, Gene C. Schaerr,* and *Steffen N. Johnson;* for the Service Employees International Union by *Leon Dayan* and *Laurence Gold;* and for Representative Romano L. Mazzoli et al. by *Paul M. Smith* and *Lindsay C. Harrison.*

Briefs of *amici curiae* urging affirmance were filed for the State of Missouri et al. by *Chris Koster,* Attorney General of Missouri, *James R. Layton,* Solicitor General, *Jeremiah J. Morgan,* Deputy Solicitor General, and *Arax R. Corn,* Assistant Attorney General, and by the Attorneys General for their respective States as follows: *Troy King* of Alabama, *Dustin McDaniel* of Arkansas, *Steve Six* of Kansas, *James D. Caldwell* of Louisiana, *Michael A. Cox* of Michigan, *Jim Hood* of Mississippi, *Jon Bruning* of Nebraska, *Wayne Stenehjem* of North Dakota, *Henry D. McMaster* of South Carolina, *Robert E. Cooper, Jr.,* of Tennessee, *Mark L. Shurtleff* of Utah, and *Kenneth T. Cuccinelli II* of Virginia; for the American Center for Law and Justice by *Jay Alan Sekulow, Stuart J. Roth, Colby M. May, John P. Tuskey,* and *Laura B. Hernandez;* for the American Unity Legal Defense Fund by *Barnaby W. Zall;* for the Eagle Forum Education & Legal Defense Fund by *Lawrence J. Joseph;* for the Immigration Reform Law Institute by *Michael M. Hethmon;* for NumbersUSA Education &

CHIEF JUSTICE ROBERTS delivered the opinion of the Court, except as to Parts II–B and III–B.†

Federal immigration law expressly preempts "any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ . . . unauthorized aliens." 8 U. S. C. § 1324a(h)(2). A recently enacted Arizona statute—the Legal Arizona Workers Act—provides that the licenses of state employers that knowingly or intentionally employ unauthorized aliens may be, and in certain circumstances must be, suspended or revoked. The law also requires that all Arizona employers use a federal electronic verification system to confirm that the workers they employ are legally authorized workers. The question presented is whether federal immigration law preempts those provisions of Arizona law. Because we conclude that the State's licensing provisions fall squarely within the federal statute's saving clause and that the Arizona regulation does not otherwise conflict with federal law, we hold that the Arizona law is not preempted.

I

A

In 1952, Congress enacted the Immigration and Nationality Act (INA), 66 Stat. 163, as amended, 8 U. S. C. § 1101 *et seq.* That statute established a "comprehensive federal statutory scheme for regulation of immigration and naturalization" and set "the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country." *De Canas* v. *Bica*, 424 U. S. 351, 353, 359 (1976).

In the years following the enactment of the INA, several States took action to prohibit the employment of individuals

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Research Foundation by *J. E. McNeil;* and for State Senator Russell Pearce by *Paul J. Orfanedes* and *James F. Peterson.*

†JUSTICE THOMAS joins Parts I, II–A, and III–A of this opinion and concurs in the judgment.

living within state borders who were not lawful residents of the United States. For example, in 1971 California passed a law providing that "[n]o employer shall knowingly employ an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers." 1971 Cal. Stats. ch. 1442, § 1(a). The California law imposed fines ranging from $200 to $500 for each violation of this prohibition. § 1(b). At least 11 other States enacted provisions during that same time period proscribing the employment of unauthorized aliens.[1]

We first addressed the interaction of federal immigration law and state laws dealing with the employment of unauthorized aliens in *De Canas*, 424 U. S. 351. In that case, we recognized that the "[p]ower to regulate immigration is unquestionably . . . a federal power." *Id.*, at 354. At the same time, however, we noted that the "States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State," *id.*, at 356, that "prohibit[ing] the knowing employment . . . of persons not entitled to lawful residence in the United States, let alone to work here, is certainly within the mainstream of [the State's] police power," *ibid.*, and that the Federal Government had "at best" expressed "a peripheral concern with [the] employment of illegal entrants" at that point in time, *id.*, at 360. As a result, we declined to hold that a state law assessing civil fines for the employment of unauthorized aliens was preempted by federal immigration law.

Ten years after *De Canas*, Congress enacted the Immigration Reform and Control Act (IRCA), 100 Stat. 3359. IRCA makes it "unlawful for a person or other entity . . . to hire,

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[1] See Conn. Gen. Stat. § 31–51k (1973) (enacted 1972); Del. Code Ann., Tit. 19, § 705 (1978 Cum. Supp.) (enacted 1976); Fla. Stat. § 448.09 (1981) (enacted 1977); Kan. Stat. Ann. § 21–4409 (1981) (enacted 1973); 1985 La. Acts p. 1894; 1977 Me. Acts p. 171; 1976 Mass. Acts p. 641; Mont. Code Ann. § 41–121 (1977 Cum. Supp.); N. H. Rev. Stat. Ann. § 275–A:4–a (1986 Cum. Supp.) (enacted 1976); 1977 Vt. Laws p. 320; 1977 Va. Acts ch. 438.

or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien." 8 U. S. C. § 1324a(a)(1)(A). IRCA defines an "unauthorized alien" as an alien who is not "lawfully admitted for permanent residence" or not otherwise authorized by the Attorney General to be employed in the United States. § 1324a(h)(3).

To facilitate compliance with this prohibition, IRCA requires that employers review documents establishing an employee's eligibility for employment. § 1324a(b). An employer can confirm an employee's authorization to work by reviewing the employee's United States passport, resident alien card, alien registration card, or other document approved by the Attorney General; or by reviewing a combination of other documents such as a driver's license and social security card. §§ 1324a(b)(1)(B)–(D). The employer must attest under penalty of perjury on Department of Homeland Security Form I–9 that he "has verified that the individual is not an unauthorized alien" by reviewing these documents. § 1324a(b)(1)(A). The form I–9 itself "and any information contained in or appended to [it] . . . may not be used for purposes other than for enforcement of" IRCA and other specified provisions of federal law. § 1324a(b)(5).

Employers that violate IRCA's strictures may be subjected to both civil and criminal sanctions. Immigration and Customs Enforcement, an entity within the Department of Homeland Security, is authorized to bring charges against a noncompliant employer under § 1324a(e). Depending on the circumstances of the violation, a civil fine ranging from $250 to $16,000 per unauthorized worker may be imposed. See § 1324a(e)(4)(A); 73 Fed. Reg. 10136 (2008). Employers that engage in a pattern or practice of violating IRCA's requirements can be criminally prosecuted, fined, and imprisoned for up to six months. § 1324a(f)(1). The Act also imposes fines for engaging in "unfair immigration-related employment practice[s]" such as discriminating on the basis of citizenship or national origin. §1324b(a)(1); see §1324b(g)(2)(B).

Good-faith compliance with IRCA's I–9 document review requirements provides an employer with an affirmative defense if charged with a § 1324a violation. § 1324a(a)(3).

IRCA also restricts the ability of States to combat employment of unauthorized workers. The Act expressly preempts "any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." § 1324a(h)(2). Under that provision, state laws imposing civil fines for the employment of unauthorized workers like the one we upheld in *De Canas* are now expressly preempted.

In 1996, in an attempt to improve IRCA's employment verification system, Congress created three experimental complements to the I–9 process as part of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), 110 Stat. 3009–655, note following 8 U. S. C. § 1324a. *Arizona Contractors Assn., Inc.* v. *Candelaria*, 534 F. Supp. 2d 1036, 1042 (Ariz. 2008); see 8 U. S. C. § 1324a(d). Only one of those programs—E-Verify—remains in operation today. Originally known as the "Basic Pilot Program," E-Verify "is an internet-based system that allows an employer to verify an employee's work-authorization status." *Chicanos Por La Causa, Inc.* v. *Napolitano*, 558 F. 3d 856, 862 (CA9 2009). An employer submits a request to the E-Verify system based on information that the employee provides similar to that used in the I–9 process. In response to that request, the employer receives either a confirmation or a tentative nonconfirmation of the employee's authorization to work. An employee may challenge a nonconfirmation report. If the employee does not do so, or if his challenge is unsuccessful, his employment must be terminated or the Federal Government must be informed. See *ibid.*

In the absence of a prior violation of certain federal laws, IIRIRA prohibits the Secretary of Homeland Security from "requir[ing] any person or . . . entity" outside the Federal

Government "to participate in" the E-Verify program, §§ 402(a), (e), 110 Stat. 3009–656 to 3009–658. To promote use of the program, however, the statute provides that any employer that utilizes E-Verify "and obtains confirmation of identity and employment eligibility in compliance with the terms and conditions of the program . . . has established a rebuttable presumption" that it has not violated IRCA's unauthorized alien employment prohibition, § 402(b)(1), *id.*, at 3009–656 to 3009–657.

B

Acting against this statutory and historical background, several States have recently enacted laws attempting to impose sanctions for the employment of unauthorized aliens through, among other things, "licensing and similar laws," 8 U. S. C. § 1324a(h)(2).[2] Arizona is one of them. The Legal Arizona Workers Act of 2007 allows Arizona courts to suspend or revoke the licenses necessary to do business in the State if an employer knowingly or intentionally employs an unauthorized alien. Ariz. Rev. Stat. Ann. §§ 23–211, 23–212, 23–212.01 (West Supp. 2010) (citing 8 U. S. C. § 1324a).

Under the Arizona law, if an individual files a complaint alleging that an employer has hired an unauthorized alien, the attorney general or the county attorney first verifies the employee's work authorization with the Federal Government pursuant to 8 U. S. C. § 1373(c). Ariz. Rev. Stat. Ann. § 23–212(B). Section 1373(c) provides that the Federal Government "shall respond to an inquiry by a" State "seeking to verify or ascertain the citizenship or immigration status of any individual . . . by providing the requested verification or status information." The Arizona law expressly prohib-

[2] See, *e. g.*, Colo. Rev. Stat. Ann. § 8–17.5–102 (2008); Miss. Code Ann. § 71–11–3(7)(e) (Supp. 2010); Mo. Rev. Stat. §§ 285–525, 285–535 (2009 Cum. Supp.); Pa. Stat. Ann., Tit. 73, § 820.311 (Purdon Supp. 2010); S. C. Code Ann. § 41–8–50(D)(2) (Supp. 2010); Tenn. Code Ann. § 50–1–103(d) (2008); Va. Code Ann. § 2.2–4311.1 (Lexis 2008); W. Va. Code Ann. § 21–1B–7 (Lexis Supp. 2010).

its state, county, or local officials from attempting "to independently make a final determination on whether an alien is authorized to work in the United States." Ariz. Rev. Stat. Ann. § 23–212(B). If the § 1373(c) inquiry reveals that a worker is an unauthorized alien, the attorney general or the county attorney must notify United States Immigration and Customs Enforcement officials, notify local law enforcement, and bring an action against the employer. §§ 23–212(C)(1)–(3), (D).

When a complaint is brought against an employer under Arizona law, "the court shall consider only the federal government's determination pursuant to" 8 U. S. C. § 1373(c) in "determining whether an employee is an unauthorized alien." § 23–212(H). Good-faith compliance with the federal I–9 process provides employers prosecuted by the State with an affirmative defense. § 23–212(J).

A first instance of "knowingly employ[ing] an unauthorized alien" requires that the court order the employer to terminate the employment of all unauthorized aliens and file quarterly reports on all new hires for a probationary period of three years. §§ 23–212(A), (F)(1)(a)–(b). The court may also "order the appropriate agencies to suspend all licenses . . . that are held by the employer for [a period] not to exceed ten business days." § 23–212(F)(1)(d). A second knowing violation requires that the adjudicating court "permanently revoke all licenses that are held by the employer specific to the business location where the unauthorized alien performed work." § 23–212(F)(2).

For a first intentional violation, the court must order the employer to terminate the employment of all unauthorized aliens and file quarterly reports on all new hires for a probationary period of five years. §§ 23–212.01(A), (F)(1)(a)–(b). The court must also suspend all the employer's licenses for a minimum of 10 days. § 23–212.01(F)(1)(c). A second intentional violation requires the permanent revocation of all business licenses. § 23–212.01(F)(2).

With respect to both knowing and intentional violations, a violation qualifies as a "second violation" only if it occurs at the same business location as the first violation, during the time that the employer is already on probation for a violation at that location. §§ 23–212(F)(3)(a)–(b); §§ 23–212.01(F)(3)(a)–(b).

The Arizona law also requires that "every employer, after hiring an employee, shall verify the employment eligibility of the employee" by using E-Verify. § 23–214(A).[3] "[P]roof of verifying the employment authorization of an employee through the e-verify program creates a rebuttable presumption that an employer did not knowingly employ an unauthorized alien." § 23–212(I).

C

The Chamber of Commerce of the United States and various business and civil rights organizations (collectively Chamber of Commerce or Chamber) filed a pre-enforcement suit in federal court against those charged with administering the Arizona law: more than a dozen Arizona county attorneys, the Governor of Arizona, the Arizona attorney general, the Arizona registrar of contractors, and the director of the Arizona Department of Revenue (collectively Arizona).[4]

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[3] Several States have passed statutes mandating the use of E-Verify. See, *e. g.*, Miss. Code Ann. §§ 71–11–3(3)(d), (4)(b)(i) (Supp. 2010); S. C. Code Ann. §§ 41–8–20(B)–(C) (Supp. 2010); Utah Code Ann. § 13–47–201(1) (Lexis Supp. 2010); Va. Code Ann. § 40.1–11.2 (Lexis Supp. 2010).

[4] No suits had been brought under the Arizona law when the complaint in this case was filed. As of the date that Arizona submitted its merits brief to this Court only three enforcement actions had been pursued against Arizona employers. See *Arizona* v. *Waterworld Ltd. Partnership*, No. CV2009–038848 (Maricopa Cty. Super. Ct., filed Dec. 21, 2009) (resolved by consent judgment); *Arizona* v. *Danny's Subway Inc.*, No. CV2010–005886 (Maricopa Cty. Super. Ct., filed Mar. 9, 2010) (resolved by consent decree); *Arizona* v. *Scottsdale Art Factory, LLC*, No. CV2009–036359 (Maricopa Cty. Super. Ct., filed Nov. 18, 2009) (pending).

The Chamber argued that the Arizona law's provisions allowing the suspension and revocation of business licenses for employing unauthorized aliens were both expressly and impliedly preempted by federal immigration law, and that the mandatory use of E-Verify was impliedly preempted.

The District Court held that Arizona's law was not preempted. 534 F. Supp. 2d 1036. It found that the plain language of IRCA's preemption clause did not preempt the Arizona law because the state law does no more than impose licensing conditions on businesses operating within the State. *Id.*, at 1045–1046. With respect to E-Verify, the court concluded that although Congress had made the program voluntary at the national level, it had expressed no intent to prevent States from mandating participation. *Id.*, at 1055–1057. The Court of Appeals affirmed the District Court in all respects, holding that Arizona's law was a "'licensing and similar law[]'" falling within IRCA's saving clause and that none of the state law's challenged provisions was "expressly or impliedly preempted by federal policy." 558 F. 3d, at 860, 861, 866.

We granted certiorari. 561 U. S. 1024 (2010).

II

The Chamber of Commerce argues that Arizona's law is expressly preempted by IRCA's text and impliedly preempted because it conflicts with federal law. We address each of the Chamber's arguments in turn.

A

When a federal law contains an express preemption clause, we "focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent." *CSX Transp., Inc.* v. *Easterwood*, 507 U. S. 658, 664 (1993).

IRCA expressly preempts States from imposing "civil or criminal sanctions" on those who employ unauthorized

aliens, "other than through licensing and similar laws." 8 U. S. C. § 1324a(h)(2). The Arizona law, on its face, purports to impose sanctions through licensing laws. The state law authorizes state courts to suspend or revoke an employer's business licenses if that employer knowingly or intentionally employs an unauthorized alien. Ariz. Rev. Stat. Ann. §§ 23–212(A) and (F); §§ 23–212.01(A) and (F). The Arizona law defines "license" as "any agency permit, certificate, approval, registration, charter or similar form of authorization that is required by law and that is issued by any agency for the purposes of operating a business in" the State. § 23–211(9)(a). That definition largely parrots the definition of "license" that Congress codified in the Administrative Procedure Act. See 5 U. S. C. § 551(8) ("'license' includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission").

Apart from that general definition, the Arizona law specifically includes within its definition of "license" documents such as articles of incorporation, certificates of partnership, and grants of authority to foreign companies to transact business in the State. Ariz. Rev. Stat. Ann. § 23–211(9). These examples have clear counterparts in the APA definition just quoted. See 5 U. S. C. § 551(8) (defining "license" as including a "registration" or "charter").

A license is "a right or permission granted in accordance with law . . . to engage in some business or occupation, to do some act, or to engage in some transaction which but for such license would be unlawful." Webster's Third New International Dictionary 1304 (2002). Articles of incorporation and certificates of partnership allow the formation of legal entities and permit them as such to engage in business and transactions "which but for such" authorization "would be unlawful." *Ibid.*; see Ariz. Rev. Stat. Ann. §§ 10–302, 10–302(11) (West 2004) (articles of incorporation allow a corporation "to carry out its business and affairs" and to "[c]onduct

its business"); see also § 10–202(A)(3) (West Supp. 2010). As for state-issued authorizations for foreign businesses to operate within a State, we have repeatedly referred to those as "licenses." See, *e. g.*, *Helicopteros Nacionales de Colombia, S. A.* v. *Hall*, 466 U. S. 408, 417 (1984); *G. D. Searle & Co.* v. *Cohn*, 455 U. S. 404, 413, n. 8 (1982); *Rosenberg Bros. & Co.* v. *Curtis Brown Co.*, 260 U. S. 516, 518 (1923). Moreover, even if a law regulating articles of incorporation, partnership certificates, and the like is not itself a "licensing law," it is at the very least "similar" to a licensing law, and therefore comfortably within the saving clause. 8 U. S. C. § 1324a(h)(2).[5]

The Chamber and the United States as *amicus* argue that the Arizona law is not a "licensing" law because it operates only to suspend and revoke licenses rather than to grant them. Again, this construction of the term runs contrary to the definition that Congress itself has codified. See 5 U. S. C. § 551(9) ("'licensing' includes agency process re-

[5] JUSTICE BREYER recognizes that Arizona's definition of the word "license" comports with dictionaries' treatment of the term, but argues that "license" must be read in a more restricted way so as not to include things such as "marriage licenses" and "dog licens[es]." *Post*, at 612–613, 622 (dissenting opinion). Luckily, we need not address such fanciful hypotheticals; Arizona limits its definition of "license" to those state permissions issued "for the purposes of operating a business" in the State. Ariz. Rev. Stat. Ann. § 23–211(9)(a) (West Supp. 2010).

JUSTICE BREYER's primary concern appears to be that state permissions such as articles of incorporation and partnership certificates are treated as "licensing and similar laws." Because myriad other licenses are required to operate a business, that concern is largely academic. See § 42–5005(A) (West 2006) (Corporations that receive "gross proceeds of sales or gross income upon which a privilege tax is imposed . . . shall make application to the department for a privilege license." Such a corporation "shall not engage or continue in business until the [corporation] has obtained a privilege license"). Suspending or revoking an employer's articles of incorporation will often be entirely redundant. See §§ 42–5010, 42–5061 to 42–5076 (West 2006 and Supp. 2010) (describing when transaction privilege tax licenses are required).

specting the grant, renewal, denial, *revocation*, *suspension*, *annulment*, *withdrawal*, limitation, amendment, modification, or conditioning of a license" (emphasis added)). It is also contrary to common sense. There is no basis in law, fact, or logic for deeming a law that grants licenses a licensing law, but a law that suspends or revokes those very licenses something else altogether.

The Chamber also submits that the manner in which Congress amended a related statute when enacting IRCA supports a narrow interpretation of the saving clause. The Migrant and Seasonal Agricultural Worker Protection Act (AWPA), 29 U. S. C. § 1801 *et seq.*, requires employers to secure a registration certificate from the Department of Labor before engaging in any "farm labor contracting activity." § 1811(a). Prior to IRCA, AWPA had contained its own prohibition on hiring unauthorized workers, with accompanying adjudication procedures. See § 1813(a); § 1816(a) (1982 ed.) (repealed by IRCA, 100 Stat. 3372); §§ 1851(a)–(b) (1982 ed.) (amended by IRCA, 100 Stat. 3372). When Congress enacted IRCA, it repealed AWPA's separate unauthorized worker prohibition and eliminated the associated adjudication process. Under the current state of the law, an AWPA certification may be denied based on a prior IRCA violation. § 1813(a)(6) (2006 ed.). And once obtained, that certification can be revoked because of the employment of an unauthorized alien only following a finding of an IRCA violation. *Ibid.*

The Chamber asserts that IRCA's amendment of AWPA shows that Congress meant to allow state licensing sanctions only after a federal IRCA adjudication, just as adverse action under AWPA can now be taken only through IRCA's procedures. But the text of IRCA's saving clause says nothing about state licensing sanctions being contingent on prior federal adjudication, or indeed about state licensing processes at all. The simple fact that federal law creates procedures for federal investigations and adjudications culminat-

ing in federal civil or criminal sanctions does not indicate that Congress intended to prevent States from establishing their own procedures for imposing their own sanctions through licensing. Were AWPA not amended to conform with IRCA, two different federal agencies would be responsible for administering two different unauthorized alien employment laws. The conforming amendments eliminated that potential redundancy and centralized federal adjudicatory authority. That hardly supports a conclusion that any state licensing programs must also be contingent on the central federal system.

In much the same vein, the Chamber argues that Congress's repeal of "AWPA's separate prohibition concerning unauthorized workers belies any suggestion that IRCA meant to authorize each of the 50 States . . . to impose its own separate prohibition," and that Congress instead wanted uniformity in immigration law enforcement. Brief for Petitioners 36. JUSTICE BREYER also objects to the departure from "one centralized enforcement scheme" under federal law. *Post,* at 617 (dissenting opinion). But Congress expressly preserved the ability of the States to impose their own sanctions through licensing; that—like our federal system in general—necessarily entails the prospect of some departure from homogeneity. And as for "separate prohibition[s]," it is worth recalling that the Arizona licensing law is based exclusively on the federal prohibition—a court reviewing a complaint under the Arizona law may "consider only the federal government's determination" with respect to "whether an employee is an unauthorized alien." § 23–212(H).

Even more boldly, the Chamber contends that IRCA's saving clause was intended to allow States to impose licensing sanctions solely on AWPA-related farm contracting licensees. AWPA specifically recognized that federal regulation of farm contracting licensing was only "intended to supplement State law," 29 U. S. C. § 1871, and the Chamber ar-

gues that the purpose of IRCA's saving clause was limited to preserving existing state farm contractor licensing programs. But here again no such limit is remotely discernible in the statutory text. Absent any textual basis, we are not inclined to limit so markedly the otherwise broad phrasing of the saving clause. See *United States* v. *Shreveport Grain & Elevator Co.*, 287 U. S. 77, 83 (1932) ("extrinsic aids to construction" may be used "to solve, but not to create an ambiguity" (emphasis and internal quotation marks omitted)).

The Chamber argues that its textual and structural arguments are bolstered by IRCA's legislative history. We have already concluded that Arizona's law falls within the plain text of IRCA's saving clause. And, as we have said before, Congress's "authoritative statement is the statutory text, not the legislative history." *Exxon Mobil Corp.* v. *Allapattah Services, Inc.*, 545 U. S. 546, 568 (2005); see also *Hoffman Plastic Compounds, Inc.* v. *NLRB*, 535 U. S. 137, 149–150, n. 4 (2002). Whatever the usefulness of relying on legislative history materials in general, the arguments against doing so are particularly compelling here. Beyond verbatim recitation of the statutory text, all of the legislative history documents related to IRCA save one fail to discuss the saving clause at all. The Senate Judiciary Committee Report on the Senate version of the law does not comment on it. See S. Rep. No. 99–132 (1985). Only one of the four House Reports on the law touches on the licensing exception, see H. R. Rep. No. 99–682, pt. 1, p. 58 (1986), and we have previously dismissed that very report as "a rather slender reed" from "one House of a politically divided Congress." *Hoffman*, *supra*, at 149–150, n. 4. And the Conference Committee Report does not discuss the scope of IRCA's preemption provision in any way. See H. Conf. Rep. No. 99–1000 (1986).[6]

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[6] JUSTICE BREYER poses several rhetorical questions challenging our reading of IRCA and then goes on to propose two seemingly alternative views of the phrase "licensing and similar laws"—that it was meant to

IRCA expressly preempts some state powers dealing with the employment of unauthorized aliens and it expressly preserves others. We hold that Arizona's licensing law falls well within the confines of the authority Congress chose to leave to the States and therefore is not expressly preempted.

B

As an alternative to its express preemption argument, the Chamber contends that Arizona's law is impliedly preempted because it conflicts with federal law. At its broadest level, the Chamber's argument is that Congress "intended the federal system to be exclusive," and that any state system therefore necessarily conflicts with federal law. Brief for Petitioners 39. But Arizona's procedures simply implement the sanctions that Congress expressly allowed Arizona to pursue through licensing laws. Given that Congress spe-

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refer to "employment-related licensing systems," *post*, at 621 (dissenting opinion) (emphasis deleted), or, even more narrowly, to "the licensing of firms in the business of recruiting or referring workers for employment, such as . . . state agricultural labor contractor licensing schemes," *post*, at 622–623. If we are asking questions, a more telling one may be why, if Congress had intended such limited exceptions to its prohibition on state sanctions, it did not simply say so, instead of excepting "licensing and similar laws" generally?

JUSTICE SOTOMAYOR takes a different tack. Invoking arguments that resemble those found in our implied preemption cases, she concludes that the Arizona law "falls outside" the saving clause and is expressly preempted because it allows "state courts to determine whether a person has employed an unauthorized alien." *Post*, at 631 (dissenting opinion). While JUSTICE BREYER would add language to the statute narrowly limiting the phrase "licensing and similar laws" to specific types of licenses, JUSTICE SOTOMAYOR creates an entirely new statutory requirement: She would allow States to impose sanctions through "licensing and similar laws" only after a federal adjudication. Such a requirement is found nowhere in the text, and JUSTICE SOTOMAYOR does not even attempt to link it to a specific textual provision.

It should not be surprising that the two dissents have sharply different views on how to read the statute. That is the sort of thing that can happen when statutory analysis is so untethered from the text.

cifically preserved such authority for the States, it stands to reason that Congress did not intend to prevent the States from using appropriate tools to exercise that authority.

And here Arizona went the extra mile in ensuring that its law closely tracks IRCA's provisions in all material respects. The Arizona law begins by adopting the federal definition of who qualifies as an "unauthorized alien." Compare 8 U. S. C. § 1324a(h)(3) (an "unauthorized alien" is an alien not "lawfully admitted for permanent residence" or not otherwise authorized by federal law to be employed) with Ariz. Rev. Stat. Ann. § 23–211(11) (adopting the federal definition of "unauthorized alien"); see *De Canas*, 424 U. S., at 363 (finding no preemption of state law that operates "only with respect to individuals whom the Federal Government has already declared cannot work in this country").

Not only that, the Arizona law expressly provides that state investigators must verify the work authorization of an allegedly unauthorized alien with the Federal Government, and "shall not attempt to independently make a final determination on whether an alien is authorized to work in the United States." § 23–212(B). What is more, a state court "shall consider *only* the federal government's determination" when deciding "whether an employee is an unauthorized alien." § 23–212(H) (emphasis added). As a result, there can by definition be no conflict between state and federal law as to worker authorization, either at the investigatory or adjudicatory stage.[7]

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[7] After specifying that a state court may consider "only" the federal determination, the Arizona law goes on to provide that the federal determination is "a rebuttable presumption of the employee's lawful status," Ariz. Rev. Stat. Ann. § 23–212(H) (West Supp. 2010). Arizona explains that this provision does not permit the State to establish unlawful status apart from the federal determination—the provision could hardly do that, given the foregoing. It instead operates to "ensur[e] that the *employer* has an opportunity to rebut the evidence presented to establish a worker's unlawful status." Brief for Respondents 49 (emphasis added). Only in that sense is the federal determination a "rebuttable presumption." See

The federal determination on which the State must rely is provided under 8 U. S. C. § 1373(c). See *supra*, at 591–592. That provision requires the Federal Government to "verify or ascertain" an individual's "citizenship or immigration status" in response to a state request. JUSTICE BREYER is concerned that this information "says nothing about work authorization." *Post*, at 619 (dissenting opinion). JUSTICE SOTOMAYOR shares that concern. *Post*, at 639 (dissenting opinion). But if a § 1373(c) inquiry reveals that someone is a United States citizen, that certainly answers the question whether that individual is authorized to work. The same would be true if the response to a § 1373(c) query disclosed that the individual was a lawful permanent resident alien or, on the other hand, had been ordered removed. In any event, if the information provided under § 1373(c) does not confirm that an employee is an unauthorized alien, then the State cannot prove its case. See Brief for Respondents 50, n. 10 ("if the information from the federal authorities does not establish that a person is an unauthorized alien, it means that the county attorney cannot satisfy his burden of proof in an enforcement action"); Tr. of Oral Arg. 47.

From this basic starting point, the Arizona law continues to trace the federal law. Both the state and federal law prohibit "knowingly" employing an unauthorized alien. Compare 8 U. S. C. § 1324a(a)(1)(A) with Ariz. Rev. Stat. Ann. § 23–212(A).[8] But the state law does not stop there in guarding against any conflict with the federal law. The Arizona law provides that "'[k]nowingly employ an unauthor-

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Tr. of Oral Arg. 46–47. Giving an employer a chance to show that it did not break the state law certainly does not place the Arizona regime in conflict with federal law.

[8] State law also prohibits "intentionally" employing an unauthorized alien, § 23–212.01(A), a more severe violation of the law. The Chamber does not suggest that this prohibition is any more problematic than the prohibition on "knowingly" employing an unauthorized alien.

ized alien' means the actions described in 8 United States Code § 1324a," and that the "term shall be interpreted consistently with 8 United States Code § 1324a and any applicable federal rules and regulations." § 23–211(8).

The Arizona law provides employers with the same affirmative defense for good-faith compliance with the I–9 process as does the federal law. Compare 8 U. S. C. § 1324a(a)(3) ("A person or entity that establishes that it has complied in good faith with the [employment verification] requirements of [§ 1324a(b)] with respect to hiring . . . an alien . . . has established an affirmative defense that the person or entity has not violated" the law) with Ariz. Rev. Stat. Ann. § 23–212(J) ("an employer that establishes that it has complied in good faith with the requirements of 8 United States Code section 1324a(b) establishes an affirmative defense that the employer did not knowingly employ an unauthorized alien").[9] And both the federal and Arizona law accord employers a rebuttable presumption of compliance with the law when they use E-Verify to validate a finding of employment eligibility. Compare IIRIRA § 402(b), 110 Stat. 3009–656 to 3009–657, with Ariz. Rev. Stat. Ann. § 23–212(I).

Apart from the mechanics of the Arizona law, the Chamber argues more generally that the law is preempted because it upsets the balance that Congress sought to strike when enacting IRCA. In the Chamber's view, IRCA reflects Congress's careful balancing of several policy considerations—

[9] The Chamber contends that the Arizona law conflicts with federal law because IRCA prohibits the use of the I–9 form and "any information contained in or appended to [it]" from being "used for purposes other than for enforcement of" IRCA and other specified federal laws. 8 U. S. C. § 1324a(b)(5). That argument mistakenly assumes that an employer would need to use the I–9 form or its supporting documents themselves to receive the benefit of the affirmative defense in Arizona court. In fact, "[a]n employer [could] establish good faith compliance with [the] I–9 process[ ] . . . through testimony of employees and descriptions of office policy." Brief for Respondents 52; see Tr. of Oral Arg. 33.

deterring unauthorized alien employment, avoiding burdens on employers, protecting employee privacy, and guarding against employment discrimination. According to the Chamber, the harshness of Arizona's law "'exert[s] an extraneous pull on the scheme established by Congress'" that impermissibly upsets that balance. Brief for Petitioners 45 (quoting *Buckman Co.* v. *Plaintiffs' Legal Comm.*, 531 U. S. 341, 353 (2001)); see Brief for Petitioners 42–45; Reply Brief for Petitioners 20.

As an initial matter, the cases on which the Chamber relies in advancing this argument all involve uniquely federal areas of regulation. See *American Ins. Assn.* v. *Garamendi*, 539 U. S. 396, 401, 405–406 (2003) (Presidential conduct of foreign policy); *Crosby* v. *National Foreign Trade Council*, 530 U. S. 363, 373–374 (2000) (foreign affairs power); *Buckman*, *supra*, at 352 (fraud on a federal agency); *United States* v. *Locke*, 529 U. S. 89, 97, 99 (2000) (regulation of maritime vessels); *Bonito Boats, Inc.* v. *Thunder Craft Boats, Inc.*, 489 U. S. 141, 143–144 (1989) (patent law). Regulating in-state businesses through licensing laws has never been considered such an area of dominant federal concern.

Furthermore, those cases all concern state actions that directly interfered with the operation of the federal program. In *Buckman*, for example, the Court determined that allowing a state tort action would cause applicants before a federal agency "to submit a deluge of information that the [agency] neither wants nor needs, resulting in additional burdens on the [agency's] evaluation of an application," and harmful delays in the agency process. 531 U. S., at 351. In *Garamendi*, a state law imposing sanctions on insurance companies directly "thwart[ed] the [Federal] Government's policy of repose" for insurance companies that participated in an international program negotiated by the President. 539 U. S., at 425. *Crosby* involved a state law imposing sanctions on any entity doing business with Burma, a law that left the President with "less to offer and less economic and

diplomatic leverage" in exercising his foreign affairs powers. 530 U. S., at 377. The state law in *Bonito Boats* extended patent-like protection "for subject matter for which patent protection has been denied or has expired," "thus eroding the general rule of free competition upon which the attractiveness of the federal patent bargain depends." 489 U. S., at 159, 161. And the portions of *Locke* on which the Chamber relies involved state efforts "to impose additional unique substantive regulation on the at-sea conduct of vessels"—"an area where the federal interest has been manifest since the beginning of our Republic." 529 U. S., at 106, 99. There is no similar interference with the federal program in this case; that program operates unimpeded by the state law.

License suspension and revocation are significant sanctions. But they are typical attributes of a licensing regime. Numerous Arizona laws provide for the suspension or revocation of licenses for failing to comply with specified state laws. See, *e. g.*, Ariz. Rev. Stat. Ann. §§ 5–108.05(D), 32–852.01(L), 32–1154(B), 32–1451(M), 41–2186 (West 2002). Federal law recognizes that the authority to license includes the authority to suspend, revoke, annul, or withdraw a license. See 5 U. S. C. § 551(9). Indeed, AWPA itself—on which the Chamber so heavily relies—provides that AWPA "certificates of registration" can be suspended or revoked for employing an unauthorized alien. 29 U. S. C. § 1813(a)(6). It makes little sense to preserve state authority to impose sanctions through licensing, but not allow States to revoke licenses when appropriate as one of those sanctions.

The Chamber and JUSTICE BREYER assert that employers will err on the side of discrimination rather than risk the "'business death penalty'" by "hiring unauthorized workers." *Post,* at 617 (dissenting opinion); see Brief for Petitioners 3, 35. That is not the choice. License termination is not an available sanction simply for "hiring unauthorized workers." Only far more egregious violations of the law trigger that consequence. The Arizona law covers only

knowing or intentional violations. The law's permanent licensing sanctions do not come into play until a second knowing or intentional violation at the same business location, and only if the second violation occurs while the employer is still on probation for the first. These limits ensure that licensing sanctions are imposed only when an employer's conduct fully justifies them. An employer acting in good faith need have no fear of the sanctions.

As the Chamber points out, IRCA has its own antidiscrimination provisions, see 8 U. S. C. §§ 1324b(a)(1), (g)(1)(B) (imposing sanctions for discrimination "against any individual . . . with respect to the hiring . . . or the discharging of the individual from employment"); Arizona law certainly does nothing to displace those. Other federal laws, and Arizona antidiscrimination laws, provide further protection against employment discrimination—and strong incentive for employers not to discriminate. See, *e. g.*, 42 U. S. C. § 2000e–2(a) (prohibiting discrimination based on "race, color, religion, sex, or national origin"); Ariz. Rev. Stat. Ann. § 41–1463(B)(1) (West Supp. 2010) (prohibiting employment discrimination based on "race, color, religion, sex, age or national origin").

All that is required to avoid sanctions under the Legal Arizona Workers Act is to refrain from knowingly or intentionally violating the employment law. Employers enjoy safe harbors from liability when they use the I–9 system and E-Verify—as Arizona law requires them to do. The most rational path for employers is to obey the law—both the law barring the employment of unauthorized aliens and the law prohibiting discrimination—and there is no reason to suppose that Arizona employers will choose not to do so.

As with any piece of legislation, Congress did indeed seek to strike a balance among a variety of interests when it enacted IRCA. Part of that balance, however, involved allocating authority between the Federal Government and

the States. The principle that Congress adopted in doing so was not that the Federal Government can impose large sanctions, and the States only small ones. IRCA instead preserved state authority over a particular category of sanctions—those imposed "through licensing and similar laws."

Of course Arizona hopes that its law will result in more effective enforcement of the prohibition on employing unauthorized aliens. But in preserving to the States the authority to impose sanctions through licensing laws, Congress did not intend to preserve only those state laws that would have no effect. The balancing process that culminated in IRCA resulted in a ban on hiring unauthorized aliens, and the state law here simply seeks to enforce that ban.

Implied preemption analysis does not justify a "freewheeling judicial inquiry into whether a state statute is in tension with federal objectives"; such an endeavor "would undercut the principle that it is Congress rather than the courts that pre-empts state law." *Gade* v. *National Solid Wastes Management Assn.*, 505 U. S. 88, 111 (1992) (KENNEDY, J., concurring in part and concurring in judgment); see *Silkwood* v. *Kerr-McGee Corp.*, 464 U. S. 238, 256 (1984). Our precedents "establish that a high threshold must be met if a state law is to be pre-empted for conflicting with the purposes of a federal Act." *Gade*, *supra*, at 110. That threshold is not met here.

III

The Chamber also argues that Arizona's requirement that employers use the federal E-Verify system to determine whether an employee is authorized to work is impliedly preempted. In the Chamber's view, "Congress wanted to develop a reliable and non-burdensome system of work-authorization verification" that could serve as an alternative to the I–9 procedures, and the "mandatory use of E-Verify impedes that purpose." 558 F. 3d, at 866.

A

We begin again with the relevant text. The provision of IIRIRA setting up the program that includes E-Verify contains no language circumscribing state action. It does, however, constrain federal action: Absent a prior violation of federal law, "the Secretary of Homeland Security may not require any person or other entity [outside of the Federal Government] to participate in a pilot program" such as E-Verify. IIRIRA § 402(a), 110 Stat. 3009–656. That provision limits what the Secretary of Homeland Security may do—nothing more.

The Federal Government recently argued just that, and approvingly referenced Arizona's E-Verify law when doing so. In 2008, an Executive Order mandated that executive agencies require federal contractors to use E-Verify as a condition of receiving a federal contract. See Exec. Order No. 13465, 73 Fed. Reg. 33286 (2008). When that order and its implementing regulation were challenged, the Government pointed to Arizona's E-Verify mandate as an example of a permissible use of that system: "[T]he State of Arizona has required all public and private employers in that State to use E-Verify . . . . *This is permissible* because the State of Arizona is not the Secretary of Homeland Security." Defendants' Reply Memorandum in Support of Their Motion for Summary Judgment in No. 8:08–cv–03444 (D Md.), p. 7 (emphasis added), appeal dism'd, No. 09–2006 (CA4, Dec. 14, 2009).

Arizona's use of E-Verify does not conflict with the federal scheme. The Arizona law requires that "every employer, after hiring an employee, shall verify the employment eligibility of the employee" through E-Verify. Ariz. Rev. Stat. Ann. § 23–214(A) (West Supp. 2010). That requirement is entirely consistent with the federal law. And the consequences of not using E-Verify under the Arizona law are the same as the consequences of not using the system under federal law. In both instances, the only result is that the em-

ployer forfeits the otherwise available rebuttable presumption that it complied with the law. Compare IIRIRA § 402(b)(1) with Ariz. Rev. Stat. Ann. § 23–212(I).[10]

B

Congress's objective in authorizing the development of E-Verify was to ensure reliability in employment authorization verification, combat counterfeiting of identity documents, and protect employee privacy. 8 U. S. C. § 1324a(d)(2). Arizona's requirement that employers operating within its borders use E-Verify in no way obstructs achieving those aims.

In fact, the Federal Government has consistently expanded and encouraged the use of E-Verify. When E-Verify was created in 1996, it was meant to last just four years and it was made available in only six States. IIRIRA §§ 401(b) and (c)(1), 110 Stat. 3009–655 to 3009–656. Congress since has acted to extend the E-Verify program's existence on four separate occasions, the most recent of which ensures the program's vitality through 2012.[11] And in 2003 Congress directed the Secretary of Homeland Security to make E-Verify available in all 50 States. 117 Stat. 1944; IIRIRA § 401(c)(1), 110 Stat. 3009–656. The Department of Homeland Security has even used "billboard and radio advertisements . . . to encourage greater participation" in the E-Verify program. 534 F. Supp. 2d, at 1056.

The Chamber contends that "if the 49 other States followed Arizona's lead, the state-mandated drain on federal

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[10] Arizona has since amended its statute to include other consequences, such as the loss of state-allocated economic development incentives. See 2008 Ariz. Sess. Laws ch. 152. Because those provisions were not part of the statute when this suit was brought, they are not before us and we do not address their interaction with federal law.

[11] See Basic Pilot Extension Act of 2001, § 2, 115 Stat. 2407; Basic Pilot Program Extension and Expansion Act of 2003, § 2, 117 Stat. 1944; Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009, Div. A, § 143, 122 Stat. 3580; Department of Homeland Security Appropriations Act, 2010, § 547, 123 Stat. 2177.

resources would overwhelm the federal system and render it completely ineffective, thereby defeating Congress's primary objective in establishing E-Verify." Brief for Petitioners 50–51. Whatever the legal significance of that argument, the United States does not agree with the factual premise. According to the Department of Homeland Security, "the E-Verify system can accommodate the increased use that the Arizona statute and existing similar laws would create." Brief for United States as *Amicus Curiae* 34. And the United States notes that "[t]he government continues to encourage more employers to participate" in E-Verify. *Id.*, at 31.

The Chamber has reservations about E-Verify's reliability, see Brief for Petitioners 49, n. 27, but again the United States disagrees. The Federal Government reports that "E-Verify's successful track record . . . is borne out by findings documenting the system's accuracy and participants' satisfaction." Brief for United States as *Amicus Curiae* 31. Indeed, according to the Government, the program is "the best means available to determine the employment eligibility of new hires." U. S. Dept. of Homeland Security, U. S. Citizenship and Immigration Services, E-Verify User Manual for Employers 4 (Sept. 2010).[12]

[12] JUSTICE BREYER shares the Chamber's concern about E-Verify's accuracy. See *post*, at 618–619, 629. Statistics from Fiscal Year 2010, however, indicate that of the 15,640,167 E-Verify cases submitted, 98.3% were automatically confirmed as work authorized, 0.3% were confirmed as work authorized after contesting and resolving an initial nonconfirmation—an avenue available to all workers—and 1.43% were not found work authorized. E-Verify Statistics and Reports, available at http://www.uscis.gov/portal/site/uscis/menuitem/statistics (as visited May 23, 2011, and available in Clerk of Court's case file). As JUSTICE BREYER notes, the initial mismatches (the 0.3%) are frequently due to "'incorrectly spelled [names] in government databases or on identification documents.'" *Post*, at 629. Such a hazard is of course not unique to E-Verify. Moreover, JUSTICE BREYER's statistical analysis underlying his conclusion that E-Verify queries, at least initially, wrongly "suggest[ ] that an individual [i]s not lawfully employable" "*18 percent of the time*" needs to be understood for what

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IRCA expressly reserves to the States the authority to impose sanctions on employers hiring unauthorized workers, through licensing and similar laws. In exercising that authority, Arizona has taken the route least likely to cause tension with federal law. It uses the Federal Government's own definition of "unauthorized alien," it relies solely on the Federal Government's own determination of who is an unauthorized alien, and it requires Arizona employers to use the Federal Government's own system for checking employee status. If even this gives rise to impermissible conflicts with federal law, then there really is no way for the State to implement licensing sanctions, contrary to the express terms of the saving clause.

Because Arizona's unauthorized alien employment law fits within the confines of IRCA's saving clause and does not conflict with federal immigration law, the judgment of the United States Court of Appeals for the Ninth Circuit is affirmed.

It is so ordered.

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

JUSTICE BREYER, with whom JUSTICE GINSBURG joins, dissenting.

The federal Immigration Reform and Control Act of 1986 (Act or IRCA) pre-empts "any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." 8 U. S. C. § 1324a(h)(2). The state law before us, the Legal Arizona

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it is. *Post*, at 618–619. If E-Verify initially indicated that two individuals were not found work authorized, and later revealed that one of those determinations was incorrect, JUSTICE BREYER would be able to exclaim that the error rate was *50%*.

Workers Act, imposes civil sanctions upon those who employ unauthorized aliens. See Ariz. Rev. Stat. Ann. § 23–211 *et seq.* (West Supp. 2010). Thus the state law falls within the federal Act's general pre-emption rule and is pre-empted—unless it also falls within that rule's exception for "licensing and similar laws." Unlike the Court, I do not believe the state law falls within this exception, and I consequently would hold it pre-empted.

Arizona calls its state statute a "licensing law," and the statute uses the word "licensing." But the statute strays beyond the bounds of the federal licensing exception, for it defines "license" to include articles of incorporation and partnership certificates, indeed *virtually every* state-law authorization for *any* firm, corporation, or partnership to do business in the State. § 23–211(9)(a); cf. § 23–211(9)(c) (excepting professional licenses, and water and environmental permits). Congress did not intend its "licensing" language to create so broad an exemption, for doing so would permit States to eviscerate the federal Act's pre-emption provision, indeed to subvert the Act itself, by undermining Congress' efforts (1) to protect lawful workers from national-origin-based discrimination and (2) to protect lawful employers against erroneous prosecution or punishment.

Dictionary definitions of the word "licensing" are, as the majority points out, broad enough to include virtually any permission that the State chooses to call a "license." See *ante*, at 595 (relying on a dictionary and the federal Administrative Procedure Act). But neither dictionary definitions nor the use of the word "license" in an unrelated statute can demonstrate what scope Congress intended the word "licensing" to have *as it used that word in this federal statute.* Instead, statutory context must ultimately determine the word's coverage. Context tells a driver that he cannot produce a partnership certificate when a policeman stops the car and asks for a license. Context tells all of us that "licensing" as used in the Act does not include marriage li-

censes or the licensing of domestic animals. And context, which includes statutory purposes, language, and history, tells us that the federal statute's "licensing" language does not embrace Arizona's overly broad definition of that term. That is to say, ordinary corporate charters, certificates of partnership, and the like do not fall within the scope of the word "licensing" as used in this federal exception. See *Dolan* v. *Postal Service*, 546 U. S. 481, 486 (2006) (statutory interpretation requires courts to "rea[d] the whole statutory text, conside[r] the purpose and context of the statute, and consul[t] any precedents or authorities that inform the analysis"); *United States* v. *Heirs of Boisdoré*, 8 How. 113, 122 (1849) (similar).

I

To understand how the majority's interpretation of the word "licensing" subverts the Act, one must understand the basic purposes of the pre-emption provision and of the Act itself. Ordinarily, an express pre-emption provision in a federal statute indicates a particular congressional interest in *preventing* States from enacting laws that might interfere with Congress' statutory objectives. See *International Paper Co.* v. *Ouellette*, 479 U. S. 481, 494 (1987). The majority's reading of the provision's "licensing" exception, however, does the opposite. It *facilitates* the creation of "'obstacle[s] to the accomplishment and execution of the full purposes and objectives of Congress.'" *Crosby* v. *National Foreign Trade Council*, 530 U. S. 363, 373 (2000) (quoting *Hines* v. *Davidowitz*, 312 U. S. 52, 67 (1941)).

A

Essentially, the federal Act requires employers to verify the work eligibility of their employees. And in doing so, the Act balances three competing goals. First, it seeks to discourage American employers from hiring aliens not authorized to work in the United States. H. R. Rep. No. 99–682, pt. 1, p. 56 (1986).

Second, Congress wished to avoid "placing an undue burden on employers," *id.*, at 90, and the Act seeks to prevent the "harassment" of "innocent employers," S. Rep. No. 99–132, p. 35 (1985).

Third, the Act seeks to prevent employers from disfavoring job applicants who appear foreign. Reiterating longstanding antidiscrimination concerns, the House Committee Report explained:

> "Numerous witnesses . . . have expressed their deep concern that the imposition of employer sanctions will cause extensive employment discrimination against Hispanic-Americans and other minority group members. These witnesses are genuinely concerned that employers, faced with the possibility of civil and criminal penalties, will be extremely reluctant to hire persons because of their linguistic or physical characteristics." H. R. Rep. No. 99–682, at 68.

See also 42 U. S. C. § 2000e–2(a)(1) (making it an "unlawful employment practice" for an employer to discriminate against an individual "because of such individual's race, color, religion, sex, or national origin"); U. S. Commission on Civil Rights, The Tarnished Golden Door: Civil Rights Issues in Immigration 74 (1980) (finding that "increased employment discrimination against United States citizens and legal residents who are racially and culturally identifiable with major immigrant groups could be the unintended result of an employer sanctions law"). The Committee concluded that "every effort must be taken to minimize the potentiality of discrimination." H. R. Rep. No. 99–682, at 68.

B

The Act reconciles these competing objectives in several ways:

First, the Act prohibits employers from hiring an alien knowing that the alien is unauthorized to work in the United States. 8 U. S. C. § 1324a(a)(1)(A).

Second, the Act provides an easy-to-use mechanism that will allow employers to determine legality: the I–9 form. In completing an I–9 form, the employer certifies that he or she has examined one or two documents (*e. g.*, a passport, or a driver's license along with a Social Security card) that tend to confirm the worker's identity and employability. § 1324a(b)(1). Completion of the form in good faith immunizes the employer from liability, even if the worker turns out to be unauthorized. §§ 1324a(a)(3), 1324a(b)(6).

A later amendment to the law also allows an employer to verify an employee's work eligibility through an Internet-based federal system called E-Verify. If the employer does so, he or she will receive the benefit of a rebuttable presumption of compliance. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), § 402(b), 110 Stat. 3009–656 to 3009–657, note following 8 U. S. C. § 1324a, p. 331 (Pilot Programs for Employment Eligibility Confirmation).

Third, the Act creates a central enforcement mechanism. The Act directs the Attorney General to establish a single set of procedures for receiving complaints, investigating those complaints that "have a substantial probability of validity," and prosecuting violations. 8 U. S. C. § 1324a(e)(1). The relevant immigration officials and administrative law judges have the power to access necessary evidence and witnesses, § 1324a(e)(2), and the employer has the right to seek discovery from the Federal Government, 28 CFR § 68.18 (2010). The employer also has the right to administrative and judicial review of the administrative law judge's decision. §§ 68.54, 68.56.

Fourth, the Act makes it "an unfair immigration-related employment practice . . . to discriminate against any individual" in respect to employment "because of such individual's national origin." 8 U. S. C. § 1324b(a).

Fifth, the Act sets forth a carefully calibrated sanction system. The penalties for hiring unauthorized aliens are graduated to prevent the Act from unduly burdening em-

ployers who are not serious offenders. As adjusted for inflation, civil penalties for a first violation of the employment restrictions range from $375–$3,200 per worker, and rise to $3,200–$16,000 per worker for repeat offenders. § 1324a(e)(4)(A); 73 Fed. Reg. 10133 (2008); see also § 1324a(f) (imposing criminal fines of not more than $3,000 per worker and imprisonment for up to six months for "pattern or practice" violators of employment restrictions).

As importantly, the Act limits or removes any incentive to discriminate on the basis of national origin by setting antidiscrimination fines at equivalent levels: $375–$3,200 per worker for first-time offenders, and $3,200–$16,000 per worker for repeat offenders. § 1324b(g)(2)(B)(iv); 73 Fed. Reg. 10134. The Act then ties its unlawful employment and antidiscrimination provisions together by providing that, should the antihiring provisions terminate, the antidiscrimination provisions will also terminate, § 1324b(k), "the justification for them having been removed," H. R. Conf. Rep. No. 99–1000, p. 87 (1986).

C

Now, compare and contrast Arizona's statute. As I have said, that statute applies to virtually all business-related licenses, other than professional licenses. Ariz. Rev. Stat. Ann. § 23–211(9). Like the federal Act, the state law forbids the employment of unauthorized aliens. §§ 23–212(A), 23–212.01(A). It also provides employers with somewhat similar defenses. §§ 23–212(I)–(J), 23–212.01(I)–(J). But thereafter the state and federal laws part company.

First, the state statute seriously threatens the federal Act's antidiscriminatory objectives by radically skewing the relevant penalties. For example, in the absence of the Arizona statute, an Arizona employer who intentionally hires an unauthorized alien for the second time would risk a maximum penalty of $6,500. 8 U. S. C. § 1324a(e)(4)(A)(ii); 73 Fed. Reg. 10133. But the Arizona statute subjects that same employer (in respect to the same two incidents) to

mandatory, permanent loss of the right to do business in Arizona—a penalty that Arizona's Governor has called the "business death penalty." Ariz. Rev. Stat. Ann. §23–212.01(F)(2); News Release, Governor Signs Employer Sanctions Bill (2007), App. 399. At the same time, the state law leaves the other side of the punishment balance—the antidiscrimination side—unchanged.

This is no idle concern. Despite the federal Act's efforts to prevent discriminatory practices, there is evidence that four years after it had become law, discrimination was a serious problem. In 1990, the General Accounting Office identified "widespread discrimination . . . as a result of" the Act. Report to the Congress, Immigration Reform: Employer Sanctions and the Question of Discrimination 3, 37, 80. Sixteen percent of employers in Los Angeles admitted that they applied the I–9 requirement "only to foreign-looking or foreign-sounding persons," and 22 percent of Texas employers reported that they "began a practice to (1) hire only persons born in the United States or (2) not hire persons with temporary work eligibility documents" because of the Act. *Id.*, at 41–43. If even the federal Act (with its carefully balanced penalties) can result in some employers discriminating, how will employers behave when erring on the side of discrimination leads only to relatively small fines, while erring on the side of hiring unauthorized workers leads to the "business death penalty"?

Second, Arizona's law subjects lawful employers to increased burdens and risks of erroneous prosecution. In addition to the Arizona law's severely burdensome sanctions, the law's procedures create enforcement risks not present in the federal system. The federal Act creates one centralized enforcement scheme, run by officials versed in immigration law and with access to the relevant federal documents. The upshot is an increased likelihood that federal officials (or the employer) will discover whether adverse information flows from an error-prone source and that they will proceed ac-

cordingly, thereby diminishing the likelihood that burdensome proceedings and liability reflect documentary mistakes.

Contrast the enforcement system that Arizona's statute creates. Any citizen of the State can complain (anonymously or otherwise) to the state attorney general (or any county attorney), who then "*shall* investigate," Ariz. Rev. Stat. Ann. §23–212(B) (emphasis added), and upon a determination that the "complaint is not false and frivolous . . . shall notify the appropriate county attorney to bring an action," §23–212(C)(3). This mandatory language, the lower standard ("not frivolous" instead of "substantial"), and the removal of immigration officials from the state screening process (substituting numerous, elected county attorneys) increase the likelihood that suspicious circumstances will lead to prosecutions and liability of employers—even where more careful investigation would have revealed that there was no violation.

Again, this matter is far from trivial. Studies of one important source of Government information—the E-Verify system—describe how the federal administrative process *corrected* that system's tentative "unemployable" indications *18 percent of the time.* This substantial error rate is not a function of a small sample size. See *ante*, at 610, n. 12. Rather, data from one fiscal year showed 46,921 workers initially rejected but later "confirmed as work authorized"—all while E-Verify was used by only a fraction of the Nation's employers. U. S. Citizenship and Immigration Services, Statistics and Reports, http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextchannel=7c579589cdb76210VgnVCM100000b92ca60aRCRD (Feb. 4, 2011) (as visited May 18, 2011, and available in Clerk of Court's case file). That is to say nearly one in five times that the E-Verify system suggested that an individual was not lawfully employable (*i. e.*, returned a tentative nonconfirmation of work authorization), the system was wrong; and subsequent review in the federal administrative process de-

termined as much. (And those wrongly identified were likely to be persons of foreign, rather than domestic, origin, by a ratio of approximately 20 to 1.) See Westat, Findings of the E-Verify® Program Evaluation xxxi, 210, 246 (Dec. 2009) (assessing data from April to June 2008). E-Verify's accuracy rate is even worse "in states that require the use of E-Verify for all or some of their employees." *Id.*, at 122.

A related provision of the state law aggravates the risk of erroneous prosecutions. The state statute says that in "determining whether an employee is an unauthorized alien, the court shall consider only the federal government's determination pursuant to 8 [U. S. C.] § 1373(c)." Ariz. Rev. Stat. Ann. § 23–212(H). But the federal provision to which the state law refers, 8 U. S. C. § 1373(c), says only that the Federal Government, upon a State's request, shall verify a person's "citizenship or immigration status." It says nothing about work authorization. See *post*, at 637–639 (SOTOMAYOR, J., dissenting). It says nothing about the source of the Federal Government's information. It imposes no duty upon the Federal Government or anyone else to investigate the validity of that information, which may falsely implicate an employer 18 percent of the time.

So what is the employer to do? What statute gives an employer whom the State proceeds against in state court the right to conduct discovery against the Federal Government? The Arizona statute, like the federal statute, says that the employer's use of an I–9 form provides a defense. But there is a hitch. The federal Act says that neither the I–9 form, nor "any information contained in or appended to" the form, "may . . . be used for purposes other than for enforcement of this" federal Act. § 1324a(b)(5). So how can the employer present a defense, say, that the Government's information base is flawed? The plurality takes the view that the forms are not *necessary* to receive the benefit of the affirmative defense. *Ante,* at 603, n. 9. But the I–9 form would surely be the employer's most effective evidence. See also *post*, at

640 (SOTOMAYOR, J., dissenting) (suggesting that the unavailability of I–9 forms to defend against state-court charges means that Congress "intended no such" proceedings).

Nor does the Arizona statute facilitate the presentation of a defense when it immediately follows (1) its statement that "the court shall consider *only* the federal government's determination" when it considers "whether an employee is an *unauthorized alien*" with (2) its statement that "[t]he federal government's determination creates a rebuttable presumption of the employee's *lawful* status." Ariz. Rev. Stat. Ann. §23–212(H) (emphasis added). The two statements sound as if they mean that a Federal Government determination that the worker is *unlawful* is conclusive against the employer, but its determination that the worker's employment is *lawful* is subject to rebuttal by the State. Arizona tells us that the statute means the opposite. See *ante,* at 601, n. 7. But the legal briefs of Arizona's attorney general do not bind the state courts. And until the matter is cleared up, employers, despite I–9 checks, despite efforts to use E-Verify, will hesitate to hire those they fear will turn out to lack the right to work in the United States.

And that is my basic point. Either directly or through the uncertainty that it creates, the Arizona statute will impose additional burdens upon lawful employers and consequently lead those employers to erect ever stronger safeguards against the hiring of unauthorized aliens—without counterbalancing protection against unlawful discrimination. And by defining "licensing" so broadly, by bringing nearly all businesses within its scope, Arizona's statute creates these effects statewide.

Why would Congress, after deliberately limiting ordinary penalties to the range of a few thousand dollars per illegal worker, want to permit far more drastic state penalties that would directly and mandatorily destroy entire businesses? Why would Congress, after carefully balancing sanctions to avoid encouraging discrimination, want to allow States to

destroy that balance? Why would Congress, after creating detailed procedural protections for employers, want to allow States to undermine them? Why would Congress want to write into an express pre-emption provision—a provision designed to prevent States from undercutting federal statutory objectives—an exception that could so easily destabilize its efforts? The answer to these questions is that Congress would not have wanted to do any of these things. And that fact indicates that the majority's reading of the licensing exception—a reading that would allow what Congress sought to forbid—is wrong.

II

The federal licensing exception cannot apply to a state statute that, like Arizona's statute, seeks to bring virtually all articles of incorporation and partnership certificates within its scope. I would find the scope of the exception to federal pre-emption to be far more limited. Context, purpose, and history make clear that the "licensing and similar laws" at issue involve *employment-related* licensing systems.

The issuance of articles of incorporation and partnership certificates and the like have long had little or nothing to do with hiring or "employment." Indeed, Arizona provides no evidence that any State, at the time the federal Act was enacted, had refused to grant or had revoked, say, partnership certificates, in light of the partners' hiring practices of any kind, much less the hiring of unauthorized aliens. See Ariz. Rev. Stat. Ann. §29–308 (limited partnership formed upon the filing of a certificate of partnership providing names and addresses); §29–345 (providing for dissolution of a limited partnership "[o]n application by or for a partner or assignee . . . whenever it is not reasonably practicable to carry on the business in conformity with the partnership agreement").

To read the exception as covering laws governing corporate charters and partnership certificates (which are not

usually called "licensing" laws) is to permit States to turn virtually every permission-related state law into an employment-related "licensing" law. The State need only call the permission a "license" and revoke the license should its holder hire an unauthorized alien. If what was not previously an employment-related licensing law can become one simply by using it as a sanction for hiring unauthorized aliens or simply by state definition, indeed, if the State can call a corporate charter an employment-related licensing law, then why not an auto licensing law (amended to revoke the driver's licenses of those who hire unauthorized aliens)? Why not a dog licensing law? Or why not "impute" a newly required license to conduct any business to every human being in the State, withdrawing that license should that individual hire an unauthorized alien? See S. C. Code Ann. § 41–8–20 (Supp. 2010) (providing that "[a]ll private employers in South Carolina . . . shall be imputed a South Carolina employment license, which permits a private employer to employ a person in this State," but conditioning the license on the company's not hiring unauthorized aliens).

Such laws might prove more effective in stopping the hiring of unauthorized aliens. But they are unlikely to do so consistent with Congress' other critically important goals, in particular, Congress' efforts to protect from discrimination legal workers who look or sound foreign. That is why we should read the federal exemption's "licensing" laws as limited to those that involve the kind of licensing that, in the absence of this general state statute, would nonetheless have some significant relation to employment or hiring practices. Otherwise we read the federal "licensing" exception as authorizing a State to undermine, if not to swallow up, the federal pre-emption rule.

III

I would therefore read the words "licensing and similar laws" as covering state licensing systems applicable primarily to the licensing of firms in the business of recruiting or

referring workers for employment, such as the state agricultural labor contractor licensing schemes in existence when the federal Act was created. This reading is consistent with the provision's history and language, and it minimizes the risk of harm of the kind just described.

The Act's history supports this interpretation. Ever since 1964, the Federal Government has administered statutes that create a federal licensing scheme for agricultural labor contractors, firms that specialize in recruiting agricultural workers and referring them to farmers for a fee. Farm Labor Contractor Registration Act of 1963 (FLCRA), 78 Stat. 920; Migrant and Seasonal Agricultural Worker Protection Act (AWPA), 96 Stat. 2583. The statutes require agricultural labor contractors to register with the federal Secretary of Labor, to obtain a registration certificate (in effect a license), and to require the contractor's employees to carry that certificate with them when engaging in agricultural labor contracting activities. AWPA § 101; FLCRA § 4. The statutes list a host of forbidden activities, one of which (prior to 1986) was hiring unauthorized aliens. See AWPA §§ 103, 106; FLCRA § 5(b). Prior to 1986, if the federal Labor Department believed a firm had violated these substantive provisions, it could institute administrative proceedings within the Labor Department. And if the Secretary found the labor contracting firm had violated the provisions, the Secretary could impose monetary penalties or withdraw the firm's registration. AWPA §§ 103, 503; FLCRA §§ 5(b), 9.

Most important, and unlike the 1986 Act before us, the earlier agricultural labor contracting statutes *did not preempt similar state laws.* To the contrary, the earlier Acts were "intended to supplement State law" and did not "excuse any person from compliance with appropriate State law and regulation." AWPA § 521; see FLCRA § 12. By 1986, nearly a dozen States had developed state licensing systems for agricultural labor contractors, *i. e.*, firms that recruited

and referred farm (and sometimes forestry) workers for a fee; some of these laws provided that state licenses could be revoked if the contractors hired unauthorized aliens. See, *e. g.*, Cal. Lab. Code § 1690(f) (Deering Supp. 1991); 43 Pa. Cons. Stat. §§ 1301.503(4), 1301.505(3) (1965–1983 Supp. Pamphlet); Ore. Rev. Stat. §§ 658.405(1), 658.440(1)(d) (1987) (covering forestry workers).

In 1986, Congress (when enacting the Act now before us) focused directly upon the earlier federal agricultural labor contractor licensing system. And it changed that earlier system by including a series of conforming amendments in the Act. One amendment removes from the earlier statutes the specific prohibition against hiring unauthorized aliens. It thereby makes agricultural labor contractors subject to the Act's similar general prohibition against such hiring. IRCA § 101(b)(1)(C) (repealing AWPA § 106). Another amendment takes from the Secretary of Labor most of the Secretary's enforcement powers in respect to the hiring of unauthorized aliens. It thereby leaves agricultural labor contractors subject to the same single unified enforcement system that the immigration Act applies to all employers. See 29 U. S. C. § 1853. A third amendment, however, leaves with the Secretary of Labor the power to withdraw the federal registration certificate from an agricultural labor contractor that hired unauthorized aliens. IRCA § 101(b)(1)(B)(iii), 29 U. S. C. § 1813(a)(6). Thus, the Act leaves this subset of employers (*i. e.*, agricultural labor contractors but not other employers) subject to a federal licensing scheme.

So far, the conforming amendments make sense. But have they not omitted an important matter? Prior to 1986, States as well as the Federal Government could license agricultural labor contractors. Should the 1986 statute not say whether Congress intended that dual system to continue? The answer is that the 1986 Act does not omit this matter. It answers the coexistence question directly with the parenthetical phrase we are now considering, namely, the

phrase, "other than through licensing and similar laws," placed in the middle of the Act's pre-emption provision. 8 U. S. C. § 1324a(h)(2). That phrase refers to agricultural labor contractors, and it says that, in respect to those licensing schemes, dual state/federal licensing can continue.

As of 1986, there were strong reasons for permitting that dual system to continue *in this specialized area.* Dual enforcement had proved helpful in preventing particularly serious employment abuses. See, *e. g.,* 128 Cong. Rec. 24090 (1982) (reflecting concerns that agricultural workers were "housed in hovels; . . . subjected to physical abuse and kept in virtual slavery"). And because the contractors' business consists of providing labor forces, their hiring of authorized workers is closely related to their general fitness to do business. See S. Rep. No. 202, 88th Cong., 1st Sess., 1 (1963) (explaining that farm labor contractor registration laws are needed to prevent "irresponsible crew leaders" from "exploit[ing] . . . farmers"); Martin, Good Intentions Gone Awry: IRCA and U. S. Agriculture, 534 Annals Am. Acad. Pol. & Soc. Sci. 44, 49 (1994) (describing how farmers who relied on contractors risked losing their labor forces to immigration raids). Dual enforcement would not create a federal/state penalty disparity, for federal systems as well as state systems provide for license revocation. Experience had shown that dual enforcement had not created any serious conflict or other difficulty. And in light of the specialized nature and comparatively small set of businesses subject to dual enforcement, to permit licensing of that set of businesses would not seriously undermine the objectives of the Act or its pre-emption provision.

Thus, it is not surprising that the legislative history of the 1986 Act's pre-emption provision says that the licensing exception is about the licensing of agricultural labor contractors. The House Report on the Act, referring to the licensing exception, states that the Committee did "not intend to preempt licensing or 'fitness to do business laws,' *such as*

state farm labor contractor laws or forestry laws, which specifically require such licensee or contractor to refrain from hiring, recruiting or referring undocumented aliens." H. R. Rep. No. 99–682, at 58 (emphasis added).

The Act's language, while not requiring this interpretation, is nonetheless consistent with limiting the scope of the phrase in this way. Context can limit the application of the term "licensing" to particular *types* of licensing. The Act's subject matter itself limits the term to employment-related licensing. And the Act's specific reference to those who "recruit or refer for a fee for employment, unauthorized aliens," is consistent with employment-related licensing that focuses primarily upon labor contracting businesses.

Thus, reading the phrase as limited in scope to laws licensing businesses that recruit or refer workers for employment is consistent with the statute's language, with the relevant history, and with other statutory provisions in the Act. That reading prevents state law from undermining the Act and from turning the pre-emption clause on its head. That is why I consider it the better reading of the statute.

IV

Another section of the Arizona statute requires "every employer, after hiring an employee," to "verify the employment eligibility of the employee" through the Federal Government's E-Verify program. Ariz. Rev. Stat. Ann. §23–214. This state provision makes participation in the federal E-Verify system *mandatory* for virtually all Arizona employers. The federal law governing the E-Verify program, however, creates a program that is *voluntary.* By making mandatory that which federal law seeks to make voluntary, the state provision stands as a significant "'obstacle to the accomplishment and execution of the full purposes and objectives of Congress,'" *Crosby,* 530 U. S., at 373 (quoting *Hines,* 312 U. S., at 67). And it is consequently pre-empted.

The federal statute itself makes clear that participation in the E-Verify program is voluntary. The statute's relevant section bears the title "Voluntary Election to Participate in a Pilot Program." IIRIRA § 402, note following 8 U. S. C. § 1324a, p. 331. A subsection bears the further title, "Voluntary Election." § 402(a). And within that subsection, the statute says that employers "*may* elect to participate." (Emphasis added.) The statute elsewhere requires the Secretary of Homeland Security to "widely publicize . . . the voluntary nature" of the program. § 402(d)(2); see also § 402(d)(3)(A) (requiring the designation of local officials to advertise the "voluntary nature" of the program). It adds that employers may "terminate" their "election" to participate by following certain procedures. § 402(c)(3). And it tells the Secretary of Homeland Security (as an earlier version told the Attorney General) that she "may not require any person or other entity to participate." § 402(a); see also § 402(e) (creating exceptions, none of which is applicable here, that require federal employers and certain others to participate in E-Verify or another pilot program).

Congress had strong reasons for insisting on the voluntary nature of the program. E-Verify was conceived as, and remains, a pilot program. Its database consists of tens of millions of Social Security and immigration records kept by the Federal Government. These records are prone to error. See, *e. g.*, Office of the Inspector General, Social Security Administration, Congressional Response Report: Accuracy of the Social Security Administration's Numident File 12 (2006) (hereinafter Social Security Report) (estimating that 3.3 million naturalized citizens are misclassified in a Social Security database used by E-Verify); GAO, Employment Verification: Federal Agencies Have Taken Steps To Improve E-Verify, but Significant Challenges Remain 16 (GAO–11–146, 2010) (hereinafter GAO Report) (noting that "erroneous [nonconfirmations] related to name inconsistencies . . . remain an issue" that "can create the appearance of discrimination

because of their disparate impact on certain cultural groups"). And making the program mandatory would have been hugely expensive. See *post*, at 644–645 (SOTOMAYOR, J., dissenting).

The E-Verify program is still a pilot program, as a matter of statute and practice. See IIRIRA § 401; Letter from H. Couch to R. Stana (Dec. 8, 2010) (discussing aspects of E-Verify that have yet to be implemented). The effects of the program's efforts to take account of, and correct for, potential errors remain uncertain. Congress could decide that, based on the results of the pilot, E-Verify should become a mandatory program. But it has not yet made that determination. And in making that decision, it will have to face a number of questions: Will workers receiving tentative negative verdicts understand the possibility of administrative challenge? Will they make the effort to invoke that process, say, traveling from a farm to an urban Social Security office? Will employers prove willing to undergo the financial burden of supporting a worker who might lose the challenge? Will employers hesitate to train those workers during the time they bring their challenges? Will employers simply hesitate to hire workers who might receive an initial negative verdict—more likely those who look or sound foreign? Or will they find ways to dismiss those workers? These and other unanswered questions convinced Congress to make E-Verify a pilot program, to commission continuous study and evaluation, and to insist that participation be voluntary.

In co-opting a federal program and changing the key terms under which Congress created that program, Arizona's mandatory state law simply ignores both the federal language and the reasoning it reflects, thereby posing an "'obstacle to the accomplishment'" of the objectives Congress' statute evinces. *Crosby*, *supra*, at 373 (quoting *Hines*, *supra*, at 67).

The majority reaches a contrary conclusion by pointing out (1) that Congress has renewed the E-Verify program several

times, each time expanding its coverage, to the point where it now encompasses all 50 States; (2) that the E-Verify database has become more accurate; (3) that the Executive Branch has itself mandated participation for federal contractors; and (4) that the statute's language tells the Secretary of Homeland Security, *not the States*, to maintain the program as voluntary.

The short, and, I believe, conclusive answers to these objections are: (1) Congress has kept the language of the statute—and the voluntary nature of the program—the same throughout its program renewals. See § 2, 115 Stat. 2407; 117 Stat. 1944; § 547, 123 Stat. 2177. And it is up to Congress, not to Arizona or this Court, to decide when participation in the program should cease to be voluntary.

(2) The studies and reports have repeatedly found both (a) that the E-Verify program had achieved greater accuracy, but (b) that problems remain. See, *e. g.*, Social Security Report 11 (estimating that Social Security records contain 4.8 million "discrepancies that could require the numberholder to visit [the Social Security Administration] . . . before employment eligibility would be confirmed"); GAO Report 19 (estimating that, if E-Verify were made mandatory nationwide, 164,000 newly hired workers each year would erroneously be adjudged ineligible to work because of name mismatches, as when the worker's "first or last name is incorrectly spelled in government databases or on identification documents"). And it is up to Congress, not to Arizona or this Court, to determine when the federally designed and federally run E-Verify program is ready for expansion.

(3) Federal contractors are a special group of employers, subject to many special requirements, who enter voluntarily into a special relation with the Government. For the Federal Government to mandate that a special group participate in the E-Verify program tells us little or nothing about the effects of a State's mandating that nearly every employer within the State participate—as Arizona has done. And insofar as we have not determined whether the Executive was

authorized by Congress to mandate E-Verify for federal contractors, it says nothing about Congress' intent.

(4) There is no reason to imply negatively from language telling the Secretary *not* to make the program mandatory, permission for the States to do so. There is no presumption that a State may modify the operation of a uniquely federal program like E-Verify. Cf. *Buckman Co.* v. *Plaintiffs' Legal Comm.*, 531 U. S. 341, 347–348 (2001); *Boyle* v. *United Technologies Corp.*, 487 U. S. 500, 504–505 (1988); see also *post*, at 643–644 (SOTOMAYOR, J., dissenting). The remaining federal statutory language makes clear the voluntary nature of the E-Verify program. Arizona's plan would undermine that federal objective.

For these reasons I would hold that the federal Act, including its E-Verify provisions, pre-empts Arizona's state law. With respect, I dissent from the majority's contrary holdings.

JUSTICE SOTOMAYOR, dissenting.

In enacting the Immigration Reform and Control Act of 1986 (IRCA), 100 Stat. 3359, Congress created a "comprehensive scheme prohibiting the employment of illegal aliens in the United States." *Hoffman Plastic Compounds, Inc.* v. *NLRB*, 535 U. S. 137, 147 (2002). The Court reads IRCA's saving clause—which preserves from pre-emption state "licensing and similar laws," 8 U. S. C. § 1324a(h)(2)—to permit States to determine for themselves whether someone has employed an unauthorized alien so long as they do so in conjunction with licensing sanctions. This reading of the saving clause cannot be reconciled with the rest of IRCA's comprehensive scheme. Having constructed a federal mechanism for determining whether someone has knowingly employed an unauthorized alien, and having withheld from the States the information necessary to make that determination, Congress could not plausibly have intended for the saving clause to operate in the way the majority reads it to do. When viewed in context, the saving clause can only be

understood to preserve States' authority to impose licensing sanctions after a final federal determination that a person has violated IRCA by knowingly employing an unauthorized alien. Because the Legal Arizona Workers Act instead creates a separate state mechanism for Arizona state courts to determine whether a person has employed an unauthorized alien, I would hold that it falls outside the saving clause and is pre-empted.

I would also hold that federal law pre-empts the provision of the Arizona Act making mandatory the use of E-Verify, the federal electronic verification system. By requiring Arizona employers to use E-Verify, Arizona has effectively made a decision for Congress regarding use of a federal resource, in contravention of the significant policy objectives motivating Congress' decision to make participation in the E-Verify program voluntary.

I

A

I begin with the plain text of IRCA's pre-emption clause. IRCA expressly pre-empts States from "imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens."[1] *Ibid.* The Arizona Act, all agree, imposes civil sanctions upon those who employ unauthorized aliens. The Act thus escapes express pre-emption only if it falls within IRCA's parenthetical saving clause for "licensing and similar laws." *Ibid.*

The saving clause is hardly a paragon of textual clarity. IRCA does not define "licensing," nor does it use the word "licensing" in any other provision. Laws that impose sanc-

[1] IRCA defines the term "unauthorized alien" to mean, "with respect to the employment of an alien at a particular time, that the alien is not at that time either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this chapter or by the Attorney General." 8 U. S. C. § 1324a(h)(3).

tions by means of licensing exist in many forms. Some permit authorities to take action with respect to licenses upon finding that a licensee has engaged in prohibited conduct. See, *e. g.*, Ariz. Rev. Stat. Ann. § 4–210(A)(1) (West 2011) (liquor licenses may be suspended or revoked if the licensing authority determines after notice and a hearing that repeated acts of violence have occurred on the licensed premises). Others, more narrowly, permit authorities to take such action following a pre-existing determination by another authorized body that the licensee has violated another provision of law. See, *e. g.*, § 4–202(D) (liquor licenses may not be renewed to persons who have been convicted of felonies within the past five years). That both types of laws might be defined in some contexts as licensing laws does not necessarily mean that Congress intended the saving clause to encompass both types. See *Dolan* v. *Postal Service*, 546 U. S. 481, 486 (2006) ("A word in a statute may or may not extend to the outer limits of its definitional possibilities"); see also *FCC* v. *AT&T Inc.*, 562 U. S. 397, 407 (2011) ("[C]onstruing statutory language is not merely an exercise in ascertaining the outer limits of [a word's] definitional possibilities" (internal quotation marks omitted; second alteration in original)). In isolation, the text of IRCA's saving clause provides no hint as to which type or types of licensing laws Congress had in mind.

B

Because the plain text of the saving clause does not resolve the question, it is necessary to look to the text of IRCA as a whole to illuminate Congress' intent. See *Dolan*, 546 U. S., at 486 ("Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute"); *Ali* v. *Federal Bureau of Prisons*, 552 U. S. 214, 222 (2008) (construction of a statutory term "must, to the extent possible, ensure that the statutory scheme is coherent and consistent"); *Davis* v. *Michigan Dept. of Treasury*, 489 U. S. 803, 809 (1989) ("[St]tatutory language

cannot be construed in a vacuum. It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme").[2]

Before Congress enacted IRCA in 1986, a number of States had enacted legislation prohibiting employment of unauthorized aliens. See *ante*, at 588, and n. 1 (citing 11 such laws). California, for example, prohibited the knowing employment of an alien "who is not entitled to lawful residence in the United States" when "such employment would have an adverse effect on lawful resident workers," and made violations punishable by fines of $200 to $500. 1971 Cal. Stats. ch. 1442, § 1; see also *De Canas* v. *Bica*, 424 U. S. 351, 352, n. 1 (1976). Kansas went even further, making it a misdemeanor, punishable by a term of confinement not to exceed one month, to employ a person within Kansas knowing "such person to be illegally within the territory of the United States." Kan. Stat. Ann. §§ 21–4409, 21–4502 (1981).[3]

Congress enacted IRCA amidst this patchwork of state laws. IRCA "'forcefully' made combating the employment of illegal aliens central to 'the policy of immigration law.'" *Hoffman*, 535 U. S., at 147 (quoting *INS* v. *National Center for Immigrants' Rights, Inc.*, 502 U. S. 183, 194, and n. 8 (1991); brackets omitted); see also H. R. Rep. No. 99–682, pt. 1, p. 46 (1986) ("[L]egislation containing employer sanctions is the most humane, credible and effective way to respond to the large-scale influx of undocumented aliens"). As the

[2] As these cases demonstrate, a contextual analysis of a statutory provision is in no way "untethered" from the statute's text. *Ante*, at 600, n. 6. To the contrary, the majority's reading of the saving clause—with its singular focus on the undefined word "licensing" to the exclusion of all contextual considerations—is "untethered" from the statute as a whole.

[3] None of the pre-IRCA state laws cited by the majority provided for licensing-related sanctions. The parties have not identified any pre-IRCA state laws related to licensing that purported to regulate the employment of unauthorized aliens other than those governing agricultural labor contractors. See *ante*, at 623–624 (BREYER, J., dissenting).

majority explains, IRCA makes it "unlawful for a person or other entity . . . to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien." § 1324a(a)(1)(A); *ante*, at 588–589. IRCA also requires employers to verify that they have reviewed documents establishing an employee's eligibility for employment. See § 1324a(b); *ante*, at 589. These two provisions are the foundation of IRCA's "comprehensive scheme prohibiting the employment of illegal aliens in the United States." *Hoffman*, 535 U. S., at 147.

Congress made explicit its intent that IRCA be enforced uniformly. IRCA declares that "[i]t is the sense of the Congress that . . . the immigration laws of the United States should be enforced vigorously *and uniformly.*" § 115, 100 Stat. 3384 (emphasis added). Congress structured IRCA's provisions in a number of ways to accomplish this goal of uniform enforcement.

First, and most obviously, Congress expressly displaced the myriad state laws that imposed civil and criminal sanctions on employers who hired unauthorized aliens. See § 1324a(h)(2); see also H. R. Rep. No. 99–682, at 58 ("The penalties contained in this legislation are intended to specifically preempt any state or local laws providing civil fines and/or criminal sanctions on the hiring, recruitment or referral of undocumented aliens"). Congress could not have made its intent to pre-empt state and local laws imposing civil or criminal sanctions any more "'clear [or] manifest.'" *Medtronic, Inc.* v. *Lohr*, 518 U. S. 470, 485 (1996) (quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947)).

Second, Congress centralized in the Federal Government enforcement of IRCA's prohibition on the knowing employment of unauthorized aliens. IRCA instructs the Attorney General to designate a specialized federal agency unit whose "primary duty" will be to prosecute violations of IRCA. § 1324a(e)(1)(D). IRCA also instructs the Attorney General to establish procedures for receiving complaints, investigat-

ing complaints having "a substantial probability of validity," and investigating other violations. § 1324a(e)(1); see also 8 CFR § 274a.9 (2010). Upon concluding that a person has violated IRCA, the Attorney General must provide the person with notice and an opportunity for a hearing before a federal administrative law judge (ALJ). 8 U. S. C. §§ 1324a(e)(3)(A), (B). If the person does not request a hearing, the Attorney General may impose a final, nonappealable order requiring payment of sanctions. § 1324a(e)(3)(B). If the person requests a hearing, the ALJ is required to hold a hearing and, upon finding that the person has violated IRCA, must order the payment of sanctions. § 1324a(e)(3)(C). The ALJ's order is the final agency order, unless the affected person requests and obtains further administrative appellate review. § 1324a(e)(7); see also 28 CFR § 68.54 (2010). IRCA grants immigration officers and ALJs "reasonable access to examine evidence of any person or entity being investigated" and provides them with extensive subpoena powers. § 1324a(e)(2). And the immigration officers investigating suspected violations obviously have access to the relevant federal information concerning the work authorization status of the employee in question.[4]

Third, Congress provided persons "adversely affected" by an agency order with a right of review in the federal courts of appeals. § 1324a(e)(8); see also § 1324a(e)(9) (directing the Attorney General in cases of noncompliance to file suit in federal district court to enforce a final order imposing sanctions); § 1324a(f) (authorizing the Attorney General to pursue injunctive relief and criminal sanctions in federal district court). In this way, Congress ensured that administrative orders finding violations of IRCA would be reviewed by federal judges with experience adjudicating immigration-related matters.

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[4] By regulation, the Attorney General has conferred on parties charged with violating IRCA the right to obtain discovery from the Federal Government in a hearing before an ALJ. See 28 CFR § 68.18.

Fourth, Congress created a uniquely federal system by which employers must verify the work authorization status of new hires. Under this system, an employer must attest under penalty of perjury on a form designated by the Attorney General (the I–9 form) that it has examined enumerated identification documents to verify that a new hire is not an unauthorized alien. § 1324a(b)(1)(A); see also 8 CFR § 274a.2; *ante*, at 589. Good-faith compliance with this verification requirement entitles an employer to an affirmative defense if charged with violating IRCA. § 1324a(a)(3); see also H. R. Rep. No. 99–682, at 57. Notably, however, IRCA prohibits use of the I–9 form for any purpose other than enforcement of IRCA and various provisions of federal criminal law. § 1324a(b)(5); 8 CFR § 274a.2(b)(4). Use of the I–9 form is thus limited to *federal* proceedings, as the plurality acknowledges. See *ante*, at 603, n. 9.

Finally, Congress created no mechanism for States to access information regarding an alien's work authorization status for purposes of enforcing state prohibitions on the employment of unauthorized aliens. The relevant sections of IRCA make no provision for the sharing of work authorization information between federal and state authorities even though access to that information would be critical to a State's ability to determine whether an employer has employed an unauthorized alien. In stark contrast, a separate provision in the same title of IRCA creates a verification system by which States can ascertain the immigration status of aliens applying for benefits under programs such as Medicaid and the food stamp program. See IRCA § 121(a)(1)(C), 42 U. S. C. § 1320b–7(d)(3). The existence of a verification system in one provision of IRCA, coupled with its absence in the provision governing employment of unauthorized aliens, suggests strongly that Congress did not contemplate any role for the States in adjudicating questions regarding employment of unauthorized aliens. Cf. *Bates* v. *United States*, 522 U. S. 23, 29–30 (1997) ("Where Congress includes particu-

lar language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion" (internal quotation marks and brackets omitted)).

In an attempt to show that Congress intended for the Federal Government to share immigration-related information with the States, Arizona points to a federal statute, 8 U. S. C. § 1373(c), requiring the Government to respond to certain inquiries from state agencies. Section 1373(c), however, merely requires the Government to respond to inquiries from state agencies "seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency." It does not require the provision of information regarding an alien's work authorization status, which is not necessarily synonymous with immigration status. See 8 CFR § 274a.12(c) (identifying categories of *legal* aliens "who must apply for employment authorization").[5] Arizona has not identified any federal statute or regulation requiring the Federal Government to provide information regarding an alien's work authorization status to a State.[6] More importantly, § 1373(c) was enacted in 1996, see § 642(c), 110 Stat. 3009–707, and thus says nothing about Congress' intent when it enacted IRCA's saving clause a decade earlier. See *Jones* v. *United States*, 526 U. S. 227, 238 (1999).

Collectively, these provisions demonstrate Congress' intent to build a centralized, exclusively federal scheme for determining whether a person has "employ[ed], or recruit[ed]

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[5] For example, spouses and minor children of persons working in the United States as exchange visitors must apply for employment authorization even though they have lawful immigration status as dependents of the exchange visitor. See 8 CFR § 274a.12(c)(5).

[6] In its capacity as an employer, a State may be able to access information regarding the work authorization status of its employees through use of E-Verify.

or refer[red] for a fee for employment, unauthorized aliens." 8 U. S. C. § 1324a(h)(2).

C

IRCA's saving clause must be construed against this backdrop. Focusing primarily on the text of the saving clause, Arizona and the majority read the clause to permit States to determine themselves whether a person has employed an unauthorized alien, so long as they do so in connection with licensing sanctions. See *ante*, at 597–599. This interpretation overlooks the broader statutory context and renders the statutory scheme "[in]coherent and [in]consistent." *Ali*, 552 U. S., at 222.

Under the majority's reading of the saving clause, state prosecutors decide whether to commence licensing-related proceedings against a person suspected of employing an unauthorized alien. The majority's holding also permits state courts and other tribunals to adjudicate the question whether an employer has employed an unauthorized alien. The Arizona Act illustrates the problems with reading the saving clause to permit such state action. The Act directs prosecutors to verify an employee's work authorization with the Federal Government pursuant to § 1373(c), *e. g.*, Ariz. Rev. Stat. Ann. § 23–212(B) (West Supp. 2010), and the state court "shall consider only the federal government's determination pursuant to [§] 1373(c)" in "determining whether an employee is an unauthorized alien," *e. g.*, § 23–212(H).[7] Putting aside the question whether § 1373(c) actually provides access to work authorization information, § 1373(c) did not exist when IRCA was enacted in 1986. See *supra*, at 637. Arizona has not identified any avenue by which States could have accessed work authorization information in the first decade of IRCA's existence. The absence of any such avenue at the time of IRCA's enactment speaks volumes as to

[7] However, the "federal government's determination creates [only] a rebuttable presumption of the employee's lawful status." *E. g.*, § 23–212(H).

how Congress would have understood the saving clause to operate: If States had no access to information regarding the work authorization status of aliens, how could state courts have accurately adjudicated the question whether an employer had employed an unauthorized alien?

The Arizona Act's reliance on § 1373(c) highlights the anomalies inherent in state schemes that purport to adjudicate whether an employee is an authorized alien. Even when Arizona prosecutors obtain information regarding an alien's *immigration* status pursuant to § 1373(c), the prosecutors and state court will have to determine the significance of that information to an alien's *work authorization* status, which will often require deciding technical questions of immigration law. See, *e. g.,* 8 CFR §§ 274a.12(a)–(c) (dividing 62 different classes of aliens into those authorized for employment incident to immigration status, those authorized for employment with a specific employer incident to immigration status, and those who must apply for work authorization). And, as discussed above, that information may not shed light at all on an alien's work authorization status, which is oftentimes distinct from immigration status. See *supra,* at 637, and n. 5. As a result, in many cases state decisions—made by prosecutors and courts with no or little experience in federal immigration law—will rest on less-than-complete or inaccurate information, "creat[ing] enforcement risks not present in the federal system." *Ante,* at 617 (BREYER, J., dissenting). I can discern no reason why Congress would have intended for state courts inexperienced in immigration matters to adjudicate, in the context of licensing sanctions, the very same question that IRCA commits to federal officers, ALJs, and the courts of appeals.

Equally problematic is the fact that employers charged under a state enforcement scheme with hiring unauthorized aliens are foreclosed from using I–9 forms in their defense in the state proceedings. Like IRCA, the Arizona Act con-

fers an affirmative defense on employers who comply in good faith with IRCA's verification requirement. See Ariz. Rev. Stat. Ann. §§23–212(J), 23–212.01(J). As discussed above, however, IRCA prohibits an employer from using the I–9 form to establish that affirmative defense under Arizona law. See 8 U. S. C. §1324a(b)(5); 8 CFR §274a.2(b)(4). Not to worry, the plurality says: The employer can establish the affirmative defense through office policies and testimony of employees. *Ante*, at 603, n. 9. But Congress made the I–9 verification system and accompanying good-faith defense central to IRCA. See, *e. g.*, H. R. Rep. No. 99–682, at 60 ("[A]n effective verification procedure, combined with an affirmative defense for those who in good faith follow the procedure, is essential"). Given the importance of this procedure, if Congress in fact intended for state courts to adjudicate whether a person had employed an unauthorized alien in connection with licensing sanctions, why would it have prohibited that person from using the I–9 form—"the employer's most effective evidence," *ante*, at 619 (BREYER, J., dissenting)—in the state-court proceeding? The question answers itself: Congress intended no such thing.

Furthermore, given Congress' express goal of "unifor[m]" enforcement of "the immigration laws of the United States," IRCA §115, 100 Stat. 3384, I cannot believe that Congress intended for the 50 States and countless localities to implement their own distinct enforcement and adjudication procedures for deciding whether employers have employed unauthorized aliens. Reading the saving clause as the majority does subjects employers to a patchwork of enforcement schemes similar to the one that Congress sought to displace when it enacted IRCA. Having carefully constructed a uniform federal scheme for determining whether a person has employed an unauthorized alien, Congress could not plausibly have meant to create such a gaping hole in that scheme through the undefined, parenthetical phrase "licensing and similar laws." See *Whitman* v. *American Trucking Assns.*,

Inc., 531 U. S. 457, 468 (2001) ("Congress . . . does not, one might say, hide elephants in mouseholes").

In sum, the statutory scheme as a whole defeats Arizona's and the majority's reading of the saving clause. Congress would not sensibly have permitted States to determine for themselves whether a person has employed an unauthorized alien, while at the same time creating a specialized federal procedure for making such a determination, withholding from the States the information necessary to make such a determination, and precluding use of the I–9 forms in nonfederal proceedings. See *United States* v. *Locke*, 529 U. S. 89, 106 (2000) ("We decline to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law").

To render IRCA's saving clause consistent with the statutory scheme, I read the saving clause to permit States to impose licensing sanctions following a final federal determination that a person has violated § 1324a(a)(1)(A) by knowingly hiring, recruiting, or referring for a fee an unauthorized alien.[8] This interpretation both is faithful to the saving

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[8] This reading of the saving clause finds support in IRCA's legislative history. The House Committee on the Judiciary reported that IRCA was "not intended to preempt or prevent lawful state or local processes concerning the suspension, revocation or refusal to reissue a license to any person who has been found to have violated the sanctions provisions *in this legislation*." H. R. Rep. No. 99–682, at 58 (emphasis added). The Committee's reference to "this legislation" is, of course, a reference to IRCA, and only federal officers, ALJs, and courts have authority under IRCA to find that a person has violated the statute's sanctions provisions.

My reading is also consistent with, though not compelled by, the provisions in IRCA that amended the Migrant and Seasonal Agricultural Worker Protection Act (AWPA), 96 Stat. 2583. As JUSTICE BREYER discusses in detail, see *ante*, at 623–625 (dissenting opinion), AWPA requires entities to secure a certificate of registration from the Department of Labor before engaging in any "farm labor contracting activity." AWPA § 101, 96 Stat. 2587, 29 U. S. C. § 1811(a). Before 1986, AWPA prohibited farm labor contractors from hiring unauthorized aliens, and it permitted the Department of Labor to institute administrative proceedings to en-

clause's text, see *supra*, at 631–632, and best reconciles the saving clause with IRCA's "careful regulatory scheme," *Locke*, 529 U. S., at 106. It also makes sense as a practical matter. In enacting IRCA's pre-emption clause, Congress vested in the Federal Government the authority to impose civil and criminal sanctions on persons who employ unauthorized aliens. Licensing and other types of business-related permissions are typically a matter of state law, however. See, *e. g.*, *Kamen* v. *Kemper Financial Services, Inc.*, 500 U. S. 90, 98 (1991) (noting that "[c]orporation law" is an area traditionally "governed by state-law standards"); *Chicago Title & Trust Co.* v. *Forty-One Thirty-Six Wilcox Bldg. Corp.*, 302 U. S. 120, 127 (1937) ("How long and upon what terms a state-created corporation may continue to exist is a matter exclusively of state power"). As a result, if Congress wanted to "ensur[e] that a full range of sanctions [was] available to be used against businesses that employ unauthorized aliens," Brief for Respondents 37, Congress had to authorize the States and localities to impose licensing sanctions following a federal adjudication of a violation of IRCA.

I do not mean to suggest that the mere existence of a comprehensive federal scheme necessarily reveals a congressional intent to oust state remedies. Cf. *English* v. *General Elec. Co.*, 496 U. S. 72, 87 (1990) ("[T]he mere existence of a federal regulatory or enforcement scheme . . . does not by itself imply pre-emption of state remedies"); *New York State Dept. of Social Servs.* v. *Dublino*, 413 U. S. 405, 415 (1973) (rejecting the argument that "pre-emption is to be inferred merely from the comprehensive character of the federal [program]"). Here, Congress has made clear its intent to oust

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force this prohibition. See §§ 103(a)(3), 103(b), 106(a), 96 Stat. 2588–2590. In IRCA, Congress repealed this prohibition, § 101(b)(1)(C), but authorized the Secretary of Labor to withdraw a contractor's federal registration certificate upon a finding of an IRCA violation, § 101(b)(1)(B)(iii), 100 Stat. 3372, 29 U. S. C. § 1813(a)(6). Thus, IRCA made AWPA's licensing sanctions turn on a prior federal adjudication of a violation of IRCA.

state civil and criminal remedies; the sole question is the scope of the saving clause's exception for "licensing and similar laws." The comprehensive scheme established by Congress necessarily informs the scope of this clause. For all the reasons stated, the only interpretation of that clause that is consistent with the rest of the statute is that it preserves the States' authority to impose licensing sanctions after a final federal determination that a person has violated IRCA's prohibition on the knowing employment of unauthorized aliens.

Under my construction of the saving clause, the Arizona Act cannot escape pre-emption. The Act authorizes Arizona county attorneys to commence actions charging an employer with having employed an unauthorized alien. Ariz. Rev. Stat. Ann. §§ 23–212(D), 23–212.01(D). Arizona state courts must find that an employer has employed an unauthorized alien before imposing the sanctions enumerated in the Act. §§ 23–212(F), 23–212.01(F). Because the Act's sanctions are not premised on a final federal determination that an employer has violated IRCA, I would hold that the Act does not fall within IRCA's saving clause and is therefore pre-empted.[9]

II

I agree with the conclusion reached by JUSTICE BREYER in Part IV of his dissenting opinion that federal law impliedly pre-empts the provision in the Arizona Act requiring all Arizona employers to use the federal E-Verify program. See Ariz. Rev. Stat. Ann. § 23–214. I also agree with much of his reasoning. I write separately to offer a few additional observations.

As we have recently recognized, that a state law makes mandatory something that federal law makes voluntary does

[9] Because I believe that the Arizona Act does not fall within IRCA's saving clause for this reason, I have no reason to consider the separate question whether the Act's definition of "license" sweeps too broadly. Compare *ante*, at 594–597, with *ante*, at 612–613, 621–622 (BREYER, J., dissenting).

not mean, in and of itself, that the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Crosby* v. *National Foreign Trade Council*, 530 U. S. 363, 373 (2000) (internal quotation marks omitted). See *Williamson* v. *Mazda Motor of America, Inc.*, 562 U. S. 323, 326 (2011) (concluding that a federal regulation permitting manufacturers to choose between two seatbelt options did not pre-empt state tort liability based on a decision to install one of those options); see also *id.*, at 337 (SOTOMAYOR, J., concurring) ("[T]he mere fact that an agency regulation allows manufacturers a choice between options is insufficient to justify implied pre-emption").

This case, however, is readily distinguishable from cases like *Williamson*, in which state law regulates relationships between private parties. Here, the Arizona Act directly regulates the relationship between the Federal Government and private parties by mandating use of a federally created and administered resource. This case thus implicates the "uniquely federal interes[t]" in managing use of a federal resource. *Boyle* v. *United Technologies Corp.*, 487 U. S. 500, 504 (1988) (internal quotation marks omitted); see also *Buckman Co.* v. *Plaintiffs' Legal Comm.*, 531 U. S. 341, 347 (2001) ("[T]he relationship between a federal agency and the entity it regulates is inherently federal in character because the relationship originates from, is governed by, and terminates according to federal law").

Significant policy objectives motivated Congress' decision to make use of E-Verify voluntary. In addition to those discussed by JUSTICE BREYER, see *ante*, at 627–628 (dissenting opinion), I note that Congress considered the cost of a mandatory program. In 2003, when Congress elected to expand E-Verify to all 50 States but declined to require its use, it cited a congressionally mandated report concluding that the annual cost of the pilot program was $6 million, the annual cost of a nationwide voluntary program would be $11 million, and the annual cost of a nationwide mandatory program

would be $11.7 *billion*. H. R. Rep. No. 108–304, pt. 1, p. 6 (2003); see also Institute for Survey Research, Temple Univ., and Westat, INS Basic Pilot Evaluation: Summary Report 38 (2002) (concluding that the Social Security Administration (SSA) and the Immigration and Naturalization Service were not "capable of enrolling and administering a program for the hundreds of thousands of employers in any of the large mandatory programs explored here"). A more recent report prepared for the Department of Homeland Security similarly noted the costs associated with mandatory use of E-Verify. See Westat, Findings of the E-Verify® Program Evaluation 224 (Dec. 2009) (observing that the SSA estimated that it would have to hire an additional 1,500 field staff to handle a mandatory national program); *id.*, at 251 (recommending that any expansion of E-Verify take place gradually "to allow the Federal government adequate time to hire and train the new staff required to run such a program"). Permitting States to make use of E-Verify mandatory improperly puts States in the position of making decisions for the Federal Government that directly affect expenditure and depletion of federal resources.[10]

The majority highlights the Government's statement in its *amicus* brief that "'the E-Verify system can accommodate the increased use that the Arizona statute and existing similar laws would create.'" *Ante*, at 610 (quoting Brief for United States 34). But "[t]he purpose of Congress is the ultimate touchstone in every pre-emption case." *Medtronic*, 518 U. S., at 494 (internal quotation marks omitted). It matters not whether the Executive Branch believes that

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[10] In *Williamson* v. *Mazda Motor of America, Inc.*, 562 U. S. 323, 335 (2011), we held that the Federal Government's judgment regarding the cost effectiveness of seatbelt options did not reveal an intent "to forbid common-law tort suits in which a judge or jury might reach a different conclusion." The obvious distinction between that case and this one is that Congress' decision to keep use of E-Verify voluntary bears directly on the costs to the Federal Government itself.

the Government is now capable of handling the burdens of a mandatory system.[11] Congressional intent controls, and Congress has repeatedly decided to keep the E-Verify program voluntary. Because state laws requiring use of E-Verify frustrate the significant policy objectives underlying this decision, thereby imposing explicitly unwanted burdens on the Federal Government, I would hold that federal law impliedly pre-empts the Arizona requirement.

* * *

For these reasons, I cannot agree with either of the Court's holdings in this case. I respectfully dissent.

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[11] Notably, the Government's brief does not state that the E-Verify system could accommodate the increased use that would result if all 50 States enacted similar laws; it limits its statement to "the Arizona statute and *existing* similar laws." Brief for United States as *Amicus Curiae* 34 (emphasis added).

Syllabus

UNITED STATES *v.* TINKLENBERG

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

No. 09–1498. Argued February 22, 2011—Decided May 26, 2011

The Speedy Trial Act of 1974 (Act) provides, *inter alia*, that in "any case in which a plea of not guilty is entered, the trial . . . shall commence within seventy days" after the arraignment, 18 U. S. C. § 3161(c)(1), but lists a number of exclusions from the 70-day period, including "delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion," § 3161(h)(1)(D).

Respondent Tinklenberg's trial on federal drug and gun charges began 287 days after his arraignment. The District Court denied his motion to dismiss the indictment on the ground that the trial violated the Act's 70-day requirement, finding that 218 of the days fell within various of the Act's exclusions, leaving 69 nonexcludable days, thus making the trial timely. On Tinklenberg's appeal from his conviction, the Sixth Circuit agreed that many of the 287 days were excludable, but concluded that 9 days during which three pretrial motions were pending were not, because the motions did not actually cause a delay, or the expectation of delay, of trial. Since these 9 days were sufficient to bring the number of nonexcludable days above 70, the court found a violation of the Act. And given that Tinklenberg had already served his prison sentence, it ordered the indictment dismissed with prejudice.

Held:

1. The Act contains no requirement that the filing of a pretrial motion actually caused, or was expected to cause, delay of a trial. Rather, § 3161(h)(1)(D) stops the speedy trial clock from running automatically upon the filing of a pretrial motion irrespective of whether the motion has any impact on when the trial begins. Pp. 652–660.

(a) The Sixth Circuit reasoned that subparagraph (D)'s "delay resulting from" phrase, read most naturally, requires a court to apply the exclusion provision only to motions that actually cause a trial delay, or the expectation of such a delay. While such a reading is linguistically reasonable, it is not the only reasonable interpretation. The subparagraph falls within a general set of provisions introduced by the phrase: "The following periods of delay shall be excluded." § 3161(h). That phrase is followed by a list that includes "[a]ny period of delay resulting from other proceedings concerning the defendant, including . . . ."

§ 3161(h)(1). This latter list is followed by a sublist, each member (but one) of which is introduced by the phrase "delay resulting from . . . ." *Ibid.* Those words are followed by a more specific description, such as "any pretrial motion" from its "filing" "through the conclusion of the hearing on, or other prompt disposition of, such motion." § 3161(h)(1)(D). The whole paragraph can be read as requiring the automatic exclusion of the members of that specific sublist, while referring to those members in general as "periods of delay" and as causing that delay, not because Congress intended the judge to determine causation, but because, in a close to definitional way, the words embody Congress' own view of the matter. Thus, language alone cannot resolve the basic question presented. Pp. 653–655.

(b) Several considerations, taken together, compel the conclusion that Congress intended subparagraph (D) to apply automatically. First, subparagraph (D) and neighboring subparagraphs (F) and (H) contain language that instructs courts to measure the time actually consumed by the specified pretrial occurrence, but those subparagraphs do not mention the date on which the trial begins or was expected to begin. Second, during the 37 years since Congress enacted the statute, every other Court of Appeals has rejected the Sixth Circuit's interpretation. Third, the Sixth Circuit's interpretation would make the subparagraph (D) exclusion significantly more difficult to administer, thereby hindering the Act's efforts to secure fair and efficient trials. Fourth, the Court's conclusion is reinforced by the difficulty of squaring the Sixth Circuit's interpretation with the "automatic application" rule expressed in, *e. g.*, *Henderson* v. *United States*, 476 U. S. 321, 327. Fifth, the legislative history also supports the Court's conclusion. Sixth, because all the subparagraphs but one under paragraph (1) begin with the phrase "delay resulting from," the Sixth Circuit's interpretation would potentially extend well beyond pretrial motions and encompass such matters as mental and physical competency examinations, interlocutory appeals, consideration of plea agreements, and the absence of essential witnesses. Pp. 656–660.

2. The Sixth Circuit also misinterpreted § 3161(h)(1)(F), which excludes from the 70-day calculation "delay resulting from transportation of any defendant . . . to and from places of examination . . . , except that any time consumed in excess of ten days . . . shall be presumed to be unreasonable." The lower courts agreed that a total of 20 transportation days had elapsed when Tinklenberg was evaluated for competency, and that because the Government provided no justification, all days in excess of the 10 days specified in the statute were unreasonable. However, the Sixth Circuit exempted 8 weekend days and holidays from the count on the theory that subparagraph (F) incorporated Federal Rule of

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Criminal Procedure 45(a), which, at the time, excluded such days when computing any period specified in "rules" and "court order[s]" that was less than 11 days. Thus, the Circuit considered only two transportation days excessive, and the parties concede that the eight extra days were enough to make the difference between compliance with, and violation of, the Act.

This Court exercises its discretion to consider the subsidiary subparagraph (F) question because doing so is fairer to Tinklenberg, who has already served his sentence. In the Court's view, subparagraph (F) does not incorporate Rule 45. The Act does not say that it does so, the Government gives no good reason for such a reading, and the Rule itself, as it existed at the relevant time, stated it applied to rules and court orders, but said nothing about statutes. The fact that Rule 45 is revised from time to time also argues against its direct application to subparagraph (F) because such changes, likely reflecting considerations other than those related to the Act, may well leave courts treating similar defendants differently. The better reading includes weekend days and holidays in subparagraph (F)'s 10-day period under the common-law rule that such days are included when counting a statutory time period of 10 days unless a statute specifically excludes them. Many courts have treated statutory time periods this way, and Congress has tended specifically to exclude weekend days and holidays from statutory time periods of 10 days when it intended that result. Indeed, Rule 45 has been recently modified to require a similar result. Pp. 660–663.

3. Although the Sixth Circuit's interpretations of subparagraphs (D) and (F) are both mistaken, the conclusions the court drew from its interpretations in relevant part cancel each other out, such that the court's ultimate conclusion that Tinklenberg's trial failed to comply with the Act's deadline is correct. P. 663.

579 F. 3d 589, affirmed.

Breyer, J., delivered the opinion of the Court, in which Kennedy, Ginsburg, Alito, and Sotomayor, JJ., joined, and in which Roberts, C. J., and Scalia and Thomas, JJ., joined as to Parts I and III. Scalia, J., filed an opinion concurring in part and concurring in the judgment, in which Roberts, C. J., and Thomas, J., joined, *post*, p. 663. Kagan, J., took no part in the consideration or decision of the case.

Matthew D. Roberts argued the cause for the United States. With him on the briefs were *Acting Solicitor General Katyal*, *Assistant Attorney General Breuer*, *Acting Deputy Solicitor General McLeese*, and *Joseph C. Wyderko*.

Jeffrey L. Fisher argued the cause for respondent. With him on the brief were *Steve S. Nolder*, *Kevin M. Schad*, and *Pamela S. Karlan.**

JUSTICE BREYER delivered the opinion of the Court.

The Speedy Trial Act of 1974, 18 U. S. C. § 3161 *et seq.*, provides that in "any case in which a plea of not guilty is entered, the trial . . . shall commence within seventy days" from the later of (1) the "filing date" of the information or indictment or (2) the defendant's initial appearance before a judicial officer (*i. e.*, the arraignment). § 3161(c)(1). The Act goes on to list a set of exclusions from the 70-day period, including "*delay resulting from* any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion." § 3161(h)(1)(D) (2006 ed., Supp. III) (emphasis added).

The United States Court of Appeals for the Sixth Circuit held in this case that a pretrial motion falls within this exclusion only if it "actually cause[s] a delay, or the expectation of a delay, of trial." 579 F. 3d 589, 598 (2009). In our view, however, the statutory exclusion does not contain this kind of causation requirement. Rather, the filing of a pretrial motion falls within this provision irrespective of whether it actually causes, or is expected to cause, delay in starting a trial.

I

Jason Louis Tinklenberg, the respondent, was convicted of violating federal drug and gun laws. 18 U. S. C. § 922(g)(1) (felon in possession of a firearm); 21 U. S. C. § 843(a)(6) (possession of items used to manufacture a controlled substance). He made his initial appearance before a judicial officer on October 31, 2005, and the speedy trial clock then began to

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**Dennis G. Terez*, *Melissa M. Salinas*, and *David M. Porter* filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae* urging affirmance.

run. His trial began on August 14, 2006, 287 days later. Just before trial, Tinklenberg asked the District Court to dismiss the indictment on the ground that the trial came too late, violating the Speedy Trial Act's 70-day requirement. The District Court denied the motion after finding that 218 of the 287 days fell within various Speedy Trial Act exclusions, leaving 69 nonexcludable days, thereby making the trial timely.

On appeal the Sixth Circuit agreed with the District Court that many of the 287 days were excludable. But it disagreed with the District Court about the excludability of time related to three pretrial motions. The Government filed the first motion, an unopposed motion to conduct a video deposition of a witness, on August 1, 2006; the District Court disposed of the motion on August 3, 2006. The Government filed the second motion, an unopposed motion to bring seized firearms into the courtroom as evidence at trial, on August 8, 2006; the District Court disposed of the motion on August 10, 2006. Tinklenberg filed the third motion, a motion to dismiss the indictment under the Speedy Trial Act, on August 11, 2006; the District Court denied that motion on August 14, 2006. In the Sixth Circuit's view, the nine days during which the three motions were pending were not excludable because the motions did not "actually cause a delay, or the expectation of delay, of trial." 579 F. 3d, at 598. Because these 9 days were sufficient to bring the number of nonexcludable days above 70, the Court of Appeals found a violation of the Act. And given the fact that Tinklenberg had already served his prison sentence, it ordered the District Court to dismiss the indictment with prejudice.

We granted certiorari at the Government's request in order to review the Sixth Circuit's motion-by-motion causation test. We now reverse its determination. But because we agree with the defendant about a subsidiary matter, namely, the exclusion of certain holidays and weekend days during the period in which he was transported for a compe-

tency examination, *id.*, at 597, we affirm the Court of Appeals' ultimate conclusion.

II

A

In relevant part the Speedy Trial Act sets forth a basic rule:

> "In any case in which a plea of not guilty is entered, the trial of a defendant . . . shall commence within seventy days from [the later of (1)] the filing date . . . of the information or indictment, or . . . [(2)] the date the defendant has appeared before a judicial officer of the court in which such charge is pending . . . ." § 3161(c)(1) (2006 ed.).

The Act then says that the "following periods of delay shall be excluded in computing . . . the time within which the trial . . . must commence." § 3161(h) (2006 ed., Supp. III). It lists seven such "periods of delay."

It describes the first of these seven excludable periods as

> "(1) Any period of *delay resulting from* other proceedings concerning the defendant, including but not limited to—
>
> "(A) *delay resulting from* any proceeding . . . to determine the mental competency or physical capacity of the defendant;
>
> "(B) *delay resulting from* trial with respect to other charges . . . ;
>
> "(C) *delay resulting from* any interlocutory appeal;
>
> "(D) *delay resulting from* any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion;
>
> "(E) *delay resulting from* any proceeding relating to the transfer of a case [or defendant] . . . from another district . . . ;
>
> "(F) *delay resulting from* transportation of any defendant from another district, or to and from places of

examination or hospitalization, except that any time consumed in excess of ten days . . . shall be presumed to be unreasonable;

"(G) *delay resulting from* consideration by the court of a proposed plea agreement . . . ;

"(H) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court." *Ibid.* (2006 ed. and Supp. III) (emphasis added).

B

The particular provision before us, subparagraph (D), excludes from the speedy trial period "delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion." §3161(h)(1)(D). The question is whether this provision stops the speedy trial clock from running automatically upon the filing of a pretrial motion irrespective of whether the motion has any impact on when the trial begins. Unlike the Sixth Circuit, we believe the answer to this question is yes.

We begin with the Act's language. The Sixth Circuit based its answer primarily upon that language. It argued that the phrase "delay resulting from," read most naturally, requires a court to apply the exclusion provision only to those "motion[s]" that "actually cause a delay, or the expectation of a delay, of trial." 579 F. 3d, at 598. We agree that such a reading is linguistically reasonable, but the Court of Appeals wrote that there "is no conceivable way to read this language other than to require a delay to *result* from any pretrial motion before excludable time occurs." *Ibid.* See also *ibid.* ("[T]he statute is clear"). And here we disagree.

When the Court of Appeals says that its reading is the *only* way any reasonable person could read this language, it overstates its claim. For one thing, even though the word "delay" ordinarily indicates a postponement, it need not inev-

itably do so. Compare American Heritage Dictionary 480 (4th ed. 2000) ("[t]o postpone until a later time" or "[t]o cause to be later or slower than expected or desired") with *ibid.* ("[t]he interval of time between two events"). In any event, terms must be read in their statutory context in order to determine how the provision in question should be applied in an individual case.

Statutory language that describes a particular circumstance, for example, might require a judge to examine each individual case to see if that circumstance is present. But, alternatively, it might ask a judge instead to look at more general matters, such as when a statute requires a judge to increase the sentence of one convicted of a "crime of violence" without requiring the judge to determine whether the particular crime at issue in a particular case was committed in a violent manner. See *Taylor* v. *United States*, 495 U. S. 575, 602 (1990) ("crime of violence" characterizes the generic crime, not the particular act committed). Similarly a statute that forbids the importation of "wild birds" need not require a court to decide whether a particular parrot is, in fact, wild or domesticated. It may intend to place the entire species within that definition without investigation of the characteristics of an individual specimen. See *United States* v. *Fifty-Three (53) Eclectus Parrots*, 685 F. 2d 1131, 1137 (CA9 1982).

More than that, statutory language can sometimes specify that a set of circumstances exhibits a certain characteristic virtually as a matter of definition and irrespective of how a court may view it in a particular case. A statute that describes "extortion" as a "crime of violence" makes that fact so by definition, without asking a court to second-guess Congress about the matter. 18 U. S. C. § 924(e)(2)(B)(ii) (2006 ed.) (defining "violent felony" to include extortion for purposes of the Armed Career Criminal Act).

The statute before us, though more complex, can be read similarly. The pretrial motion subparagraph falls within a

general set of provisions introduced by the phrase: "The following periods of delay shall be excluded." § 3161(h) (2006 ed., Supp. III). That phrase is then followed by a list that includes "[a]ny period of delay resulting from other proceedings concerning the defendant, including . . . ." § 3161(h)(1). This latter list is followed by a sublist, each member (but one) of which is introduced by the phrase "delay resulting from . . . ," *ibid.* (2006 ed. and Supp. III), which words are followed by a more specific description, such as "any pretrial motion" from its "filing" "through the conclusion of the hearing on, or other prompt disposition of, such motion." § 3161(h)(1)(D) (2006 ed., Supp. III). The whole paragraph can be read as requiring the automatic exclusion of the members of that specific sublist, while referring to those members in general as "periods of delay" and as causing that delay, not because Congress intended the judge to determine causation, but because, in a close to definitional way, the words embody Congress' own view of the matter.

It is not farfetched to describe the members of the specific sublist in the statute before us in this definitional sense—as "periods of delay" or as bringing about delay. After all, the exclusion of any of the specific periods described always delays the expiration of the 70-day speedy trial deadline. Or Congress might have described the specific periods listed in paragraph (1) as "periods of delay" and "delay[s] resulting from" simply because periods of the type described often do cause a delay in the start of trial. Both explanations show that, linguistically speaking, one can read the statutory exclusion as automatically applying to the specific periods described without leaving to the district court the task of determining whether the period described would or did actually cause a postponement of the trial in the particular case. Thus, language alone cannot resolve the basic question presented in this case. But when read in context and in light of the statute's structure and purpose, we think it clear that Congress intended subparagraph (D) to apply automatically.

C

We now turn to several considerations, which, taken together, convince us that the subparagraphs that specifically list common pretrial occurrences apply automatically in the way we have just described. First, subparagraph (D) clarifies that the trial court should measure the period of excludable delay for a pretrial motion "from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion," but nowhere does it mention the date on which the trial begins or was expected to begin. § 3161(h)(1)(D) (2006 ed., Supp. III). Thus, it is best read to instruct measurement of the time actually consumed by consideration of the pretrial motion. Two other related subparagraphs contain clarifying language that contemplates measurement of the time actually consumed by the specified pretrial occurrence without regard to the commencement of the trial. See § 3161(h)(1)(F) ("[A]ny time consumed in excess of ten days from the date an order of removal or an order directing such transportation, and the defendant's arrival at the destination shall be presumed to be unreasonable"); § 3161(h)(1)(H) ("delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court"). If "delay" truly referred to the postponement of trial, then presumably those subparagraphs would instruct that excludable periods should be measured from the date that trial was otherwise scheduled to begin.

Second, we are impressed that during the 37 years since Congress enacted the Speedy Trial Act, every Court of Appeals has considered the question before us now, and every Court of Appeals, implicitly or explicitly, has rejected the interpretation that the Sixth Circuit adopted in this case. See *United States* v. *Wilson*, 835 F. 2d 1440, 1443 (CADC 1987) (explicit), abrogated on other grounds by *Bloate* v. *United States*, 559 U. S. 196 (2010); *United States* v. *Hood*,

469 F. 3d 7, 10 (CA1 2006) (explicit); *United States* v. *Cobb*, 697 F. 2d 38, 42 (CA2 1982) (explicit), abrogated on other grounds by *Henderson* v. *United States*, 476 U. S. 321 (1986); *United States* v. *Novak*, 715 F. 2d 810, 813 (CA3 1983) (explicit), abrogated on other grounds by *Henderson*, *supra;* *United States* v. *Dorlouis*, 107 F. 3d 248, 253–254 (CA4 1997) (explicit); *United States* v. *Green*, 508 F. 3d 195, 200 (CA5 2007) (explicit); *United States* v. *Montoya*, 827 F. 2d 143, 151 (CA7 1987) (explicit); *United States* v. *Titlbach*, 339 F. 3d 692, 698 (CA8 2003) (implicit); *United States* v. *Van Brandy*, 726 F. 2d 548, 551 (CA9 1984) (explicit); *United States* v. *Vogl*, 374 F. 3d 976, 985–986 (CA10 2004) (explicit); *United States* v. *Stafford*, 697 F. 2d 1368, 1371–1372 (CA11 1983) (explicit). This unanimity among the lower courts about the meaning of a statute of great practical administrative importance in the daily working lives of busy trial judges is itself entitled to strong consideration, particularly when those courts have maintained that interpretation consistently over a long period of time. See *General Dynamics Land Systems, Inc.* v. *Cline*, 540 U. S. 581, 593–594 (2004).

Third, the Sixth Circuit's interpretation would make the subparagraph (D) exclusion significantly more difficult to administer. And in doing so, it would significantly hinder the Speedy Trial Act's efforts to secure fair and efficient criminal trial proceedings. See *Zedner* v. *United States*, 547 U. S. 489, 497 (2006) (noting that the Act's exceptions provide "necessary flexibility"); H. R. Rep. No. 93–1508, p. 15 (1974) (the Act seeks to achieve "efficiency in the processing of cases which is commensurate with due process"); S. Rep. No. 93–1021, p. 21 (1974). Trial judges may, for example, set trial dates beyond 70 days in light of other commitments. And in doing so, a trial judge may well be aware, based on his or her experience, that pretrial motions will likely consume the extra time—even though the judge may know little about which specific motions will be filed, when, and how many. How is that judge to apply the Sixth Circuit's ap-

proach, particularly when several, including unanticipated, pretrial proceedings did consume the time in question?

Moreover, what is to happen if several excludable and several nonexcludable potential causes of delay (*e. g.*, pretrial motions to take depositions, potential scheduling conflicts, various health examinations, etc.) coincide, particularly in multidefendant cases? Can the judge, motion by motion, decide which motions were responsible and which were not responsible for postponing what otherwise might have been an earlier trial date? And how is a defendant or his attorney to predict whether or when a judge will later find a particular motion to have caused a postponement of trial? And if the matter is difficult to predict, how is the attorney to know when or whether he or she should seek further postponement of the 70-day deadline?

With considerable time and judicial effort, perhaps through the use of various presumptions, courts could find methods for overcoming these and other administrative difficulties. In some instances, the judge may know at the time of filing that a given motion is easily resolved or that its complexity will almost certainly postpone the trial. Judges could note on the record their predictions about whether the motion will postpone trial at the time that the motion is filed. Parties could also stipulate as to whether a given motion would be excluded from the speedy trial clock. But those theoretical strategies would not prevent all or even most mistakes, needless dismissals of indictments, and potential retrials after appeal—all of which exact a toll in terms of the fairness of and confidence in the criminal justice system. And any such future strategies for administering the Sixth Circuit's rule cannot provide a present justification for turning the federal judicial system away from the far less obstacle-strewn path that the system has long traveled.

Fourth, we are reinforced in our conclusion by the difficulty of squaring the Sixth Circuit's interpretation with this Court's precedent. In *Henderson* v. *United States*, *supra*,

the Court rejected the contention that the exclusion provision for pretrial motions governs only reasonable delays. The Court there concluded (as the Court of Appeals had held) that the exclusion "was intended to be automatic." *Id.*, at 327 (quoting *United States* v. *Henderson*, 746 F. 2d 619, 622 (CA9 1984); internal quotation marks omitted). See also *Bloate*, 559 U. S. 196 (holding based in part on the view that the exclusion applies "*automatically*" to the specified period of delay). *Henderson* did not consider whether a trial court must determine whether the pretrial motion actually caused postponement of the trial in each individual case. But the Sixth Circuit's interpretation would nonetheless significantly limit the premise of "automatic application" upon which the case rests.

Fifth, for those who find legislative history useful, it is worthwhile noting (as this Court noted in *Henderson*) that the Senate Report concerning the reenactment of the provision in 1979 described it, along with the other provisions in § 3161(h)(1), as referring to "specific and recurring periods of time often found in criminal cases," and characterized them as "automatically excludable delay," S. Rep. No. 96–212, p. 9 (1979). See H. R. Rep. No. 93–1508, at 21 ("The time limits would be tolled by hearings, proceedings and necessary delay which *normally occur* prior to the trial of criminal cases" (emphasis added)); S. Rep. No. 93–1021, at 21 ("[The Act] has carefully constructed exclusions and exceptions which permit normal pre-trial preparation in the ordinary noncomplex cases which represent the bulk of business in the Federal courts"). But cf. *id.*, at 35 (paragraph (h)(1) excludes "[d]elays *caused by* proceedings relating to the defendant" (emphasis added)).

Sixth, because all the subparagraphs but one under paragraph (1) begin with the phrase "delay resulting from," the Sixth Circuit's interpretation would potentially extend well beyond pretrial motions and encompass such matters as mental and physical competency examinations, interlocutory

appeals, consideration of plea agreements, and the absence of essential witnesses. See § 3161(h)(1) (2006 ed., Supp. III); § 3161(h)(3)(A) (2006 ed.). Given the administrative complexity the causation requirement would bring about in all these areas, those Circuits that have considered a causation requirement in respect to these other matters have rejected it. See, *e. g.*, *United States* v. *Pete*, 525 F. 3d 844, 852 (CA9 2008) (interlocutory appeal); *United States* v. *Miles*, 290 F. 3d 1341, 1350 (CA11 2002) (unavailability of essential witnesses); *United States* v. *Robinson*, 887 F. 2d 651, 656–657 (CA6 1989) (trial on other charges). That further complexity, along with these lower court holdings, reinforce our conclusion.

We consequently disagree with the Sixth Circuit that the Act's exclusion requires a court to find that the event the exclusion specifically describes, here the filing of the pretrial motion, actually caused or was expected to cause delay of a trial. We hold that the Act contains no such requirement.

III

Tinklenberg also argues that the Sixth Circuit wrongly interpreted a different exclusion provision, this time the provision excluding

> "delay resulting from transportation of any defendant from another district, or to and from places of examination or hospitalization, *except that any time consumed in excess of ten days* from the date an order of removal or an order directing such transportation, and the defendant's arrival at the destination *shall be presumed to be unreasonable.*" § 3161(h)(1)(F) (2006 ed., Supp. III) (emphasis added).

The District Court granted Tinklenberg's request for a competency evaluation, and he was transported to a medical facility for examination. The lower courts agreed that a total

of 20 transportation days elapsed and that since the Government provided no justification, all days in excess of the 10 days specified in the statute were unreasonable. But in counting those excess days, the court exempted weekend days and holidays. Since Veterans Day, Thanksgiving Day, and three weekends all fell within the 20-day period, only 2 days, not 10 days, were considered excessive, during which the 70-day Speedy Trial Act clock continued to tick.

Tinklenberg argues that subparagraph (F) does not exempt weekend days and holidays; hence the court should have considered 10, not 2, days to be excessive. And the parties concede that those eight extra ticking days are enough to make the difference between compliance with, and violation of, the Act.

As the Solicitor General notes, we may consider, or "decline to entertain," alternative grounds for affirmance. See *United States* v. *Nobles*, 422 U. S. 225, 242, n. 16 (1975). In this case, we believe it treats Tinklenberg, who has already served his sentence, more fairly to consider the alternative ground and thereby more fully to dispose of the case.

The Sixth Circuit exempted weekend days and holidays because it believed that subparagraph (F) incorporated Federal Rule of Criminal Procedure 45(a). At the relevant time, that Rule excluded weekend days and holidays when computing any period of time specified in the "rules," in "any local rule," or in "any court order" that was less than 11 days. Fed. Rule Crim. Proc. 45(a) (2005). But in our view subparagraph (F) does not incorporate Rule 45. The Act does not say that it incorporates Rule 45. The Government has given us no good reason for reading it as incorporating the Rule. And the Rule itself, as it existed at the relevant time, said that it applied to "rules" and to "orders," but it said nothing about statutes. Other things being equal, the fact that Rule 45 is revised from time to time also argues against its direct application to subparagraph (F). That is because

those changes, likely reflecting considerations other than those related to the Speedy Trial Act, may well leave courts treating similar defendants differently.

Without relying upon a cross-reference to Rule 45, we believe the better reading of subparagraph (F) would include weekend days and holidays in its 10-day time period. Under the common-law rule, weekend days and holidays are included when counting a statutory time period of 10 days unless the statute specifically excludes them. See 74 Am. Jur. 2d, Time § 22, p. 589 (2001) (in calculating time periods expressed in statutes, "when the time stipulated must necessarily include one or more Saturdays, Sundays, or holidays, those days will not be excluded, in the absence of an express proviso for their exclusion"). Many courts have treated statutory time periods this way. See, *e. g.*, *Howeisen* v. *Chapman*, 195 Ind. 381, 383–384, 145 N. E. 487, 488 (1924); *American Tobacco Co.* v. *Strickling*, 88 Md. 500, 508–511, 41 A. 1083, 1086 (1898). And Congress has tended specifically to exclude weekend days and holidays from statutory time periods of 10 days when it intended that result. Compare 18 U. S. C. § 3142(d)(2) (permitting the temporary detention of certain defendants "for a period of not more than ten days, excluding Saturdays, Sundays, and holidays") and 5 U. S. C. § 552a(d)(2)(A) (requiring an agency to acknowledge receipt of a request to amend agency records within "10 days (excluding Saturdays, Sundays, and legal public holidays)") with 18 U. S. C. § 2518(9) (establishing a 10-day period for disclosing applications for and court orders authorizing wiretaps without specifically excluding weekends and holidays) and § 4244(a) (providing a 10-day period after conviction for filing a motion to request mental health treatment without specifically excluding weekends and holidays). Indeed, Rule 45 has been recently modified so that now (though not at the time of Tinklenberg's proceedings) it requires a similar result. Fed. Rule Crim. Proc. 45(a)(1) (2010) (instructing that weekend days and holidays are to be counted when calculat-

ing all time periods, including statutory time periods for which no alternative method of computing time is specified).

* * *

We disagree with the Sixth Circuit's interpretation of both subparagraph (D) and subparagraph (F), and now hold that its interpretations of those two provisions are mistaken. Nonetheless the conclusions the court drew from those two interpretations in relevant part cancel each other out such that the court's ultimate conclusion that Tinklenberg's trial failed to comply with the Speedy Trial Act's deadline is correct. Therefore, the Sixth Circuit's judgment ordering dismissal of the indictment on remand is

Affirmed.

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

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

I join Parts I and III of the Court's opinion. I agree with the judgment of the Court in Part II that a pretrial motion need not actually postpone a trial, or create an expectation of postponement, in order for its pendency to be excluded under the Speedy Trial Act of 1974, 18 U. S. C. § 3161(h)(1)(D) (2006 ed., Supp. III). But I think that conclusion is entirely clear from the text of the Speedy Trial Act, and see no need to look beyond the text. The clarity of the text is doubtless why, as the Court's opinion points out, *ante,* at 656–657, every Circuit disagrees with the Sixth Circuit's conclusion. That is the direction in which the causality proceeds: Clarity of text produces unanimity of Circuits—not, as the Court's opinion would have it, unanimity of Circuits clarifies text.

As the Court discusses, *ante,* at 653–654, the word "delay" can mean postponement, but it can also mean an "interval of

time between two events." American Heritage Dictionary 480 (4th ed. 2000). One might refer to the "delay" between two ticks of a clock, or between seeing lightning and hearing thunder, but that does not imply that the first postponed or slowed the second. Here there are substantial textual indications that the word "delay" similarly refers to the period between ticks of the speedy trial clock—in other words, the period during which the Speedy Trial Act's 70-day requirement is tolled.

Interpreting the "delay" referred to in § 3161(h)(1)(D) (or referred to anywhere else in § 3161(h)) as the delay of a trial date* would make little sense in light of the context of the provision and the structure of the statute. Section 3161(h)(1)(D) specifies starting and stopping points for the excludable "delay" that bear no relation whatsoever to the actual amount of time that a trial might be postponed by a pretrial motion. It equates the "delay resulting from any pretrial motion" to the period of time between "the filing of the motion" and "the conclusion of the hearing on, or other prompt disposition of, such motion." This equation is possible if "delay" refers to an interval of time excludable for purposes of the Speedy Trial Act, but it makes no sense if "delay" refers to the time a trial is postponed. Consider, for example, a pretrial motion that is pending for 10 days but causes the district court to push back a trial's beginning by only one day. In such a situation, § 3161(h)(1)(D) would require that the entire 10-day period be excluded for Speedy Trial Act purposes.

Neighboring statutory provisions, moreover, link the excludable "delay" to the time consumed by the specified event, not the number of days a trial is postponed. Section

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*I consider only this possibility, and not the extended meaning invented by the Sixth Circuit ("expectation of a dela[y] of trial")—presumably to explain how delay can be computed *ex ante*, before any trial delay has actually occurred. See 579 F. 3d 589, 598 (2009). "[E]xpectation of a delay" is simply not one of the possible meanings of "delay."

3161(h)(1)(H), for example, excludes "delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court." And § 3161(h)(1)(F) excludes "delay resulting from transportation . . . except that any time consumed in excess of ten days from . . . an order directing such transportation, and the defendant's arrival at the destination shall be presumed to be unreasonable." If "delay" means trial delay, it makes little sense for Congress to have placed a limit upon the "time consumed" in transporting a defendant rather than upon the permissible postponement of trial date.

The Speedy Trial Act's structure also suggests that § 3161(h)(1)(D) is meant to apply automatically and is not dependent on predicate findings of postponement. Section 3161(h) lists various types of delay that may be excluded, the first six of which (including § 3161(h)(1)(D)) make no reference to any required findings. But the seventh, which excludes "delay resulting from a continuance granted by any judge," conditions that exclusion upon certain findings, § 3161(h)(7)(A). In light of this difference in formulation, we have held that the first six exclusions are "'automatic,'" apply "regardless of the specifics of the case," and require no district-court findings. *Bloate* v. *United States*, 559 U. S. 196, 199, n. 1, 203 (2010); see also *Henderson* v. *United States*, 476 U. S. 321, 327 (1986). Tinklenberg's incorporation of a threshold inquiry into § 3161(h)(1)(D) would make it none of these things.

Delay of trial is also ruled out by the fact that the text is forward looking. It says that the "following periods of delay shall be excluded in computing . . . the time within which the trial . . . *must commence*." § 3161(h) (emphasis added). This is designed to enable the determination *in advance* of the date by which the trial "must commence." Quite obviously, if the specified delays did not count unless and until they delayed the trial, one could not know whether

they counted until after the fact. And on that interpretation the provision should have read, not "the time within which the trial . . . must commence," but rather "the time within which the trial . . . should have commenced."

And finally, there are the administrative difficulties that arise when "delay" is taken to mean "delay in trial," discussed in the Court's opinion, *ante*, at 657–658. These are not relevant on their own, but only because they bear upon the meaning of the text. When one of two possible meanings yields impracticable results, the other meaning is more likely correct.

Tinklenberg would invent a threshold inquiry applicable only to § 3161(h)(1)(D): If, he says, at least some delay of the trial date has occurred, then the entire period specified in § 3161(h)(1)(D) may be excluded. This makes no sense. First, nothing in the statute supports treating the word "delay" as a trigger for an exclusion of an unrelated period of time; quite the opposite, § 3161(h)(1)(D) treats the period of "delay" and the pendency of the pretrial motion equivalently. Second, that interpretation would ascribe different meanings to the word "delay" as it is used throughout the Speedy Trial Act. "[D]elay resulting from any interlocutory appeal," § 3161(h)(1)(C), for example, would refer to the number of days a trial was postponed; but "delay resulting from any pretrial motion," § 3161(h)(1)(D), would refer to the different period specified in that paragraph. Identical words used in different parts of a statute are presumed to have the same meaning absent indication to the contrary, and here no such indication exists. See *IBP, Inc.* v. *Alvarez*, 546 U. S. 21, 34 (2005).

Tinklenberg also argues that his interpretation draws support from the phrase "resulting from," which appears after the word "delay" in § 3161(h)(1)(D). He asserts that this phrase "underscores that Subsection (D) excludes periods of delay that occur *as a consequence of* pretrial motions, not merely the time during which such motions are pending."

Brief for Respondent 17. That is true enough, but it sheds no light on the meaning of the word "delay." Cf. *Bloate*, *supra*, at 205, n. 9. There is nothing odd in saying that an interval of excludable time under § 3161(h)(1)(D) arises "as a consequence" of a party's having filed a pretrial motion; if no pretrial motion is filed, no delay results.

Syllabus

FOWLER *v.* UNITED STATES

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

No. 10–5443. Argued March 29, 2011—Decided May 26, 2011

While preparing to rob a bank, petitioner Fowler and others were discovered by a local police officer, whom Fowler killed. Fowler was convicted of violating the federal witness tampering statute, which makes it a crime "to kill another person, with intent to . . . prevent the communication by any person to a [Federal] law enforcement officer" of "information relating to the . . . possible commission of a Federal offense," 18 U. S. C. § 1512(a)(1)(C). Rejecting Fowler's argument that the evidence was insufficient to show that he had killed the officer intending to prevent him from communicating with a *federal* officer, the Eleventh Circuit held that a showing of a possible or potential communication to federal authorities was sufficient.

Held: In such circumstances, the Government must establish a § 1512(a)(1)(C) violation by showing there was a reasonable likelihood that a relevant communication would have been made to a federal officer. Pp. 671–678.

(a) In a § 1512(a)(1)(C) prosecution, "no state of mind need be proved with respect to the circumstance . . . that the law enforcement officer is an . . . employee of the Federal Government," § 1512(g)(2). Thus, the Government must prove (1) a killing, (2) committed with a particular intent, namely, an intent (a) to "prevent" a "communication" (b) about "the commission or possible commission of a Federal offense" (c) to a federal "law enforcement officer." Pp. 671–672.

(b) Nothing in § 1512(a)(1)(C)'s language limits it to instances in which the defendant has some identifiable law enforcement officers particularly in mind. Any such limitation would conflict with the statute's basic purpose. Witness tampering may prove more serious (and more effective) when the crime takes place before the victim has engaged in any communication at all with officers—at a time when the precise communication and nature of the officer who may receive it are not yet known. Hence, the statute covers a defendant, like petitioner, who kills with intent to prevent communication with any and all officers. The Court must consequently decide what, if anything, the Government must show about the likelihood of a hypothetical communication with a federal offi-

Syllabus

cer where the defendant did not think specifically about any particular communication or its recipient. Pp. 672–675.

(c) To determine what the Government must prove in such instances, the Court looks to the dictionary definition of the statutory word "prevent," which means rendering an "intended," "possible," or "likely" event impractical or impossible by anticipatory action. No one suggests that the word "intended" sets forth the appropriate standard here. The Government and the Eleventh Circuit would rest their standard on the word "possible." But that standard would eliminate the independent force of the statutory "federal officer" requirement, and would extend the statute beyond its intended, basically federal, scope. Fashioning a standard based on the word "likely" is consistent with the statute's language and objectives. Thus, where the defendant kills a person with an intent to prevent communication with law enforcement officers generally, that intent includes an intent to prevent communications with *federal* officers only if there is a reasonable likelihood under the circumstances that, in the absence of the killing, at least one of the relevant communications would have been made to a federal officer. The Government need not show that such a communication, had it occurred, would have been federal beyond a reasonable doubt, nor even that it is more likely than not. But it must show that the likelihood of communication to a federal officer was more than remote, outlandish, or hypothetical. Pp. 675–678.

(d) Because Fowler's argument that the evidence is insufficient to satisfy a "reasonable likelihood" standard was not raised at trial, the lower courts must determine whether, and how, the standard applies in this case. P. 678.

603 F. 3d 883, vacated and remanded.

BREYER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, THOMAS, SOTOMAYOR, and KAGAN, JJ., joined. SCALIA, J., filed an opinion concurring in the judgment, *post*, p. 678. ALITO, J., filed a dissenting opinion, in which GINSBURG, J., joined, *post*, p. 685.

Stephen M. Crawford argued the cause for petitioner. With him on the briefs was *Kenneth S. Siegel.*

Sarah E. Harrington argued the cause for the United States. With her on the brief were *Acting Solicitor General Katyal*, *Assistant Attorney General Breuer*, *Deputy Solicitor General Dreeben*, and *Kirby A. Heller.*

JUSTICE BREYER delivered the opinion of the Court.

The federal witness tampering statute makes it a crime "to kill another person, with intent to . . . prevent the communication by any person to a law enforcement officer . . . of the United States" of "information relating to the . . . possible commission of a Federal offense." 18 U. S. C. § 1512(a)(1)(C). We focus on instances where a defendant killed a person with an intent to prevent that person from communicating with law enforcement officers in general but where the defendant did not have federal law enforcement officers (or any specific individuals) particularly in mind. The question before us concerns what, if anything, the Government must show beyond this broad indefinite intent in order to show that the defendant more particularly intended to prevent communication with *federal* officers as well. We hold that, in such circumstances, the Government must show that there was a *reasonable likelihood* that a relevant communication would have been made to a federal officer.

I

In the early morning hours of March 3, 1998, Charles Fowler and several other men prepared to rob a Florida bank. They met in a cemetery, put on black clothes and gloves, began to drink and use drugs, and discussed the proposed crime. Shortly before daybreak a local police officer, Todd Horner, came upon the group. He pulled out his gun and asked the men to identify themselves. Fowler and some of the others managed to overcome Horner and take his gun. After Horner spoke to one of the men by name, Fowler said, "Now we can't walk away from this thing." App. 38 (internal quotation marks omitted). And he shot and killed Horner.

Federal authorities charged Fowler with violating the federal witness tampering statute. He was convicted. On appeal, Fowler argued that the evidence was insufficient to show that he had killed Horner intending to prevent Horner

from communicating with a *federal* officer. The Eleventh Circuit disagreed. It held that a showing of a "*possible* or *potential* communication to federal authorities" was sufficient. 603 F. 3d 883, 888 (2010).

Fowler sought certiorari. And because the Circuits have disagreed about this last-mentioned matter, we granted Fowler's petition for certiorari. Compare *United States* v. *Harris*, 498 F. 3d 278, 286 (CA4 2007) ("So long as the information the defendant seeks to suppress actually relates to the commission or possible commission of a federal offense, the federal nexus requirement is established"), with *United States* v. *Lopez*, 372 F. 3d 86, 91–92 (CA2 2004) (requiring Government to show federal crime along with "'additional appropriate evidence'" that "the victim *plausibly* might have turned to federal officials"), vacated and remanded on other grounds, 544 U. S. 902 (2005); see also *United States* v. *Bell*, 113 F. 3d 1345, 1349 (CA3 1997); *United States* v. *Causey*, 185 F. 3d 407, 422–423 (CA5 1999); *United States* v. *Wright*, 536 F. 3d 819, 824–825 (CA8 2008).

II

The federal witness tampering statute in relevant part forbids the "kill[ing] or attempt[ed] kill[ing]" of "another person" with a certain "intent," namely, an

> "intent to . . . prevent the communication by any person to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense . . . ." 18 U. S. C. § 1512(a)(1)(C).

A related subsection says that in a prosecution for this offense

> "no state of mind need be proved with respect to the circumstance . . . that the judge is a judge of the United States or that the law enforcement officer is an officer

> or employee of the Federal Government . . . ." § 1512(g)(2).

This language makes clear that in a prosecution the Government must prove (1) a killing or attempted killing, (2) committed with a particular intent, namely, an intent (a) to "prevent" a "communication" (b) about "the commission or possible commission of a Federal offense" (c) to a federal "law enforcement officer or judge."

The question here is how this language applies when a defendant (1) kills a victim, (2) with an intent (a) to prevent a communication (b) about the commission or possible commission of a federal offense but (c) *to law enforcement officers in general rather than to some specific law enforcement officer or set of officers which the defendant has in mind.* This kind of circumstance is not necessarily rare, as the facts here illustrate. Fowler (we here assume) was not thinking specifically about federal officers, but he would nonetheless have wanted to prevent communication with federal officers from taking place (had he considered the matter).

III

When the defendant has in mind a particular individual or a particular set of individuals with whom he fears the victim might communicate, the application of the statute is relatively clear. For instance, if a defendant kills a victim with the intent of preventing the victim from communicating with a particular individual, say, John Smith, who the defendant knows is a federal law enforcement officer, the statute fits like a glove. If a defendant kills a victim with the intent of preventing the victim from communicating with Sam Smith, who is in fact (but who the defendant does not know is) a federal law enforcement officer, the statute still fits, for it specifically says that "no state of mind need be proved" with respect to this last-mentioned circumstance.

Nothing in the statutory language, however, limits it to these kinds of instances, instances in which the defendant

has some law enforcement officer or set of officers, or other identifiable individuals, particularly in mind. Moreover, any such limitation would conflict with the statute's basic purpose. Witness tampering may prove more serious (and more effective) when the crime takes place before the victim has engaged in any communication at all with law enforcement officers—at a time when the precise communication and nature of the officer who may receive it are not yet known. Cf., *e. g.*, S. Rep. No. 97–532, pp. 14, 15 (1982) (statute applies "to offenses against witnesses, victims, or informants which occur before the witness testifies or the informant communicates with law enforcement officers"); *id.*, at 19 (Witness "[i]ntimidation offenses are particularly insidious and do violence to traditional notions of justice because no one can be convicted of a crime which is not reported. [Section 1512] reaches intimidation offenses committed before a crime is reported to the appropriate authorities"). Hence the statute covers a defendant who kills with intent to prevent communication with law enforcement officers generally (*i. e.*, with any and all law enforcement officers). And we must consequently decide what, if anything, the Government must show about the likelihood of a hypothetical communication with a federal law enforcement officer in circumstances where the defendant did not think specifically about any particular communication or its recipient.

In these circumstances, the application of the statute is not as simple. We cannot determine whether the individual the defendant had in mind is in fact a federal officer, because the defendant did not have a particular individual in mind. And we cannot insist that the defendant have had some general thought about federal officers in mind because the statute says that "no state of mind need be proved" in respect to the federal nature of the communication's recipient. § 1512(g)(2). What, then, must the Government show to prove that such a defendant intended to prevent communications to federal officers?

We begin with two basic propositions. First, in our view, the Government need not show *beyond a reasonable doubt* (or even that it is *more likely than not*) that the hypothetical communication would have been to a federal officer. No Circuit has adopted this interpretation, and no party argues for it here. But see *post,* at 679–680 (SCALIA, J., concurring in judgment). And for good reason: The relevant question concerns the defendant's intent. The Government will already have shown beyond a reasonable doubt that the defendant possessed the relevant broad indefinite intent, namely, the intent to prevent the victim from communicating with (unspecified) law enforcement officers. And one can possess an intent (*i. e.*, one can act in order to bring about a certain state of affairs) even if there is considerable doubt whether the event that the intent contemplates will in fact occur. One can, for example, put up shutters with the intent of protecting the furniture from hurricane damage even if there is considerable doubt that any hurricane will actually occur. One can drive to Fenway Park with the intent of seeing the Red Sox play that afternoon even if a mistake about the date means the stadium is empty. One can blow up a bridge with the intent of stopping an advancing army, even if the army advances regardless, along a different route. And, similarly, a defendant can kill a victim with *an intent* to prevent the victim from communicating with federal law enforcement officers even if there is some considerable doubt that any such communication would otherwise have taken place.

But, second, the Government must show more than the broad indefinite intent we have described, the intent to prevent communications to law enforcement officers in general. That is so for two separate reasons. For one thing, the statute speaks of an "intent to *prevent*" something. But (apart from mistakes, as in our Red Sox example) one cannot act with an "intent to *prevent*" something that could not possibly have taken place regardless. We can speak of a Colorado trout fisherman who tries to prevent his trout stream from

being invaded by pike or carp, but in ordinary circumstances we cannot speak about trying to *prevent* the stream's invasion by whales. Indeed, the dictionary defines "prevent" as "to render (an *intended*, *possible*, *or likely* action or event) impractical or impossible by anticipatory action." OED Online (Mar. 2011) (emphasis added), http://www.oed.com/view/Entry/151073?rskey=QWN6QB&result=2&=false (all Internet materials as visited May 23, 2011, and available in Clerk of Court's case file).

For another thing, to allow the Government to show no more than the broad indefinite intent we have described (the intent to prevent communications to law enforcement officers in general) would bring within the scope of this statute many instances of witness tampering in purely state investigations and proceedings, thus extending the scope of this federal statute well beyond the primarily federal area that Congress had in mind. See *infra*, at 677. For both these reasons, unlike the dissent, we cannot read the statute as intending to excuse the Government from proving *something* about the hypothetical communication with federal officers. The question remains, what is that something?

IV

We find possible answers to this question in the dictionary definition of the word "prevent." As we have said, that word applies where a defendant, by "anticipatory action," (here, killing a victim) intended "to render . . . impractical or impossible" an "action or event" (here, the victim's communication with a federal law enforcement officer) which (1) was "*intended*," (2) was "*possible*," or (3) was "*likely*" to have otherwise occurred.

No one suggests that the first word, the word "intended," sets forth the appropriate standard. That word in this context refers to the *victim's* intent. That intent is often difficult to discern. Moreover, to require the Government to prove it would prevent the statute from applying where it is

plain that federal officers would have been involved in investigating and prosecuting the offense (for instance, robbing the United States Bullion Depository at Fort Knox), but where the defendant killed the victim before the victim had decided to communicate to law enforcement officers. Congress, however, intended the statute to apply in these last-mentioned circumstances. See *supra*, at 672.

The Government (and the Eleventh Circuit) would rest their standard on the second word, the word "possible." See Brief for United States 10 (standard is "whether it was reasonably possible that at least one of the communications that the murder . . . was intended to prevent would have been with a federal law enforcement official"); 603 F. 3d, at 888 (requiring showing of a "*possible* or *potential* communication to federal authorities"). But, in our view, that standard is difficult to reconcile with the statute's language and its intended, basically federal, scope. Cf. *supra*, at 675.

Often, when a defendant acts in ways that violate state criminal law, some or all of those acts will violate federal criminal law as well. And where a federal crime is at issue, communication with federal law enforcement officers is almost always a *possibility*. Thus, to allow the Government to show only a mere possibility that a communication would have been with federal officials is to permit the Government to show little more than the possible commission of a federal offense. (That is to say, the latter showing by itself would almost automatically show the statutorily necessary connection with a *federal* law enforcement officer.) The "possibility" standard would thereby weaken or eliminate the independent force of the separate statutory requirement that the defendant, in killing the victim, must intend to prevent communication with one who is "a law enforcement officer or judge *of the United States*." 18 U. S. C. § 1512(a)(1)(C) (emphasis added); see § 1515(a)(4) (defining "law enforcement officer" as "an officer or employee *of the Federal Government*" (emphasis added)). Cf. *Duncan* v. *Walker*, 533 U. S. 167, 174

(2001) (normally we must give effect "to every clause and word of a statute" (internal quotation marks omitted)); *Ratzlaf* v. *United States*, 510 U. S. 135, 140–141 (1994) (expressing particular reluctance to "treat statutory terms" as "surplusage" "when the words describe an element of a criminal offense").

Moreover, because of the frequent overlap between state and federal crimes, the use of a standard based on the word "possible" would transform a federally oriented statute into a statute that would deal with crimes, investigations, and witness tampering that, as a practical matter, are purely state in nature. See, *e. g.*, Dept. of Justice, Bureau of Justice Statistics (FY 2008 Persons arrested and booked, Drug offense: Marijuana), http://bjs.ojp.usdoj.gov/fjsrc; Dept. of Justice, Federal Bureau of Investigation, 2008 Crime in the United States (Arrests), http://www2.fbi.gov/ucr/cius2008/arrests/index.html; (Table 29), http://www2.fbi.gov/ucr/cius2008/data/table_29.html (In 2008, 0.7% of arrests for marijuana offenses were made by federal law enforcement officers); see also *Jones* v. *United States*, 529 U. S. 848, 858 (2000) ("[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance in the prosecution of crimes" (internal quotation marks omitted)).

The defendant argues that we should fashion a standard based on the third word, the word "likely." And we agree that doing so is consistent with the statute's language and objectives. We consequently hold that (in a case such as this one where the defendant does not have particular federal law enforcement officers in mind) the Government must show *a reasonable likelihood* that, had, *e. g.*, the victim communicated with law enforcement officers, at least one relevant communication would have been made to a federal law enforcement officer. That is to say, where the defendant kills a person with an intent to prevent communication with law enforcement officers generally, that intent includes an

intent to prevent communications with *federal* law enforcement officers only if it is reasonably likely under the circumstances that (in the absence of the killing) at least one of the relevant communications would have been made to a federal officer.

The Government need not show that such a communication, had it occurred, would have been federal beyond a reasonable doubt, nor even that it is more likely than not. For, as we have said, one can act with an intent to prevent an event from occurring without it being true beyond a reasonable doubt (or even more likely than not) that the event would otherwise occur. (Recall the homeowner who closes his shutters in order to prevent damage from a hurricane that may not happen. *Supra*, at 674.) But the Government must show that the likelihood of communication to a federal officer was more than remote, outlandish, or simply hypothetical. Jones, who kills Smith to prevent his communicating with law enforcement officers in general, does not kill Smith to prevent his communicating with Lithuanian law enforcement officers, for there is no reasonable likelihood that any Lithuanian officers would become involved.

V

Fowler argues that the evidence in this case is insufficient to satisfy a "reasonable likelihood" standard. He concedes, however, that he did not raise this question specifically at trial. Tr. of Oral Arg. 21–22. We leave it to the lower courts to determine whether, and how, the standard applies in this particular case.

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

It is so ordered.

JUSTICE SCALIA, concurring in the judgment.

I disagree with the Court's interpretation of 18 U. S. C. § 1512(a)(1)(C). In my view, the Government must prove

that the defendant intended to prevent a communication which, had it been made, would beyond a reasonable doubt have been made *to a federal law enforcement officer.* The Court's vague "reasonable likelihood" standard has no basis in the statutory text and will serve only to confuse judges and juries. Accordingly, although I agree the case should be remanded for the Eleventh Circuit to consider whether the objection to sufficiency of the evidence was preserved or whether the District Court committed plain error, I would hold that there was insufficient evidence to support Fowler's conviction.

I

Section 1512(a)(1)(C) of Title 18 makes it a federal crime "to kill another person, with intent to . . . prevent the communication by any person to a law enforcement officer . . . of the United States of information relating to the commission or possible commission of a Federal offense." Viewed in isolation, this provision contains an ambiguity: Does the *mens rea* of the statute include a specific intent to prevent communication to a law enforcement officer *of the United States;* or is it satisfied by the mere intent to prevent communication to a law enforcement officer *who happens to be* a law enforcement officer of the United States?

Happily, a different statutory provision resolves this ambiguity. It states that "no state of mind need be proved with respect to the circumstance . . . that the law enforcement officer is an officer or employee of the Federal Government." § 1512(g)(2). This makes clear that the first possibility is wrong, and the second right. But removing the "federal officer" requirement as an element of the statute's *mens rea* does not remove it as an element of the *actus reus*—that is, as an element of the facts that must be proved for conviction. It must be proved, and proved beyond a reasonable doubt, that the communication intended to be prevented was communication to a federal officer. Thus, if a suspect in an investigation murders an informant to prevent him from talk-

ing to authorities, but is unaware that the informant was working for the FBI, the suspect would be guilty: He would have committed a murder with the intention of preventing the informant's communication to authorities about his criminal activities, and the communication he sought to prevent would necessarily have been to federal law enforcement. Likewise, a suspect would be guilty if he committed a murder to prevent a witness from informing law enforcement that he lied on his federal income tax return: He sought to prevent a communication that would have been made to federal officials, because they alone prosecute federal tax violations. But a suspect who commits a murder with the general intent of preventing law enforcement from learning about activities that violate both state and federal law would not be guilty, because the Government would be unable to prove that the communication he sought to prevent necessarily would have been to a federal official.

Applying that standard, this is an easy case. There was evidence that Fowler murdered Officer Horner in order to prevent him from communicating information about Fowler's criminal activities. But the only evidence proffered by the Government to establish that the communication would have been to a federal law enforcement agent was the fact that a different state police officer, four years later, contacted federal law enforcement about a robbery by Fowler's confederate—and that only because the state-law statute of limitations for the robbery had expired. That is not nearly enough to demonstrate Fowler's guilt beyond a reasonable doubt.

II

The Court gives the statute a broader reading than the one I ascribe. The Government can obtain a conviction, it says, so long as it can prove a "reasonable likelihood" that the communication would have been made to a federal law enforcement officer. I know of no precedent for using a "likelihood" standard rather than the "beyond a reasonable

doubt" standard for a finding of fact essential to a criminal conviction; and the justifications the Court presents for that course in the present case are not convincing.

The Court maintains that the Government need not show beyond a reasonable doubt that the communication would have been to a federal officer because "[t]he relevant question concerns the defendant's intent." *Ante*, at 674. But that reasoning is directly contrary to § 1512(g)(2), which expressly states that the defendant's intent is *not* the relevant question with respect to the federal character of law enforcement officer meant to be deprived of the information. The Court's observation that "a defendant can kill a victim with *an intent* to prevent the victim from communicating with federal law enforcement officers even if there is some considerable doubt that any such communication would otherwise have taken place," *ibid.*, is completely irrelevant to the question presented.

The Court also proclaims that a narrower view "would conflict with the statute's basic purpose," which is to prevent witness tampering "at a time when the precise communication and nature of the officer who may receive it are not yet known." *Ante*, at 673. It cites no basis for attributing that purpose, and there is none—other than the fact that it supports the Court's outcome. Another purpose is just as likely—and indeed more likely, since it can be achieved without abandonment of the ancient rule that in criminal prosecutions facts must be found beyond a reasonable doubt. Murder, after all, is a crime, and often a capital crime, under all state laws. There is no reason to ascribe to Congress the "purpose" of transferring murder prosecutions that would ordinarily be brought in state court to federal court based on only a tangential federal interest. Congress was concerned with preserving the integrity and effectiveness of *federal* prosecutions, and where they are not clearly involved (as the ordinary beyond-a-reasonable-doubt standard would require) a federal murder prosecution has no proper place. Limited

as I have suggested, the federal law would still have ample scope, reaching what were surely the principal cases Congress had in mind—the killing of prospective witnesses in federal trials or in ongoing federal investigations. Here, as would be the case in many situations involving a merely hypothetical link to a federal investigation, Fowler murdered a state police officer. The natural place to have prosecuted him would have been state court.

The Court's analysis is even less persuasive in light of the rule of lenity, under which we must construe ambiguous criminal statutes in favor of the defendant. Here, the Court adopts a kind of rule of harshness, discarding the most straightforward construction of the text in favor of a textually implausible one, based on vague intuitions about the statute's purpose. The Court's opinion never cites the rule of lenity, probably because it cannot honestly say that the statute is so clear that "there is no ambiguity for the rule of lenity to resolve." *Burgess* v. *United States*, 553 U. S. 124, 136 (2008).

To make matters worse, the Court's standard is hopelessly indeterminate. The Government must show that a communication to a federal officer is "reasonably likely," which is less likely than "more likely than not," but more likely than "reasonably possible." *Ante*, at 675–678. I doubt that any jury can grasp the distinction between "you must find that a communication to a federal officer was reasonably likely" and "you must find that a communication to a federal officer was reasonably possible." Understandably, the Court refuses to give any examples of what "reasonably likely" means, except for an absurd example involving communications with Lithuanian police officers, *ante*, at 678—which obviously would not be "reasonably possible" either. Indeed, the Court refuses to apply its standard to the facts of this case, leaving that precarious task to the lower court.

III

The dissent adopts a view of the statute that is even broader than the Government's. It effectively contends that

the Government need not prove *anything* with respect to the fact that the communication sought to be prevented was "to a law enforcement officer . . . of the United States." As long as the Government can prove that the defendant sought to prevent the communication of information about a federal crime (including a federal crime that is also a state crime) it will necessarily have proved that the "set of law enforcement officers (whose identities were unknown to him)" he had in mind "included law enforcement officers who were employed by the United States." *Post*, at 687 (opinion of ALITO, J.). Conviction requires neither any specific intent regarding the federal status of the officer, nor even any likelihood that a communication to a federal officer would have occurred.

The principal defect in this interpretation is that it makes the words "of the United States" superfluous. Section 1512(a)(1)(C) specifically requires that the information the defendant seeks to prevent from being communicated be "information relating to the commission or possible commission of a Federal offense." If the phrase "to a law enforcement officer . . . of the United States" requires nothing more than this it is utterly without effect. The implication of this view is that Congress enacted § 1512(a)(1)(C)'s reference to "a law enforcement officer . . . of the United States," only to immediately nullify it by § 1512(g)(2)'s "no state of mind" provision. Not likely—and not sound statutory interpretation.

The dissent claims that my analysis "confuses what the prosecution must prove with what a rational jury may choose to infer in a particular case." *Post*, at 690. I find this contention difficult to understand. In the dissent's view, a properly instructed jury should be required to find *neither* that the defendant's *mens rea* had any connection to a federal officer, *nor* that the defendant's *actus reus* had any connection to a federal officer. It therefore follows that under the dissent's view, a properly instructed jury should be required to find nothing about a connection to a federal officer beyond the fact that the information related to a federal offense, which means that, unless the jury is acting irrationally or

is engaging in jury nullification, the "of the United States" provision is indeed superfluous. The dissent is correct that the proof of one element of a crime (such as an overt act) can sometimes be used to prove that a different element (such as a conspiratorial agreement) is satisfied, *ibid.*, n. 2; but in such cases, the jury is instructed that it is required to make a separate finding to convict (*e. g.*, that a conspiratorial agreement actually occurred). Here, the dissent identifies no separate finding the jury must make beyond the fact of a federal offense. The dissent also observes that when a defendant murders a federal officer to prevent him from communicating information about a nonfederal crime, he does not violate the statute. *Post*, at 691. This observation convincingly establishes that the statutory words "Federal offense" are not superfluous under the dissent's view, an observation irrelevant to my point that the dissent makes the statutory words "of the United States" superfluous.

The dissent contends that my interpretation "has no grounding in the language of the statute." *Post*, at 688. It asserts that "the text of the statute makes it perfectly clear that the federal officer requirement is exclusively an element of the defendant's *mens rea*." *Post*, at 689 (internal quotation marks omitted). Perhaps the only thing "perfectly clear" about this statute is that it states the precise opposite of that proposition: "[N]o state of mind need be proved with respect to the circumstance . . . that the law enforcement officer is an officer or employee of the Federal Government." § 1512(g)(2).

The dissent's interpretation would federalize crimes that have no connection to any federal investigation. A person caught by a state police officer with marijuana who murders the state police officer to cover it up could be prosecuted in federal court. That would approach the outer limits of Congress's enumerated powers. We have adopted a federalism principle that applies when a statute would render "traditionally local criminal conduct . . . a matter for federal en-

forcement": "[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance in the prosecution of crimes." *Jones* v. *United States*, 529 U. S. 848, 858 (2000) (internal quotation marks omitted). Thus, the dissent adds to the Court's "rule of harshness" a rule of antifederalism, under which a court must actually ignore a federal connection that Congress prescribed so as to avoid intrusion into traditionally local law enforcement.

* * *

Because the Government did not establish that Fowler intended to prevent a communication that, if made, would have been made to a federal law enforcement officer, there was insufficient evidence to convict him of violating § 1512(a)(1)(C). Since there remains, however, the question whether Fowler preserved this issue at trial or whether the inadequacy of the evidence constituted plain error, I concur in the Court's order vacating the judgment and remanding for resolution of that question.

JUSTICE ALITO, with whom JUSTICE GINSBURG joins, dissenting.

The decision of the Court fails to follow the clear language of 18 U. S. C. § 1512(a)(1)(C). Instead of heeding the statutory text, the Court has effectively amended the statute by adding a new element.

I

As relevant here, § 1512(a)(1)(C) makes it a federal crime "to kill another person, with intent to . . . prevent the communication by any person to a law enforcement officer . . . of the United States of information relating to the commission or possible commission of a Federal offense." Also important for present purposes is § 1512(g)(2), which provides, among other things, that "[i]n a prosecution for an offense under this section, no state of mind need be proved with

respect to the circumstance . . . that the law enforcement officer is an officer or employee of the Federal Government."

Putting these two provisions together, what had to be shown in the present case was as follows:

(1) Fowler killed Officer Horner,

(2) with the intent to prevent any person (*i. e.*, either Officer Horner or someone else) from communicating,

(3) to a person who (whether or not known as such to Fowler) was a federal law enforcement officer,

(4) information concerning the possible commission of a federal crime.

The question before us is whether there was sufficient evidence to support Fowler's conviction, and thus we must ask whether any rational jury could find that all of the elements noted above were adequately established. See *United States* v. *Powell*, 469 U. S. 57, 67 (1984).

There can be no dispute that there was sufficient evidence to establish elements (1), (2), and (4). That is, there was ample evidence to show (1) that Fowler killed Officer Horner, (2) that he did so with the intent to prevent the communication of information about what Officer Horner had seen, and (4) that this information concerned the possible commission of at least one federal crime—for example, conspiracy to rob a bank in violation of 18 U. S. C. §§ 371, 2113.

Thus, the only remaining question is whether there was enough evidence to permit a rational jury to infer that element (3) had been satisfied. And in connection with this question, it is important to keep in mind three things that element (3) *does not* require.

First, element (3) does not demand proof that Officer Horner, had he not been killed, would have reported—or even might have reported—what he saw to anyone, much less to a federal officer. Element (3) is solely concerned with a defendant's intent.

Second, while element (3) requires proof that Fowler intended to prevent *some* law enforcement officer from learn-

ing what Officer Horner had seen, element (3) does not require proof that Fowler had any particular law enforcement officer in mind. Section 1512(a)(1)(C) simply demands that the recipient of the information be "a law enforcement officer." Thus, it would be enough if Fowler's intent was to prevent Officer Horner's information from reaching *any* federal law enforcement officer.

Third, element (3) does not demand proof that Fowler *knew* that the generic officer noted above was a federal, as opposed to a state or local, law enforcement officer. Section 1512(g)(2) specifically rules out any such requirement. It is enough that our generic officer *was in fact* a federal officer.

When the meaning of element (3) is understood, it is clear that the decision of the Court of Appeals in this case must be affirmed. A rational jury could infer that Fowler's intent was to prevent information about what Officer Horner had seen from reaching any person who could bring about his arrest and conviction. In other words, a rational jury could infer that Fowler, in effect, had in mind a set of law enforcement officers (whose identities were unknown to him) who could set in motion a chain of events that would land him in prison. And since the information that Officer Horner possessed related to, among other things, the possible commission of a federal crime, a rational jury could infer that this group included law enforcement officers who were employed by the United States. The question presented in this case is as simple as that.

II

The Court begins on the right track, observing that the "relevant question concerns the defendant's intent" and that therefore "the Government need not show *beyond a reasonable doubt* (or even that it is *more likely than not*) that the hypothetical communication would have been to a federal officer." *Ante,* at 674 (emphasis in original). But the Court veers off course when it goes on to hold that the prosecution was required to show that, if Officer Horner had not been killed, there was a "*reasonable likelihood*" that his informa-

tion would have reached a federal officer. *Ante*, at 677 (emphasis in original).

The Court reaches this conclusion based on the meaning of the word "prevent." See *ante*, at 674–678. The Court starts with the proposition that "apart from mistakes . . . one cannot act with an 'intent to *prevent*' something that could not possibly have taken place regardless." *Ante*, at 674 (emphasis in original). I understand this to mean that a rational person will not take action to prevent something that the person knows is not possible. This is true, but it does not follow that a rational person will not take action to prevent an undesirable event unless the event is "reasonably likely." Risk-averse people do this all the time. They refrain from flying to avoid dying in a plane crash. They shun rooms on the upper floors of hotels to prevent being trapped in the event of a fire.

What matters under § 1512(a)(1)(C) is not the likelihood that information about a possible federal crime will be conveyed to a federal officer. What matters is the intent of the person who kills or attempts to kill in order to prevent that information from reaching such an officer. The Court's "reasonable likelihood" test has no basis in the text of § 1512(a)(1)(C).

The Court's test also makes little sense. Under this test, the application of § 1512(a)(1)(C) depends on a witness-killer's toleration of risk. According to the Court, § 1512(a)(1)(C) does not reach a killer who has so little regard for human life that he or she is willing to murder in order to prevent even a remote possibility that a witness will inform the authorities. It is hard to imagine why Congress would have wanted to draw this line.

III

JUSTICE SCALIA's interpretation of § 1512(a)(1)(C) also has no grounding in the language of the statute. He makes the fundamental mistake of confusing § 1512(a)(1)(C)'s *mens rea*

and *actus reus* elements. JUSTICE SCALIA states that what he terms "the 'federal officer' requirement" is "an element of the *actus reus*," *ante*, at 679 (opinion concurring in judgment), but the text of the statute makes it perfectly clear that "the 'federal officer' requirement" is exclusively an element of the defendant's *mens rea*.

The statute provides:

> "(a)(1) Whoever kills or attempts to kill another person, *with intent to*—
>
> . . . . . .
>
> "(C) prevent the communication by any person to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;
>
> "shall be punished as provided in paragraph (3)." § 1512(a)(1)(C) (emphasis added).

The *actus reus* of this provision is set out in its first eight words ("Whoever kills or attempts to kill another person"). Everything else—that is, everything that follows the phrase "with intent to"—concerns the defendant's *mens rea*.

JUSTICE SCALIA interprets § 1512(g)(2) as transforming "the 'federal officer' requirement" from an element of the *mens rea* into an element of the *actus reus*, see *ante*, at 679–680, but this reading is plainly wrong. Section 1512(g)(2) provides in relevant part:

> "In a prosecution for an offense under [18 U. S. C. § 1512], no state of mind need be proved with respect to the circumstance . . . that the law enforcement officer is an officer or employee of the Federal Government."

What this clearly means, as the Court recognizes, see *ante*, at 672–673, is simply that a defendant need not intend to prevent a qualifying communication from reaching an officer *whom the defendant knows to be a federal, as opposed to a*

state or local, law enforcement officer. But nothing in this provision adds to the *actus reus* elements in § 1512(a)(1)(C).

JUSTICE SCALIA's principal criticism of my interpretation of the statute is that "it makes the words 'of the United States' superfluous." *Ante,* at 683.[1] He incorrectly states that under my interpretation "the Government need not prove *anything* with respect to the fact that the communication sought to be prevented was 'to a law enforcement officer . . . of the United States'" and that "[a]s long as the Government can prove that the defendant sought to prevent the communication of information about a federal crime (including a federal crime that is also a state crime) it will necessarily have proved that [the set of officers whom the defendant had in mind] 'included law enforcement officers who were employed by the United States.'" *Ibid.* (emphasis in original). This description of my interpretation confuses what the prosecution must prove with what a rational jury may choose to infer in a particular case.

In order to violate § 1512(a)(1)(C), a defendant must have an intent regarding two things: first, the substance of the communication that the defendant wishes to prevent (information concerning, among other things, the commission or possible commission of a federal crime) and, second, the recipient of the communication (a law enforcement officer or judge who turns out to be a federal officer or judge).

It is true that evidence regarding the federal character of an offense may lead a rational jury to infer that the officers whom the defendant had in mind included federal officers.[2]

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[1] The Court makes a related argument. See *ante,* at 676–677.

[2] There is nothing unusual about the proposition that the proof of one element of a crime may provide a sufficient basis for inferring that another element may be satisfied. To take a common example, overt acts committed in furtherance of a conspiracy may be sufficient to permit a jury to infer that a conspiratorial agreement was reached. But that does not alter the need to prove beyond a reasonable doubt that such an agreement was reached.

But those two elements remain distinct; both must be proved beyond a reasonable doubt; and it is entirely possible for a defendant to satisfy one without also satisfying the other. For example, if a uniformed federal officer came upon a defendant during the commission of a purely state offense (for example, a murder, assault, or rape not committed in a federal enclave), the defendant might kill or attempt to kill the officer to prevent the officer from radioing in that information to the officer's superiors. This defendant would have the intent to prevent a communication to a federal officer, but there would be no violation of the statute because the information would not concern a federal crime. Thus, contrary to JUSTICE SCALIA's suggestion, under my interpretation, the two intent elements—relating to the substance of the feared communication and the identity of the feared recipient—are not redundant.

JUSTICE SCALIA invokes a rule that disfavors the interpretation of a federal criminal statute in a way that "'significantly change[s] the federal-state balance in the prosecution of crimes.'"[3] *Ante*, at 685 (quoting *Jones* v. *United States*, 529 U. S. 848, 858 (2000)). This rule, however, does not justify ignoring the plain terms of the statute.

* * *

The Court has effectively amended § 1512(a)(1)(C) by adding an element that is nowhere to be found in the text of the statute. And the Court's new element makes little sense and will create confusion for trial judges and juries. Following the language of § 1512(a)(1)(C), I would hold that the evidence in this case was sufficient to establish all of the elements that Congress saw fit to include. I therefore respectfully dissent.

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[3] The Court again makes a related argument. See *ante*, at 677.

Syllabus

CAMRETA *v.* GREENE, PERSONALLY AND AS NEXT FRIEND OF S. G., A MINOR, ET AL.

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

No. 09–1454. Argued March 1, 2011—Decided May 26, 2011*

Nearly a decade ago, petitioner Camreta, a state child protective services worker, and petitioner Alford, a county deputy sheriff, interviewed then 9-year-old S. G. at her Oregon elementary school about allegations that her father had sexually abused her. They did not have a warrant or parental consent to conduct the interview. S. G. eventually stated that she had been abused. Her father stood trial for that abuse, but the jury failed to reach a verdict and the charges were later dismissed. S. G.'s mother, respondent here (hereinafter S. G.), subsequently sued Camreta and Alford on S. G.'s behalf for damages under 42 U. S. C. § 1983, alleging that the in-school interview breached the Fourth Amendment's proscription on unreasonable seizures. The District Court granted summary judgment to the officials. The Ninth Circuit affirmed. The Court of Appeals first ruled that seizing S. G. absent a warrant, court order, parental consent, or exigent circumstances violated the Constitution. But the court further held that the officials were entitled to qualified immunity from damages liability because no clearly established law had warned them of the illegality of their conduct. The court explained that it had chosen to rule on the merits of the constitutional claim so that officials would be on notice that they could not dispense with traditional Fourth Amendment protections in this context. Although the judgment entered was in their favor, Camreta and Alford petitioned this Court to review the Ninth Circuit's ruling that their conduct violated the Fourth Amendment. S. G. declined to cross-petition for review of the decision that the officials have immunity.

Held:

1. This Court generally may review a lower court's constitutional ruling at the behest of government officials who have won final judgment on qualified immunity grounds. Pp. 700–709.

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*Together with No. 09–1478, *Alford, Deputy Sheriff, Deschutes County, Oregon* v. *Greene, Personally and as Next Friend of S. G., a Minor, et al.*, also on certiorari to the same court.

Syllabus

(a) The relevant statute confers unqualified power on this Court to grant certiorari "upon the petition of any party." 28 U. S. C. § 1254(1). That language covers petitions brought by litigants who have prevailed, as well as those who have lost, in the courts below. Pp. 700–701.

(b) An appeal brought by a prevailing party may satisfy Article III's case-or-controversy requirement. To comply with that requirement, litigants must demonstrate a "personal stake" in the suit. *Summers* v. *Earth Island Institute*, 555 U. S. 488, 493. The petitioner has such a stake when he has "suffered an 'injury in fact' " that is caused by "the conduct complained of" and that "will be 'redressed by a favorable decision.' " *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 560–561. And the opposing party also must have an ongoing interest in the dispute, so that the case features " 'that concrete adverseness which sharpens the presentation of issues.' " *Los Angeles* v. *Lyons*, 461 U. S. 95, 101. The parties must have the necessary stake not only at the outset of litigation, but throughout its course. *Arizonans for Official English* v. *Arizona*, 520 U. S. 43, 67. So long as the litigants possess the requisite personal stake, an appeal presents a case or controversy, no matter that the appealing party was the prevailing party below. See *Deposit Guaranty Nat. Bank* v. *Roper*, 445 U. S. 326, 332–336; *Electrical Fittings Corp.* v. *Thomas & Betts Co.*, 307 U. S. 241.

This Article III standard often will be met when immunized officials seek to challenge a determination that their conduct violated the Constitution because that ruling may have prospective effect on the parties. So long as it remains good law, an official who regularly engages in the challenged conduct as part of his job (as Camreta does) must either change the way he performs his duties or risk a meritorious damages action. The official thus can demonstrate injury, causation, and redressability. And conversely, if the person who initially brought the suit may again be subject to the challenged conduct, she has a stake in preserving the court's holding so that she will have ongoing protection from the practice. Pp. 701–703.

(c) This Court's prudential practice of declining to hear appeals by prevailing parties does not bar consideration of immunized officials' petitions. The Court has recognized exceptions to this prudential rule when there has been a "policy reaso[n] . . . of sufficient importance to allow an appeal" by the winner below. *Deposit Guaranty*, 445 U. S., at 336, n. 7. Just such a reason exists in qualified immunity cases. The constitutional rulings that prevailing parties ask the Court to consider in these cases have a significant future effect on the conduct of public officials and the policies of the government units to which they belong. The rulings are self-consciously designed to produce this effect by establishing controlling law and preventing invocations of immunity in later

cases. Moreover, they are so designed with this Court's permission, to promote clarity—and observance—of constitutional rules. Taken together, these features of qualified immunity cases support bending the usual rule to permit consideration of immunized officials' petitions.

To begin with the nature of these suits: Under § 1983 and *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388, a plaintiff may seek money damages from government officials who have violated her constitutional or statutory rights. But if those officials are entitled to qualified immunity, a court can dismiss the damages claim without ever deciding its merits—and so the qualified immunity situation threatens to leave standards of official conduct permanently in limbo. To prevent that problem, this Court has permitted lower courts to determine whether a right exists before examining whether it was clearly established. See, *e. g.*, *Pearson* v. *Callahan*, 555 U. S. 223, 237. Here, the Ninth Circuit followed exactly this two-step process so that it could settle a question of constitutional law and thereby guide the future conduct of officials.

Given its purpose and effect, such a decision is reviewable in this Court at an immunized official's behest. If the Court's usual prevailing party rule applied, the official would either have to acquiesce in a ruling he had no opportunity to contest in this Court, or defy the lower court's view, adhere to what has been declared an illegal practice, and invite further law suits and possible punitive damages. *Id.*, at 240–241. And applying this Court's usual bar on review would undermine the purpose of the two-step process, "which is to clarify constitutional rights without undue delay." *Bunting* v. *Mellen*, 541 U. S. 1019, 1024 (SCALIA, J., dissenting from denial of certiorari). Just as that purpose may justify an appellate court in reaching beyond an immunity defense to decide a constitutional issue, so too may it support this Court in reviewing the correctness of the lower court's decision.

This holding is limited in two respects. First, it addresses only this Court's authority to review cases in this procedural posture. The Court need not decide if an appellate court can also entertain an appeal from a party who has prevailed on immunity grounds. Second, the holding concerns only what the Court may review, not what the Court actually will choose to review. Going forward, the Court will consider prevailing parties' petitions one by one in accord with its usual standards for granting certiorari. Pp. 703–709.

2. A separate jurisdictional problem requires the Court to dismiss this case at the threshold: The case is moot. In a dispute of this kind, both the plaintiff and the defendant ordinarily retain a stake in the outcome. That is true of Camreta, who remains employed as a child protective services worker, and so has an interest in challenging the

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Ninth Circuit's ruling requiring him to obtain a warrant before conducting an in-school interview. But S. G. can no longer claim the plaintiff's usual stake in preserving the court's holding because she no longer needs protection from the challenged practice. She has moved to Florida and is only months away from her 18th birthday and, presumably, from her high school graduation. When "subsequent events ma[ke] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur," there is no live controversy to review. *United States* v. *Concentrated Phosphate Export Assn., Inc.*, 393 U. S. 199, 203.

When a civil suit becomes moot pending appeal, this Court has authority to "direct the entry of such appropriate judgment, decree, or order, or require such further proceedings . . . as may be just under the circumstances." 28 U. S. C. §2106. The Court's "established" practice is to vacate the judgment below, see, *e. g., United States* v. *Munsingwear, Inc.*, 340 U. S. 36, 39, to ensure that "those who have been prevented from obtaining the review to which they are entitled [are] not . . . treated as if there had been a review," *ibid.* The point of vacatur is to prevent an unreviewable decision "from spawning any legal consequences." *Id.*, at 40–41. A constitutional ruling in a qualified immunity case is a legally consequential decision. When happenstance prevents this Court's review of that ruling, the normal rule should apply: Vacatur rightly "strips the decision below of its binding effect," *Deakins* v. *Monaghan*, 484 U. S. 193, 200, and clears "the path for future relitigation," *Munsingwear*, 340 U. S., at 40. Because mootness has frustrated Camreta's ability to challenge the Ninth Circuit's ruling that he must obtain a warrant before interviewing a suspected child abuse victim at school, that part of the Ninth Circuit's decision must be vacated. Pp. 709–714.

588 F. 3d 1011, vacated in part and remanded.

KAGAN, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, GINSBURG, and ALITO, JJ., joined. SCALIA, J., filed a concurring opinion, *post*, p. 714. SOTOMAYOR, J., filed an opinion concurring in the judgment, in which BREYER, J., joined, *post*, p. 714. KENNEDY, J., filed a dissenting opinion, in which THOMAS, J., joined, *post*, p. 716.

John R. Kroger, Attorney General of Oregon, argued the cause for petitioners in both cases. With him on the briefs for petitioner in No. 09–1454 were *Mary H. Williams*, Solicitor General, and *Anna Joyce*, Deputy Solicitor General. *Christopher Dennis Bell* and *Steven Edward Griffin* filed briefs for petitioner in No. 09–1478.

Counsel

Acting Principal Deputy Solicitor General Kruger argued the cause for the United States as *amicus curiae* in support of petitioners. With her on the brief were *Acting Solicitor General Katyal*, *Assistant Attorneys General West* and *Breuer*, *Acting Deputy Solicitor General McLeese*, *Eric J. Feigin*, *Thomas M. Bondy*, *Sushma Soni*, and *John M. Pellettieri.*

Carolyn A. Kubitschek argued the cause for respondents in both cases. With her on the brief were *David J. Lansner*, *Carolyn Shapiro*, *Mikel R. Miller*, and *Robert E. Lehrer.*†

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†Briefs of *amici curiae* urging reversal in both cases were filed for the State of Arizona et al. by *Terry Goddard*, Attorney General of Arizona, *Paula S. Bickett*, Chief Counsel, and *Kathleen P. Sweeney*, *Dawn R. Williams*, and *Michelle R. Nimmo*, Assistant Attorneys General, by *Richard A. Svobodny*, Acting Attorney General of Alaska, and *Russell A. Suzuki*, Acting Attorney General of Hawaii, and by the Attorneys General for their respective jurisdictions as follows: *Troy King* of Alabama, *Dustin McDaniel* of Arkansas, *Edmund G. Brown, Jr.*, of California, *John W. Suthers* of Colorado, *Joseph R. Biden III* of Delaware, *Peter J. Nickles* of the District of Columbia, *Bill McCollum* of Florida, *Thurbert E. Baker* of Georgia, *Lawrence G. Wasden* of Idaho, *Lisa Madigan* of Illinois, *Thomas J. Miller* of Iowa, *Steve Six* of Kansas; *Jack Conway* of Kentucky, *James D. "Buddy" Caldwell* of Louisiana, *Janet T. Mills* of Maine, *Douglas F. Gansler* of Maryland, *Michael A. Cox* of Michigan, *Lori Swanson* of Minnesota, *Jim Hood* of Mississippi, *Steve Bullock* of Montana, *Jon Bruning* of Nebraska, *Catherine Cortez Masto* of Nevada, *Michael A. Delaney* of New Hampshire, *Paula T. Dow* of New Jersey, *Gary K. King* of New Mexico, *Wayne Stenehjem* of North Dakota, *Thomas W. Corbett, Jr.*, of Pennsylvania, *Patrick C. Lynch* of Rhode Island, *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 H. Sorrell* of Vermont, *Robert M. McKenna* of Washington, *Darrell V. McGraw, Jr.*, of West Virginia, *J. B. Van Hollen* of Wisconsin, and *Bruce A. Salzburg* of Wyoming; for the Center on the Administration of Criminal Law by *Michael Y. Scudder, Jr.*, and *Anthony S. Barkow;* for the Cook County Public Guardian by *Kass A. Plain;* and for the National Association of Social Workers et al. by *Mary M. Calkins*, *George E. Quillin*, and *Carolyn I. Polowy.*

Briefs of *amici curiae* urging affirmance in both cases were filed for the American Family Rights Association et al. by *Christopher Landau;* for

JUSTICE KAGAN delivered the opinion of the Court.

Almost a decade ago, a state child protective services worker and a county deputy sheriff interviewed a girl at her elementary school in Oregon about allegations that her father had sexually abused her. The girl's mother subsequently sued the government officials on the child's behalf for damages under Rev. Stat. § 1979, 42 U. S. C. § 1983, claiming that the interview infringed the Fourth Amendment. The United States Court of Appeals for the Ninth Circuit agreed, ruling that the officials had violated the Constitution

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the Center for Law and Education et al. by *Linda T. Coberly* and *Gene C. Schaerr;* for the Eagle Forum Education & Legal Defense Fund, Inc., by *Lawrence J. Joseph;* for the Family Defense Center by *Diane L. Redleaf;* for the Juvenile Law Center et al. by *Marsha Levick* and *Lourdes Rosado;* for the Legal Aid Society, Juvenile Rights Practice, by *Steven Banks* and *Gary Solomon;* for the Loyola *Civitas* Childlaw Center et al. by *Bruce A. Boyer;* for the National Association of Criminal Defense Lawyers et al. by *Mark R. Brown* and *David M. Porter;* for the New York University School of Law Family Defense Clinic et al. by *Charles L. Kerr*, *Martin Guggenheim*, and *Susan Jacobs;* for the Pacific Justice Institute et al. by *Dennis B. Atchley*, *Donnie R. Cox*, *David J. Beauvais*, *Shawn A. McMillan*, and *Paul W. Leehey;* and for the Society of Catholic Social Scientists by *Stephen M. Krason.*

Briefs of *amici curiae* were filed in both cases for the Battered Women's Resource Center et al. by *Lauren E. Handel* and *Malinda Morain;* for the California State Association of Counties et al. by *Gary C. Seiser* and *John E. B. Myers;* for the Center for Individual Rights by *Michael E. Rosman;* for the Children's Advocacy Institute by *Robert C. Fellmeth* and *Julianne D'Angelo Fellmeth;* for the Children's Law Section of the State Bar of Michigan by *Elizabeth S. Warner;* for the District Attorneys of San Diego County et al. by *Sophia G. Roach;* for the Family Research Council et al. by *David Austin R. Nimocks;* for Legal Services for Children by *John A. Basinger*, *Michael Atkins*, and *Angela C. Vigil;* for Liberty Counsel by *Mathew D. Staver*, *Anita L. Staver*, *Stephen M. Crampton*, and *Mary E. McAlister;* for the National School Boards Association et al. by *Francisco M. Negrón, Jr.*, *Matthew W. Wright*, and *David K. Pauole;* and for The Rutherford Institute by *John W. Whitehead.*

Mr. Cooley, pro se, *Irene T. Wakabayashi*, *Phyllis C. Asayama*, and *Cassandra Hart* filed a brief for Los Angeles County District Attorney Steve Cooley et al. in No. 09–1478.

by failing to obtain a warrant to conduct the interview. But the Court of Appeals further held that qualified immunity shielded the officials from monetary liability because the constitutional right at issue was not clearly established under existing law.

The two officials sought this Court's review of the Ninth Circuit's ruling on the Fourth Amendment. We granted their petitions to examine two questions. First, may government officials who prevail on grounds of qualified immunity obtain our review of a court of appeals' decision that their conduct violated the Constitution? And second, if we may consider cases in this procedural posture, did the Ninth Circuit correctly determine that this interview breached the Fourth Amendment?

We conclude that this Court generally may review a lower court's constitutional ruling at the behest of a government official granted immunity. But we may not do so in this case for reasons peculiar to it. The case has become moot because the child has grown up and moved across the country, and so will never again be subject to the Oregon in-school interviewing practices whose constitutionality is at issue. We therefore do not reach the Fourth Amendment question in this case. In line with our normal practice when mootness frustrates a party's right to appeal, see *United States* v. *Munsingwear, Inc.*, 340 U. S. 36, 39 (1950), we vacate the part of the Ninth Circuit's opinion that decided the Fourth Amendment issue.

I

In February 2003, police arrested Nimrod Greene for suspected sexual abuse of a young boy unrelated to him. During the investigation of that offense, the boy's parents told police that they suspected Greene of molesting his 9-year-old daughter S. G. The police reported this information to the Oregon Department of Human Services, which assigned petitioner Bob Camreta, a child protective services caseworker, to assess S. G.'s safety. Several days later, Camreta, accom-

panied by petitioner James Alford, a Deschutes County deputy sheriff, went to S. G.'s elementary school and interviewed her about the allegations. Camreta and Alford did not have a warrant, nor had they obtained parental consent to conduct the interview. Although S. G. at first denied that her father had molested her, she eventually stated that she had been abused. Greene was indicted and stood trial for sexually abusing S. G., but the jury failed to reach a verdict and the charges were later dismissed.

Respondent Sarah Greene, S. G.'s mother, subsequently sued Camreta and Alford on S. G.'s behalf[1] for damages under 42 U. S. C. § 1983, which authorizes suits against state officials for violations of constitutional rights. S. G. alleged that the officials' in-school interview had breached the Fourth Amendment's proscription on unreasonable seizures.[2]

The District Court granted summary judgment to Camreta and Alford, and the Ninth Circuit affirmed. The Court of Appeals first ruled that the interview violated S. G.'s rights because Camreta and Alford had "seize[d] and interrogate[d] S. G. in the absence of a warrant, a court order, exigent circumstances, or parental consent." 588 F. 3d 1011, 1030 (2009) (footnote omitted). But the court further held that the officials were entitled to qualified immunity from damages liability because no clearly established law had warned them of the illegality of their conduct. *Id.*, at 1031–1033.

The Ninth Circuit explained why it had chosen to rule on the merits of the constitutional claim, rather than merely hold that the officials were immune from suit. By addressing the legality of the interview, the court said, it could "pro-

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[1] Because Greene filed suit as next friend for her minor daughter, we will refer to respondent as S. G. throughout this opinion.

[2] S. G. also sued Deschutes County, alleging that it has a policy of unconstitutionally seizing children in public schools. See 588 F. 3d 1011, 1020, n. 4 (CA9 2009). The District Court rejected this claim, and S. G. did not appeal that ruling to the Ninth Circuit. *Ibid.*

vide guidance to those charged with the difficult task of protecting child welfare within the confines of the Fourth Amendment." *Id.*, at 1022. That guidance came in no uncertain terms: "[G]overnment officials investigating allegations of child abuse," the court warned, "should cease operating on the assumption that a 'special need' automatically justifies dispensing with traditional Fourth Amendment protections in this context." *Id.*, at 1033.

Although the judgment entered was in their favor, Camreta and Alford petitioned this Court to review the Ninth Circuit's ruling that their conduct violated the Fourth Amendment. S. G. declined to cross-petition for review of the decision that the officials have immunity. We granted certiorari. 562 U. S. 960 (2010).

II

We first consider our ability to act on a petition brought by government officials who have won final judgment on grounds of qualified immunity, but who object to an appellate court's ruling that they violated the plaintiff's constitutional rights. Camreta and Alford are, without doubt, prevailing parties. The Ninth Circuit's decision shielded them from monetary liability, and S. G. chose not to contest that ruling. So whatever else follows, they will not have to pay S. G. the damages she sought. The question we confront is whether we may nonetheless review the Court of Appeals' holding that the officials violated the Constitution.

The statute governing this Court's jurisdiction authorizes us to adjudicate a case in this posture, and S. G. does not contend otherwise. The relevant provision confers unqualified power on this Court to grant certiorari "upon the petition of *any* party." 28 U. S. C. § 1254(1) (emphasis added). That language covers petitions brought by litigants who have prevailed, as well as those who have lost, in the court below. See E. Gressman, K. Geller, S. Shapiro, T. Bishop, &

E. Hartnett, Supreme Court Practice 87 (9th ed. 2007) (hereinafter Stern & Gressman).

S. G., however, alleges two impediments to our exercise of statutory authority here, one constitutional and the other prudential. First, she claims that Article III bars review because petitions submitted by immunized officials present no case or controversy. See Brief for Respondent 31–39. Second, she argues that our settled practice of declining to hear appeals by prevailing parties should apply with full force when officials have obtained immunity. See *id.*, at 24–27. We disagree on both counts.

A

Article III of the Constitution grants this Court authority to adjudicate legal disputes only in the context of "Cases" or "Controversies." To enforce this limitation, we demand that litigants demonstrate a "personal stake" in the suit. *Summers* v. *Earth Island Institute*, 555 U. S. 488, 493 (2009) (internal quotation marks omitted); see also *United States Parole Comm'n* v. *Geraghty*, 445 U. S. 388, 395–397 (1980). The party invoking the Court's authority has such a stake when three conditions are satisfied: The petitioner must show that he has "suffered an injury in fact" that is caused by "the conduct complained of" and that "will be redressed by a favorable decision." *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 560–561 (1992) (internal quotation marks omitted). And the opposing party also must have an ongoing interest in the dispute, so that the case features "that concrete adverseness which sharpens the presentation of issues." *Los Angeles* v. *Lyons*, 461 U. S. 95, 101 (1983) (internal quotation marks omitted). To ensure a case remains "fit for federal-court adjudication," the parties must have the necessary stake not only at the outset of litigation, but throughout its course. *Arizonans for Official English* v. *Arizona*, 520 U. S. 43, 67 (1997).

We have previously recognized that an appeal brought by a prevailing party may satisfy Article III's case-or-controversy requirement. See *Deposit Guaranty Nat. Bank* v. *Roper*, 445 U. S. 326, 332–336 (1980). Indeed, we have twice before allowed a party for whom judgment was entered to challenge an unfavorable lower court ruling. See *ibid.; Electrical Fittings Corp.* v. *Thomas & Betts Co.*, 307 U. S. 241 (1939).[3] In that context as in others, we stated, the critical question under Article III is whether the litigant retains the necessary personal stake in the appeal. *Deposit Guaranty*, 445 U. S., at 334. As we will explain, a court will usually invoke rules of "federal appellate practice" to decline review of a prevailing party's challenge even when he has the requisite stake. *Id.*, at 333; see *infra*, at 703–704. But in such a case, Article III is not what poses the bar; these rules of practice "d[o] not have [their] source in the jurisdictional limitations" of the Constitution. *Deposit Guaranty*, 445 U. S., at 333–334. So long as the litigants possess the personal stake discussed above, an appeal presents a case or controversy, no matter that the appealing party was the prevailing party below.

This Article III standard often will be met when immunized officials seek to challenge a ruling that their conduct violated the Constitution. That is not because a court has made a retrospective judgment about the lawfulness of the officials' behavior, for that judgment is unaccompanied by any personal liability. Rather, it is because the judgment may have prospective effect on the parties. The court in such a case says: "Although this official is immune from dam-

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[3] The dissent discusses *Deposit Guaranty* and *Electrical Fittings* at length in an effort to distinguish them from this suit. See *post*, at 718–722 (opinion of KENNEDY, J.). But we do not say those cases are foursquare with this one on their facts; we rely on them only for the proposition that this Court has previously identified no special Article III bar on review of appeals brought by parties who obtained a judgment in their favor below. The dissent does not, because it cannot, dispute that simple point.

ages today, what he did violates the Constitution and he or anyone else who does that thing again will be personally liable." If the official regularly engages in that conduct as part of his job (as Camreta does), he suffers injury caused by the adverse constitutional ruling. So long as it continues in effect, he must either change the way he performs his duties or risk a meritorious damages action. Cf. *id.*, at 337–338 (discussing prevailing party's stake in a ruling's prospective effects). Only by overturning the ruling on appeal can the official gain clearance to engage in the conduct in the future. He thus can demonstrate, as we demand, injury, causation, and redressability.[4] And conversely, if the person who initially brought the suit may again be subject to the challenged conduct, she has a stake in preserving the court's holding. See *Erie* v. *Pap's A. M.*, 529 U. S. 277, 287–289 (2000); *Honig* v. *Doe*, 484 U. S. 305, 318–323 (1988); cf. *Lyons*, 461 U. S., at 111 (examining whether the plaintiff had shown "a sufficient likelihood that he will again be wronged in a similar way"). Only if the ruling remains good law will she have ongoing protection from the practice.

We therefore reject S. G.'s view that Article III bars us from adjudicating any and all challenges brought by government officials who have received immunity below. That the victor has filed the appeal does not deprive us of jurisdiction. The parties in such cases may yet have a sufficient "interest in the outcome of [a litigated] issue" to present a case or controversy. *Deposit Guaranty*, 445 U. S., at 336, n. 7.

B

Article III aside, an important question of judicial policy remains. As a matter of practice and prudence, we have generally declined to consider cases at the request of a pre-

[4] Contrary to the dissent's view, see *post*, at 726, the injury to the official thus occurs independent of any future suit brought by a third party. Indeed, no such suit is likely to arise because the prospect of damages liability will force the official to change his conduct.

vailing party, even when the Constitution allowed us to do so. See, *e. g.*, *Gunn* v. *University Comm. to End War in Viet Nam*, 399 U. S. 383, 390, n. 5 (1970); *New York Telephone Co.* v. *Maltbie*, 291 U. S. 645, 646 (1934) *(per curiam);* see also *Bunting* v. *Mellen*, 541 U. S. 1019, 1023 (2004) (SCALIA, J., dissenting from denial of certiorari) ("[O]ur practice reflects a 'settled refusal' to entertain an appeal by a party on an issue as to which he prevailed" (quoting Stern & Gressman 79 (8th ed. 2002))). Our resources are not well spent superintending each word a lower court utters en route to a final judgment in the petitioning party's favor. See *California* v. *Rooney*, 483 U. S. 307, 311 (1987) *(per curiam)* ("[T]hat the Court of Appeal reached its decision through analysis different than this Court might have used does not make it appropriate . . . for the prevailing party to request us to review it"). We therefore have adhered with some rigor to the principle that "[t]his Court reviews judgments, not statements in opinions." *Ibid.* (internal quotation marks omitted). On the few occasions when we have departed from that principle, we have pointed to a "policy reaso[n] . . . of sufficient importance to allow an appeal" by the winner below. *Deposit Guaranty*, 445 U. S., at 336, n. 7.

We think just such a reason places qualified immunity cases in a special category when it comes to this Court's review of appeals brought by winners. The constitutional determinations that prevailing parties ask us to consider in these cases are not mere dicta or "statements in opinions." *Rooney*, 483 U. S., at 311 (internal quotation marks omitted); see *Bunting*, 541 U. S., at 1023 (SCALIA, J., dissenting from denial of certiorari) (stating that such a determination is "*not* mere dictum in the ordinary sense"). They are rulings that have a significant future effect on the conduct of public officials—both the prevailing parties and their co-workers—and the policies of the government units to which they belong. See *supra*, at 702–703. And more: they are rulings self-consciously designed to produce this effect, by establishing

controlling law and preventing invocations of immunity in later cases. And still more: they are rulings designed this way with this Court's permission, to promote clarity—and observance—of constitutional rules. We describe in more detail below these features of the qualified immunity world and why they came to be. We hold that taken together, they support bending our usual rule to permit consideration of immunized officials' petitions.

To begin, then, with the nature of these suits: Under § 1983 (invoked in this case) and *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971), a plaintiff may seek money damages from government officials who have violated her constitutional or statutory rights. But to ensure that fear of liability will not "unduly inhibit officials in the discharge of their duties," *Anderson* v. *Creighton*, 483 U. S. 635, 638 (1987), the officials may claim qualified immunity; so long as they have not violated a "clearly established" right, they are shielded from personal liability, *Harlow* v. *Fitzgerald*, 457 U. S. 800, 818 (1982). That means a court can often avoid ruling on the plaintiff's claim that a particular right exists. If prior case law has not clearly settled the right, and so given officials fair notice of it, the court can simply dismiss the claim for money damages. The court need never decide whether the plaintiff's claim, even though novel or otherwise unsettled, in fact has merit.

And indeed, our usual adjudicatory rules suggest that a court *should* forbear resolving this issue. After all, a "long-standing principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them." *Lyng* v. *Northwest Indian Cemetery Protective Assn.*, 485 U. S. 439, 445 (1988); see also *Ashwander* v. *TVA*, 297 U. S. 288, 346–347 (1936) (Brandeis, J., concurring). In this category of qualified immunity cases, a court can enter judgment without ever ruling on the (perhaps difficult) constitutional claim the plaintiff has raised.

Small wonder, then, that a court might leave that issue for another day.

But we have long recognized that this day may never come—that our regular policy of avoidance sometimes does not fit the qualified immunity situation because it threatens to leave standards of official conduct permanently in limbo. *County of Sacramento* v. *Lewis*, 523 U. S. 833, 841, n. 5 (1998). Consider a plausible but unsettled constitutional claim asserted against a government official in a suit for money damages. The court does not resolve the claim because the official has immunity. He thus persists in the challenged practice; he knows that he can avoid liability in any future damages action, because the law has still not been clearly established. Another plaintiff brings suit, and another court both awards immunity and bypasses the claim. And again, and again, and again. So the moment of decision does not arrive.[5] Courts fail to clarify uncertain questions, fail to address novel claims, fail to give guidance to officials about how to comply with legal requirements. See, *e. g.*, *ibid.; Wilson* v. *Layne*, 526 U. S. 603, 609 (1999). Qualified immunity thus may frustrate "the development of constitutional precedent" and the promotion of law-abiding behavior. *Pearson* v. *Callahan*, 555 U. S. 223, 237 (2009).

For this reason, we have permitted lower courts to avoid avoidance—that is, to determine whether a right exists before examining whether it was clearly established. See, *e. g.*, *ibid.; Lewis*, 523 U. S., at 841, n. 5. Indeed, for some

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[5] The constitutional issue could arise in a case in which qualified immunity is unavailable—for example, "in a suit to enjoin future conduct, in an action against a municipality, or in litigating a suppression motion in a criminal proceeding." *Lewis*, 523 U. S., at 841, n. 5. A decision in such a case would break the repetitive cycle of qualified immunity defenses described above. But some kinds of constitutional questions do not often come up in these alternative settings. *Pearson* v. *Callahan*, 555 U. S. 223, 236 (2009); see *Lewis*, 523 U. S., at 841, n. 5 (noting that "these avenues w[ill] not necessarily be open").

time we *required* courts considering qualified immunity claims to first address the constitutional question, so as to promote "the law's elaboration from case to case." *Saucier* v. *Katz*, 533 U. S. 194, 201 (2001). More recently, we have left this matter to the discretion of lower courts, and indeed detailed a range of circumstances in which courts should address only the immunity question. See *Pearson*, 555 U. S., at 236–242. In general, courts should think hard, and then think hard again, before turning small cases into large ones. But it remains true that following the two-step sequence—defining constitutional rights and only then conferring immunity—is sometimes beneficial to clarify the legal standards governing public officials. *Id.*, at 236; see *id.*, at 236–242 (discussing factors courts should consider in making this determination).

Here, the Court of Appeals followed exactly this two-step process, for exactly the reasons we have said may in select circumstances make it "advantageous." *Id.*, at 242. The court, as noted earlier, explained that it was "address[ing] both prongs of the qualified immunity inquiry . . . to provide guidance to those charged with the difficult task of protecting child welfare within the confines of the Fourth Amendment." 588 F. 3d, at 1022. To that end, the court adopted constitutional standards to govern all in-school interviews of suspected child abuse victims. See *id.*, at 1030. And the court specifically instructed government officials to follow those standards going forward—to "cease operating on the assumption" that warrantless interviews are permitted. See *id.*, at 1033. With the law thus clearly established, officials who conduct this kind of interview will not receive immunity in the Ninth Circuit. And the State of Oregon has done just what we would expect in the wake of the court's decision: It has provided revised legal advice, consonant with the Ninth Circuit's ruling, to child protective services workers wishing to interview children in schools. See Tr. of Oral Arg. 14. The court thus accomplished what it set out to do:

settle a question of constitutional law and thereby guide the conduct of officials.

Given its purpose and effect, such a decision is reviewable in this Court at the behest of an immunized official. No mere dictum, a constitutional ruling preparatory to a grant of immunity creates law that governs the official's behavior. If our usual rule pertaining to prevailing parties applied, the official would "fac[e] an unenviable choice": He must either acquiesce in a ruling he had no opportunity to contest in this Court, or "defy the views of the lower court, adhere to practices that have been declared illegal, and thus invite new suits and potential punitive damages." *Pearson*, 555 U. S., at 240–241 (internal quotation marks and brackets omitted). And if our usual bar on review applied, it would undermine the very purpose served by the two-step process, "which is to clarify constitutional rights without undue delay." *Bunting*, 541 U. S., at 1024 (SCALIA, J., dissenting from denial of certiorari). This Court, needless to say, also plays a role in clarifying rights. Just as that purpose may justify an appellate court in reaching beyond an immunity defense to decide a constitutional issue, so too that purpose may support this Court in reviewing the correctness of the lower court's decision.[6]

We emphasize, however, two limits of today's holding. First, it addresses only our own authority to review cases in this procedural posture. The Ninth Circuit had no occasion to consider whether it could hear an appeal from an immu-

[6] The dissent complains that our decision "allows plaintiffs to obtain binding constitutional determinations on the merits that lie beyond this Court's jurisdiction to review." *Post*, at 725. But that is not the case. It is not this decision but our prior precedents that allow lower courts to issue "binding constitutional determinations" in qualified immunity cases even when the plaintiff is not entitled to money damages. And it is not our decision but the dissent that would insulate these rulings from this Court's power to review.

nized official: In that court, after all, S. G. appealed the judgment in the officials' favor. We therefore need not and do not decide if an appellate court, too, can entertain an appeal from a party who has prevailed on immunity grounds.[7] Second, our holding concerns only what this Court *may* review; what we actually will choose to review is a different matter. That choice will be governed by the ordinary principles informing our decision whether to grant certiorari—a "power [we] . . . sparingly exercis[e]." *Forsyth* v. *Hammond*, 166 U. S. 506, 514 (1897); see also *id.*, at 514–515 (this Court grants review "only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict [in the lower courts], or some matter affecting the interests of this nation . . . demands such exercise"); this Court's Rule 10. Our decision today does no more than exempt one special category of cases from our usual rule against considering prevailing parties' petitions. Going forward, we will consider these petitions one by one in accord with our usual standards.

III

Although we reject S. G.'s arguments for dismissing this case at the threshold, we find that a separate jurisdictional

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[7] We note, however, that the considerations persuading us to permit review of petitions in this posture may not have the same force as applied to a district court decision. "A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case." 18 J. Moore et al., Moore's Federal Practice § 134.02[1][d], p. 134–26 (3d ed. 2011). Many Courts of Appeals therefore decline to consider district court precedent when determining if constitutional rights are clearly established for purposes of qualified immunity. See, *e. g.*, *Kalka* v. *Hawk*, 215 F. 3d 90, 100 (CADC 2000) (Tatel, J., concurring in part and concurring in judgment) (collecting cases). Otherwise said, district court decisions—unlike those from the courts of appeals—do not necessarily settle constitutional standards or prevent repeated claims of qualified immunity.

problem requires that result: This case, we conclude, is moot.[8]

As we explained above, *supra*, at 702–703, in a dispute of this kind, both the plaintiff and the defendant ordinarily retain a stake in the outcome. That is true of one defendant here: Camreta remains employed as a child protective services worker, so he has an interest in challenging the Ninth Circuit's ruling requiring him to obtain a warrant before conducting an in-school interview.[9] But S. G. can no longer claim the plaintiff's usual stake in preserving the court's

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[8] JUSTICE SOTOMAYOR maintains that, because this case is moot, "[t]here is no warrant for reaching th[e] question" whether immunized officials may obtain our consideration of an adverse constitutional ruling. *Post*, at 715 (opinion concurring in judgment). But this Court has never held that it may consider only one threshold issue per case. And here, as we will explain, *infra*, at 712–714, and n. 10, our discussion of reviewability is critical to our ultimate disposition of this suit. Moreover, that issue was fully litigated in this Court. We granted certiorari to consider whether "the Ninth Circuit's constitutional ruling [is] reviewable, notwithstanding that [the Court of Appeals] ruled in [the officials'] favor on qualified immunity grounds." Pet. for Cert. in No. 09–1454, p. i. And all the parties, as well as the United States as *amicus curiae*, addressed that question in their briefs and oral arguments. Compare Brief for Petitioner in No. 09–1454, pp. 41–44, Brief for Petitioner in No. 09–1478, p. 4, n. 1, Reply Brief for Petitioner in No. 09–1454, pp. 3–13, Reply Brief for Petitioner in No. 09–1478, pp. 5–6, Brief for United States as *Amicus Curiae* 11–20, and Tr. of Oral Arg. 4–14, 17–24, 54–58, with Brief for Respondent 24–42 and Tr. of Oral Arg. 27–31, 46–52.

[9] The same cannot be said for Deputy Sheriff Alford. In their briefs, the parties informed us that Alford no longer works for Deschutes County or in law enforcement. See Brief for Respondent 1, n. 2; Reply Brief for Petitioner in No. 09–1478. Because Alford will not again participate in a child abuse investigation, he has lost his interest in the Fourth Amendment ruling. See *supra*, at 702–703; cf. *Arizonans for Official English* v. *Arizona*, 520 U. S. 43, 67 (1997) (holding that the plaintiff's challenge to a state law affecting the performance of her job duties was mooted when she left state employment). But in light of Camreta's continuing stake, Alford's altered circumstances are immaterial to our resolution of this dispute, and we do not decide any questions that would arise if he were the only defendant.

holding because she is no longer in need of any protection from the challenged practice. After we granted certiorari, we discovered that S. G. has "moved to Florida, and ha[s] no intention of relocating back to Oregon." Brief for Respondent 13, n. 13. What is more, S. G. is now only months away from her 18th birthday—and, presumably, from her high school graduation. See *id.*, at 31. S. G. therefore cannot be affected by the Court of Appeals' ruling; she faces not the slightest possibility of being seized in a school in the Ninth Circuit's jurisdiction as part of a child abuse investigation. When "subsequent events ma[ke] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur," we have no live controversy to review. *United States* v. *Concentrated Phosphate Export Assn., Inc.*, 393 U. S. 199, 203 (1968); see, *e. g., Atherton Mills* v. *Johnston*, 259 U. S. 13, 15–16 (1922) (suit contesting the validity of a child labor statute mooted when plaintiff-child was "[no longer] within the ages affected by the act"); *DeFunis* v. *Odegaard*, 416 U. S. 312 (1974) *(per curiam)* (suit challenging law school admissions policy mooted when plaintiff neared graduation). Time and distance combined have stymied our ability to consider this petition.

Camreta makes only one counterargument: He avers that S. G. has a continuing interest in the Ninth Circuit's constitutional ruling because it may help her establish a municipal liability claim against Deschutes County. See Tr. of Oral Arg. 7; *id.*, at 8. S. G.'s initial complaint charged that the county has an official policy of unconstitutionally subjecting schoolchildren to police interrogation. See n. 2, *supra.* Finding no evidence of such a policy (even assuming that an unlawful seizure had occurred in this case), the District Court granted summary judgment to the county, App. to Pet. for Cert. in No. 09–1454, pp. 66–67, and S. G. did not appeal that ruling, 588 F. 3d, at 1020, n. 4. And although S. G. recently sought to reinstate her claim against the county, the District Court denied that motion. 6:05–cv–06047–AA,

Docket Entry No. 139 (D Ore., Jan. 4, 2011). Whatever interest S. G. might have were her municipal liability claim still pending (an issue we need not and do not decide), we do not think S. G.'s *dismissed* claim against a *different* defendant involving a *separate* legal theory can save this case from mootness. See *Commodity Futures Trading Comm'n* v. *Board of Trade of Chicago*, 701 F. 2d 653, 656 (CA7 1983) (Posner, J.) ("[O]ne can never be certain that findings made in a decision concluding one lawsuit will not some day . . . control the outcome of another suit. But if that were enough to avoid mootness, no case would ever be moot").

We thus must decide how to dispose of this case. When a civil suit becomes moot pending appeal, we have the authority to "direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances." 28 U. S. C. § 2106. Our "established" (though not exceptionless) practice in this situation is to vacate the judgment below. See *Munsingwear*, 340 U. S., at 39; *Alvarez* v. *Smith*, 558 U. S. 87, 94 (2009). "A party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance," we have emphasized, "ought not in fairness be forced to acquiesce in" that ruling. *U. S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 513 U. S. 18, 25 (1994). The equitable remedy of vacatur ensures that "those who have been prevented from obtaining the review to which they are entitled [are] not . . . treated as if there had been a review." *Munsingwear*, 340 U. S., at 39.[10]

[10] Our analysis of the proper disposition of this case follows from our conclusion that government officials who secure a favorable judgment on immunity grounds may obtain our review of an adverse constitutional holding. See *supra*, at 708. As just noted, *Munsingwear* justified vacatur to protect a litigant who had the right to appeal but lost that opportunity due to happenstance. 340 U. S., at 39, 41. We have therefore left lower court decisions intact when mootness did not deprive the appealing party of any review to which he was entitled. See, *e. g.*, *U. S. Bancorp Mortgage Co.*, 513 U. S., at 25 (holding that the appealing party had "sur-

S. G. contends that vacatur is inappropriate in the qualified immunity context because that disposition would "undermine" the Court of Appeals' choice to "decide [a] constitutional questio[n]" to govern future cases. Brief for Respondent 41–42; Tr. of Oral Arg. 47. Far from counseling against vacatur, S. G.'s argument reveals the necessity of that procedural course. The point of vacatur is to prevent an unreviewable decision "from spawning any legal consequences," so that no party is harmed by what we have called a "preliminary" adjudication. *Munsingwear*, 340 U. S., at 40–41. As we have just explained, a constitutional ruling in a qualified immunity case is a legally consequential decision; that is the very reason we think it appropriate for review even at the behest of a prevailing party. See *supra*, at 704–708. When happenstance prevents that review from occurring, the normal rule should apply: Vacatur then rightly "strips the decision below of its binding effect," *Deakins* v. *Monaghan*, 484 U. S. 193, 200 (1988), and "clears the path for future relitigation," *Munsingwear*, 340 U. S., at 40.

In this case, the happenstance of S. G.'s moving across country and becoming an adult has deprived Camreta of his appeal rights. Mootness has frustrated his ability to challenge the Court of Appeals' ruling that he must obtain a warrant before interviewing a suspected child abuse victim

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render[ed] his claim to the equitable remedy of vacatur" by settling the case and thus "voluntarily forfeit[ing] his legal remedy by the ordinary processes of appeal"); *Karcher* v. *May*, 484 U. S. 72, 83 (1987) (holding that vacatur in light of mootness was not warranted when the losing party declined to file an appeal). So if immunized officials could not challenge an appellate decision in this Court, we would choose not to exercise our equitable authority to vacate that decision, even if the case later became moot. But here, as we have just explained, the theory that underlies our prior cases applying *Munsingwear* is satisfied: Vacatur expunges an adverse decision that would be reviewable had this case not become moot. See *Arizonans*, 520 U. S., at 74 (finding vacatur proper because, "when the mooting event occurred," the Arizona Attorney General was pursuing his "right to present argument on appeal").

at school. We therefore vacate the part of the Ninth Circuit's opinion that addressed that issue, and remand for further proceedings consistent with this opinion.[11] See, *e. g.*, *Arave* v. *Hoffman*, 552 U. S. 117, 118–119 (2008) *(per curiam); Selig* v. *Pediatric Specialty Care, Inc.*, 551 U. S. 1142 (2007).

It is so ordered.

JUSTICE SCALIA, concurring.

I join the Court's opinion, which reasonably applies our precedents, strange though they may be. The alternative solution, as JUSTICE KENNEDY suggests, see *post*, at 727 (dissenting opinion), is to end the extraordinary practice of ruling upon constitutional questions unnecessarily when the defendant possesses qualified immunity. See *Saucier* v. *Katz*, 533 U. S. 194 (2001). The parties have not asked us to adopt that approach, but I would be willing to consider it in an appropriate case.

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

I agree with the Court's conclusion that this case is moot and that vacatur is the appropriate disposition; unlike the majority, however, I would go no further. As the exchange

[11] Our disposition of this case differs slightly from the normal *Munsingwear* order vacating the lower court's judgment and remanding the case with instructions to dismiss the relevant claim. We leave untouched the Court of Appeals' ruling on qualified immunity and its corresponding dismissal of S. G.'s claim because S. G. chose not to challenge that ruling. We vacate the Ninth Circuit's ruling addressing the merits of the Fourth Amendment issue because, as we have explained, *supra*, at 707–708, that is the part of the decision that mootness prevents us from reviewing but that has prospective effects on Camreta. See *Walling* v. *James V. Reuter, Inc.*, 321 U. S. 671, 677 (1944) (observing that when a suit becomes moot, "this Court . . . may make such disposition of the whole case as justice may require"). But we emphasize that this unique disposition follows from the unique posture of this case and signals no endorsement of deviations from the usual *Munsingwear* order in other situations.

between the majority and JUSTICE KENNEDY demonstrates, the question whether Camreta, as a prevailing party, can obtain our review of the Ninth Circuit's constitutional ruling is a difficult one. There is no warrant for reaching this question when there is clearly no longer a genuine case or controversy between the parties before us. See *Sinochem Int'l Co.* v. *Malaysia Int'l Shipping Corp.*, 549 U. S. 422, 436 (2007) (noting that when a court can "readily" dispose of a case on one threshold ground, it should not reach another one that "is difficult to determine"). Indeed, it is improper for us to do so. Cf. *U. S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 513 U. S. 18, 21 (1994) ("[A] federal court [may not] decide the merits of a legal question not posed in an Article III case or controversy").

The majority suggests that we must decide whether Camreta has a "right to appeal" in order to vacate the judgment below under *United States* v. *Munsingwear, Inc.*, 340 U. S. 36 (1950). See *ante*, at 712, n. 10; see also *ante*, at 710, n. 8. But that view does not accord with our past practice. See *Arizonans for Official English* v. *Arizona*, 520 U. S. 43, 66, 70, 74–75 (1997) (ordering vacatur of a District Court judgment without "resolv[ing]" our "grave doubts" about the petitioners' appellate standing or deciding whether the state attorney general had a right to intervene as a party, and concluding only that he had statutory authority to "present argument" on appeal). Nor is it consistent with the principles underlying our mootness jurisprudence. See *Walling* v. *James V. Reuter, Inc.*, 321 U. S. 671, 677 (1944) ("If a judgment has become moot, this Court . . . may make such disposition of the whole case as justice may require"). In accordance with our normal procedure for disposing of cases that have become moot through no fault of the party seeking review, see *Bancorp*, 513 U. S., at 22–23; *Munsingwear*, 340 U. S., at 39–40, and n. 2, we should simply vacate the portion of the Ninth Circuit's opinion Camreta sought to challenge and remand with instructions to dismiss, see, *e. g.*, *Indiana*

State Police Pension Trust v. *Chrysler LLC*, 556 U. S. 960 (2009) *(per curiam)*.

JUSTICE KENNEDY, with whom JUSTICE THOMAS joins, dissenting.

Today's decision results from what is emerging as a rather troubling consequence from the reasoning of our recent qualified immunity cases. The Court is correct to note the problem presented when, on the one hand, its precedents permit or invite courts to rule on the merits of a constitutional claim even when qualified immunity disposes of the matter; and, on the other hand, jurisdictional principles prevent us from reviewing those invited rulings. It does seem that clarification is required. In my view, however, the correct solution is not to override jurisdictional rules that are basic to the functioning of the Court and to the necessity of avoiding advisory opinions. Dictum, though not precedent, may have its utility; but it ought not to be treated as a judgment standing on its own. So, while acknowledging the problem the Court confronts, my concern with the rule adopted for this case calls for this respectful dissent.

I

The Court acknowledges our "settled refusal to entertain an appeal," including a petition for certiorari, "by a party on an issue as to which he prevailed." *Ante*, at 704 (internal quotation marks omitted). At the outset, however, it is important to state this rule more fully to show its foundational character. A party that has already obtained the judgment it requested may not seek review to challenge the reasoning of a judicial decision. As we have said on many occasions: "This Court reviews judgments, not statements in opinions." *California* v. *Rooney*, 483 U. S. 307, 311 (1987) *(per curiam)* (internal quotation marks omitted); see also *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842, and n. 8 (1984) (collecting cases). The rule has been

noted and followed since the early years of this Court. "The question before an appellate Court is, was the *judgment* correct, not the *ground* on which the judgment professes to proceed." *McClung* v. *Silliman*, 6 Wheat. 598, 603 (1821).

The rule against hearing appeals or accepting petitions for certiorari by prevailing parties is related to the Article III prohibition against issuing advisory opinions. This principle underlies, for example, the settled rule against hearing cases involving a disputed judgment based on grounds of state law. As Justice Jackson explained for the Court: "[O]ur power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion." *Herb* v. *Pitcairn*, 324 U. S. 117, 125–126 (1945). This point has been repeated with force and clarity. See, *e. g.*, *Michigan* v. *Long*, 463 U. S. 1032, 1041–1042 (1983). The "'judicial Power' is one to render dispositive judgments," not advisory opinions. *Plaut* v. *Spendthrift Farm, Inc.*, 514 U. S. 211, 219 (1995) (some internal quotation marks omitted).

The rule against hearing appeals by prevailing parties applies in countless situations, many involving government parties. Deficient performance may not yield prejudice under *Strickland* v. *Washington*, 466 U. S. 668 (1984). A defective warrant may be entitled to good-faith reliance under *United States* v. *Leon*, 468 U. S. 897 (1984). An unreasonable search may be cured through the inevitable discovery doctrine of *Nix* v. *Williams*, 467 U. S. 431 (1984). In these and myriad other situations, an error is identified, but that conclusion does not affect the ultimate judgment entered. In all these contexts, it is established that the prevailing party may not appeal. This conclusion holds true even though a statement on the merits can have adverse consequences for the prevailing party. "The Court of Appeal's use of analysis that may

have been adverse to the State's long-term interests does not allow the State to claim status as a losing party for purposes of this Court's review." *Rooney*, *supra*, at 311.

The Court nonetheless holds that defendants who prevail in the courts of appeals based on qualified immunity may still obtain review in this Court. This point is put in perspective by the fact that the Court today, in an altogether unprecedented disposition, says that it vacates not a judgment but rather "part of the Ninth Circuit's opinion." *Ante*, at 714. The Court's conclusion is unsettling in its implications. Even on the Court's reading of our cases, the almost invariable rule is that prevailing parties are not permitted to obtain a writ of certiorari. Cf. *Kalka* v. *Hawk*, 215 F. 3d 90, 96, n. 9 (CADC 2000) (concluding that the Supreme Court "has apparently never granted the certiorari petition of a party who prevailed in the appellate court"). After today, however, it will be common for prevailing parties to seek certiorari based on the Court's newfound exception. And that will be so even though the "admonition" against reviewing mere statements in opinions "has special force when the statements raise constitutional questions, for it is our settled practice to avoid the unnecessary decision of such issues." *FCC* v. *Pacifica Foundation*, 438 U. S. 726, 734 (1978).

The Court defends its holding with citations to just two of our cases. *Ante*, at 702. Neither provides support for the Court's result.

The first case is *Electrical Fittings Corp.* v. *Thomas & Betts Co.*, 307 U. S. 241 (1939). There, a plaintiff alleged the infringement of two patent claims. The District Court found the plaintiff's first claim valid but not infringed and the second claim invalid. Rather than issuing a judgment "dismissing the bill without more," the District Court instead "entered a decree adjudging claim 1 valid" and "dismissing the bill for failure to prove infringement." *Id.*, at 241–242. The District Court thus issued a formal judgment regarding the validity of the first claim. The defendant ap-

pealed to dispute that claim's validity. This Court noted, without qualification, that a party "may not appeal from a judgment or decree in his favor, for the purpose of obtaining a review of findings he deems erroneous which are not necessary to support the decree." *Id.*, at 242. "But," this Court went on to explain, "here the decree itself purports to adjudge the validity of claim 1, and though the adjudication was immaterial to the disposition of the cause, it stands as an adjudication of one of the issues litigated." *Ibid.* In other words, the District Court had entered an unnecessary legal conclusion into the terms of the judgment itself, making it possible, for example, that the decree would have estoppel effect as to an issue whose resolution was unnecessary to the proper judgment of dismissal. *Electrical Fittings* therefore concluded that "the petitioners were entitled to have this portion of the decree eliminated." *Ibid.* The sole relief provided was an order for the "reformation of the decree." *Ibid.* That result accords with, indeed flows from, the settled rule that this Court reviews only judgments, not statements in opinions.

The second case is *Deposit Guaranty Nat. Bank* v. *Roper*, 445 U. S. 326 (1980). In that case plaintiffs attempted to bring a class action against a bank. After the District Court denied class certification, the defendant tendered to the plaintiffs the maximum value that they could recover as individuals. Of course, that offer did not amount to "all that ha[d] been requested in the complaint"—namely, "relief for the class." *Id.*, at 341 (Rehnquist, J., concurring). It is therefore no surprise that the plaintiffs responded with "a counteroffer of judgment in which they attempted to reserve the right to appeal the adverse class certification ruling." *Id.*, at 329 (opinion of the Court). But that proposal was denied. "Based on the bank's offer, the District Court entered judgment in respondents' favor, over their objection." *Id.*, at 330. The District Court thus issued a judgment other than the one the plaintiffs had sought. The

would-be class plaintiffs appealed, and this Court later granted certiorari. The Court held that appeal was not barred by the prevailing-party rule: "We view the denial of class certification as an example of a procedural ruling, collateral to the merits of a litigation, that is appealable after the entry of final judgment." *Id.*, at 336. As the Court explained, the plaintiffs had obtained only a judgment in their individual capacities. Yet the plaintiffs had "asserted as their personal stake in the appeal their desire to shift to successful class litigants a portion of those fees and expenses that have been incurred in this litigation." *Id.*, at 334, n. 6; see also *id.*, at 336. Because the purported prevailing parties were injured by their failure to obtain the class-based judgment they had sought, the Court held there was "jurisdiction to entertain the appeal only to review the asserted procedural error, not for the purpose of passing on the merits." *Ibid.* The Court was clear that the District Court's denial of class certification had a direct effect on the judgment: "As in *Electrical Fittings*," the purported prevailing parties "were entitled to have [a] portion of the District Court's judgment reviewed." *Ibid.*

Neither *Electrical Fittings* nor *Deposit Guaranty* provides support for the rule adopted today. Those decisions instead held that, in the unusual circumstances presented, particular parties who at first appeared to have prevailed below had in fact failed to obtain the judgments they had sought. This Court therefore had jurisdiction, including of course jurisdiction under Article III, to provide relief for the harm caused by the adverse judgments entered below. The parties seeking appeal in *Electrical Fittings* and *Deposit Guaranty* might be compared with plaintiffs who have requested $1,000 in relief but obtained only $500. Such parties have prevailed in part, but have not "receive[d] all that [they] ha[d] sought." *Deposit Guaranty*, *supra*, at 333. In contrast the Court appears to assume that petitioners in the present case are true prevailing parties. They have ob-

tained from the Court of Appeals the only formal judgment they requested: denial of respondent's claim for damages.

The Court points to policy concerns as the basis for its willingness to hear appeals by prevailing parties. *Ante,* at 703–706. But those concerns are unwarranted. In only one dissenting opinion has it been suggested that certiorari should be granted to reach a merits determination "locked inside" a favorable qualified immunity ruling. *Bunting* v. *Mellen,* 541 U. S. 1019, 1024 (2004) (SCALIA, J., dissenting from denial of certiorari). That dissenting opinion was issued in response to the rule that constitutional issues should be decided in every case involving qualified immunity. *Id.,* at 1025. Yet that mandated rule of decision has now been disapproved, so the dissent's argument is no longer applicable. See *Pearson* v. *Callahan,* 555 U. S. 223 (2009). Indeed, the Court today suggests that it still would not allow review of the merits even in the case that provoked the dissent. Unlike petitioner Camreta, the petitioner in *Bunting* had left the Government's employ before filing a petition for certiorari and so lacked standing to obtain review in this Court. Compare 541 U. S., at 1025, n., with *id.,* at 1021 (Stevens, J., respecting denial of certiorari), and *ante,* at 710–711, and n. 9.

The instant case thus appears to be the first in which the Court's new exception to the prevailing-party rule might have been applied. And even here that exception is neither necessary nor sufficient for the merits to be adjudicated by this Court. The Fourth Amendment question decided below is bound to arise again in future cases. Indeed, the reasoning of the decision below implicates a number of decisions in other Courts of Appeals. Cf. 588 F. 3d 1011, 1026, n. 11 (CA9 2009) (collecting cases). Yet today's decision does not supply the courts of appeals with guidance as to these merits issues. The Court instead vacates part of the reasoning of the decision below, thereby leaving other decisions intact and unreviewed. The Court thus resolves difficult constitutional

issues and provides an unprecedented answer to "an important question of judicial policy," all to no end. *Ante*, at 703.

The Court errs in reading *Electrical Fittings* and *Deposit Guaranty* to permit review and, indeed, the provision of relief disconnected from any judgment. The result is an erroneous and unbounded exception to an essential principle of judicial restraint. Parties who have obtained all requested relief may not seek review here.

II

As today's decision illustrates, our recent qualified immunity cases tend to produce decisions that are in tension with conventional principles of case-or-controversy adjudication. This Court has given the courts of appeals "permission" to find constitutional violations when ordering dismissal or summary judgment based on qualified immunity. *Ante*, at 705; see *Pearson*, *supra*. This invitation, as the Court is correct to note, was intended to produce binding constitutional holdings on the merits. *Ante*, at 706–707. The goal was to make dictum precedent, in order to hasten the gradual process of constitutional interpretation and alter the behavior of government defendants. *Ibid.* The present case brings the difficulties of that objective into perspective. In express reliance on the permission granted in *Pearson*, the Court of Appeals went out of its way to announce what may be an erroneous interpretation of the Constitution; and, under our case law, the Ninth Circuit must give that dictum legal effect as precedent in future cases.

In this way unnecessary merits decisions in qualified immunity cases could come to resemble declaratory judgments or injunctions. Indeed the United States as *amicus curiae* contends that the merits decision below "has an effect similar to an injunction or a declaratory judgment against the government as a whole." Brief for United States 13. Today's opinion adopts that view, providing as relief the vacatur of "part of the Ninth Circuit's opinion"—namely, the part of the

opinion that rules on the constitutional merits. *Ante,* at 698. For the first time, *obiter dictum* is treated not just as precedent for future cases but as a judgment in its own right.

The Court of Appeals in this case did not in fact issue a declaratory judgment or injunction embodying a determination on the merits, and it does not appear that a judgment of that kind could have issued. Plaintiffs must establish standing as to each form of relief they request, yet the plaintiff in this case had no separate interest in obtaining a declaratory judgment. See *Los Angeles* v. *Lyons,* 461 U. S. 95, 103–105 (1983) (citing *Ashcroft* v. *Mattis,* 431 U. S. 171 (1977) *(per curiam); Golden* v. *Zwickler,* 394 U. S. 103 (1969)); see also *MedImmune, Inc.* v. *Genentech, Inc.,* 549 U. S. 118, 127 (2007). There was no likelihood that S. G., the plaintiff's daughter, would again be subjected to interrogation while at school, much less that she would be interrogated by petitioner-defendant Camreta, so S. G. would seem to have had no greater stake in obtaining a declaratory judgment than the plaintiff in *Lyons* had in obtaining an injunction. See 461 U. S., at 104 (noting the "actual controversy that must exist for a declaratory judgment to be entered"). Our qualified immunity cases should not permit plaintiffs in constitutional cases to make an end run around established principles of justiciability. In treating dictum as though it were a declaratory judgment or an injunction, the Court appears to approve the issuance of such judgments outside the bounds of Article III jurisdiction.

The Court creates an exception to the prevailing-party rule in order to solve the difficulties created by our qualified immunity jurisprudence, but the Court's solution creates new problems. Sometimes defendants in qualified immunity cases have no particular interest in disputing the constitutional merits. Acknowledging as much, the Court notes that petitioner Alford no longer works for the government and so "has lost his interest in the Fourth Amendment ruling." *Ante,* at 710, n. 9. In concluding that Alford lacks

Article III standing, the Court suggests that it would lack jurisdiction to review and perhaps even to vacate the merits decision of the Court of Appeals if respondent had sued only Alford. *Ibid.;* cf. *Arizonans for Official English* v. *Arizona*, 520 U. S. 43, 72–73 (1997) (discussing standing to obtain review in this Court as well as this Court's jurisdiction to vacate judgments issued without jurisdiction). That suggestion is disconcerting. Under today's decision, it appears that the Court's ability to review merits determinations in qualified immunity cases is contingent on the defendant who has been sued. A defendant who has left the government's employ or otherwise lacks an interest in disputing the merits will be unable to obtain further review. See *ante*, at 710, n. 9 (discussing Article III limits on relief in this Court); *ante*, at 712, n. 10 (discussing limitations on this Court's equitable vacatur authority).

The Court today avoids this difficulty by concluding that petitioner Camreta has suffered an Article III injury. *Ante*, at 703; cf. *ante*, at 710, n. 9 ("[W]e do not decide any questions that would arise if [Alford] were the only defendant"). But the Court can reach that conclusion only because, "as part of his job," Camreta "regularly engages" in conduct made unlawful by the reasoning of the Court of Appeals. *Ante*, at 703. As discussed below, this conclusion is doubtful. See *infra*, at 725–727. In any event the Court's standing analysis will be inapplicable in most qualified immunity cases. Cf. *ante*, at 702 (asserting that the "Article III standard often will be met"). When an officer is sued for taking an extraordinary action, such as using excessive force during a high-speed car chase, there is little possibility that a constitutional decision on the merits will again influence that officer's conduct. The officer, like petitioner Alford or the petitioner in *Bunting*, would have no interest in litigating the merits in the court of appeals and, under the Court's rule, would seem unable to obtain review of a merits ruling by petitioning for certiorari. See *ante*, at 701–703; *ante*, at 710,

n. 9; *ante*, at 712, n. 10; see also *Lyons*, *supra*, at 103–105. This problem will arise with great frequency in qualified immunity cases. Once again, the decision today allows plaintiffs to obtain binding constitutional determinations on the merits that lie beyond this Court's jurisdiction to review. The Court thus fails to solve the problem it identifies.

III

It is most doubtful that Article III permits appeals by any officer to whom the reasoning of a judicial decision might be applied in a later suit. Yet that appears to be the implication of the Court's holding. The favorable judgment of the Court of Appeals did not in itself cause petitioner Camreta to suffer an Article III injury entitling him to appeal. Cf. *supra*, at 716–722 (discussing *Electrical Fittings* and *Deposit Guaranty*); *ASARCO Inc.* v. *Kadish*, 490 U. S. 605, 619 (1989) (finding an Article III controversy where petitioner challenged "a final judgment altering tangible legal rights"). On the contrary, Camreta has been injured by the decision below to no greater extent than have hundreds of other government officers who might argue that they too have been affected by the unnecessary statements made by the Court of Appeals. The Court notes as a limit on its authority to entertain appeals from prevailing parties certain statutory directives, directives that can be interpreted or shaped to allow expanded powers of review. *Ante*, at 700–701. But even if Congress were to give explicit permission for certiorari petitions to be filed by "any person" instead of by "any party," 28 U. S. C. § 1254(1), the constitutional definition of a case or controversy would still constrain this Court's jurisdiction.

The Court's analysis appears to rest on the premise that the reasoning of the decision below in itself causes Camreta injury. Until today, however, precedential reasoning of general applicability divorced from a particular adverse judgment was not thought to yield "standing to appeal." *Parr* v. *United States*, 351 U. S. 513, 516, 517 (1956) (opinion for

the Court by Harlan, J.). That is why "[o]nly one injured by the judgment sought to be reviewed can appeal." *Id.*, at 516; see also *supra*, at 716–721; *e. g.*, *Chathas* v. *Local 134 IBEW*, 233 F. 3d 508, 512 (CA7 2000) (Posner, J.) ("Adverse dicta are not appealable rulings. They can cause harm, but not the sort of harm that the courts . . . deem to create a genuine controversy within the meaning of Article III of the Constitution. Judgments are appealable; opinions are not" (citations omitted)); *Sea-Land Serv., Inc.* v. *Department of Transp.*, 137 F. 3d 640, 648 (CADC 1998) (Williams, J.) ("[M]ere precedential effect within an agency is not, alone, enough to create Article III standing, no matter how foreseeable the future litigation" (citing *Radiofone, Inc.* v. *FCC*, 759 F. 2d 936, 938 (CADC 1985) (opinion of Scalia, J.))); *id.*, at 939 (explaining that standing must "arise from the particular activity which the agency adjudication has approved . . . and not from the mere precedential effect of the agency's rationale in later adjudications"); *Oxford Shipping Co.* v. *New Hampshire Trading Corp.*, 697 F. 2d 1, 7 (CA1 1982) (Breyer, J.) ("Since the judgment appealed from was in [a party's] favor, and since the statement made was in no sense necessary to that judgment, the statement was dictum. There is no known basis for an appeal from a dictum"). It is revealing that the Court creates an exception to the prevailing-party rule while making clear that the courts of appeals are not to follow suit, in any context. See *ante*, at 708–709.

The conclusion that precedent of general applicability cannot in itself create standing to sue or appeal flows from basic principles. Camreta's asserted injury is caused not by the Court of Appeals or by respondent but rather by "the independent action of some third party not before the court"—that is, by the still-unidentified private plaintiffs whose lawsuits Camreta hopes to avoid. *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 560–561 (1992) (internal quotation marks omitted). This circumstance distinguishes the present case from requests for declaratory or injunctive relief

filed against officeholders who threaten legal enforcement. An inert rule of law does not cause particular, concrete injury; only the specific threat of its enforcement can do so. That is why the proper defendant in a suit for prospective relief is the party prepared to enforce the relevant legal rule against the plaintiff. See *MedImmune, Inc.*, 549 U. S., at 127 (explaining that declaratory relief requires a controversy "between parties having adverse legal interests, of sufficient immediacy and reality" (internal quotation marks omitted)); *Babbitt* v. *Farm Workers*, 442 U. S. 289, 298–299 (1979) ("A plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement"). Without an adverse judgment from which to appeal, Camreta has in effect filed a new declaratory judgment action in this Court against the Court of Appeals. This is no more consistent with Article III than filing a declaratory judgment action against this Court for its issuance of an adverse precedent or against Congress in response to its enactment of an unconstitutional law.

IV

If today's decision proves to be more than an isolated anomaly, the Court might find it necessary to reconsider its special permission that the courts of appeals may issue unnecessary merits determinations in qualified immunity cases with binding precedential effect.

Other dynamics permit the law of the Constitution to be elaborated within the conventional framework of a case or controversy. "[T]he development of constitutional law is by no means entirely dependent on cases in which the defendant may seek qualified immunity." *Pearson*, 555 U. S., at 242–243. For example, qualified immunity does not bar Fourth and Fifth Amendment suppression challenges. See, *e. g.*, *Kentucky* v. *King*, *ante*, p. 452. Nor does it prevent invocation of the Constitution as a defense against criminal prosecution, civil suit, or cruel and unusual punishment. See,

e. g., *Snyder* v. *Phelps*, 562 U. S. 443 (2011); *Graham* v. *Florida*, 560 U. S. 48 (2010); *Lawrence* v. *Texas*, 539 U. S. 558 (2003). Nor is qualified immunity available in constitutional suits against municipalities—as this very case illustrates. *Ante*, at 711–712. Our cases make clear, moreover, that "officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope* v. *Pelzer*, 536 U. S. 730, 741 (2002). That rule permits clearly established violations to be found when extreme though unheard-of actions violate the Constitution. See, *e. g.*, *ibid.* Furthermore, constitutional plaintiffs may seek declaratory or injunctive relief pursuant to standard principles of justiciability. Those plaintiffs do not need *Pearson*'s special rule. See, *e. g.*, *Citizens United* v. *Federal Election Comm'n*, 558 U. S. 310 (2010); *McDonald* v. *Chicago*, 561 U. S. 742 (2010). In any event, some incremental advance in the law occurs even when clearly established violations are found. It is an inevitable aspect of judicial decisionmaking that the resolution of one legal question or factual dispute casts light on the next.

It would be preferable at least to explore refinements to our qualified immunity jurisprudence before altering basic principles of jurisdiction. For instance, the objectives of qualified immunity might be satisfied if there were no bar to reaching the merits and issuing judgment when requested damages are nominal and substantial attorney's fees are waived or not allowed. Cf. *Farrar* v. *Hobby*, 506 U. S. 103, 112–115 (1992) (discussing unavailability of attorney's fees where nominal damages are only relief); *Hewitt* v. *Helms*, 482 U. S. 755, 761–763 (1987); *Harlow* v. *Fitzgerald*, 457 U. S. 800, 819, n. 34 (1982); *Carey* v. *Piphus*, 435 U. S. 247, 266 (1978) (discussing the propriety of providing nominal damages as relief).

The desire to resolve more constitutional questions ought not lead to altering our jurisdictional rules. That is the precise object that our legal tradition tells us we should resist.

Haste to resolve constitutional issues has never been thought advisable. We instead have encouraged the courts of appeals to follow "that older, wiser judicial counsel not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Scott* v. *Harris*, 550 U. S. 372, 388 (2007) (BREYER, J., concurring) (internal quotation marks omitted); see generally *Ashwander* v. *TVA*, 297 U. S. 288, 347 (1936) (Brandeis, J., concurring). Experience teaches that there is no persuasive reason to reverse normal principles of judicial review in qualified immunity cases. Compare, *e. g.*, *Pearson*, *supra*, at 236, and *Siegert* v. *Gilley*, 500 U. S. 226, 235 (1991) (KENNEDY, J., concurring in judgment) ("[I]t seems to reverse the usual ordering of issues to tell the trial and appellate courts that they should resolve the constitutional question first"), with *id.*, at 232 (opinion of the Court), and *Saucier* v. *Katz*, 533 U. S. 194, 201 (2001). Yet this Court's "puzzling misadventure in constitutional dictum" still has not come to an end. Leval, Judging Under the Constitution: Dicta About Dicta, 81 N. Y. U. L. Rev. 1249, 1275 (2006).

There will be instances where courts discuss the merits in qualified immunity cases. It is sometimes a better analytic approach and a preferred allocation of judicial time and resources to dismiss a claim on the merits rather than to dismiss based on qualified immunity. And "[i]t often may be difficult to decide whether a right is clearly established without deciding precisely what the existing constitutional right happens to be." *Pearson*, *supra*, at 236 (internal quotation marks omitted). This Court should not superintend the judicial decisionmaking process in qualified immunity cases under special rules, lest it make the judicial process more complex for civil rights suits than for other litigation. It follows, however, that the Court should provide no special permission to reach the merits. If qualified immunity cases were treated like other cases raising constitutional questions, settled principles of constitutional avoidance would apply. So would conventional rules regarding dictum and

holding. Judicial observations made in the course of explaining a case might give important instruction and be relevant when assessing a later claim of qualified immunity. Cf. *Wilkinson* v. *Russell*, 182 F. 3d 89, 112, and n. 3 (CA2 1999) (Calabresi, J., concurring). But as dicta those remarks would not establish law and would not qualify as binding precedent. See *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44, 67 (1996).

* * *

The distance our qualified immunity jurisprudence has taken us from foundational principles is made all the more apparent by today's decision. The Court must construe two of its precedents in so broad a manner that they are taken out of their proper and logical confines. To vacate the reasoning of the decision below, the Court accepts that *obiter dictum* is not just binding precedent but a judgment susceptible to plenary review. I would dismiss this case and note that our jurisdictional rule against hearing appeals by prevailing parties precludes petitioners' attempt to obtain review of judicial reasoning disconnected from a judgment.

Syllabus

ASHCROFT *v.* AL-KIDD

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

No. 10–98. Argued March 2, 2011—Decided May 31, 2011

Respondent al-Kidd alleges that, after the September 11th terrorist attacks, then-Attorney General Ashcroft authorized federal officials to detain terrorism suspects using the federal material-witness statute, 18 U. S. C. § 3144. He claims that this pretextual detention policy led to his material-witness arrest as he was boarding a plane to Saudi Arabia. To secure the warrant, federal officials had told a Magistrate Judge that information "crucial" to Sami Omar al-Hussayen's prosecution would be lost if al-Kidd boarded his flight. Prosecutors never called al-Kidd as a witness, and (as he alleges) never meant to do so. Al-Kidd filed suit pursuant to *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388, challenging the constitutionality of Ashcroft's alleged policy. The District Court denied Ashcroft's motion to dismiss on absolute and qualified-immunity grounds. The Ninth Circuit affirmed, holding that the Fourth Amendment prohibits pretextual arrests absent probable cause of criminal wrongdoing, and that Ashcroft could not claim qualified or absolute immunity.

Held:

1. The objectively reasonable arrest and detention of a material witness pursuant to a validly obtained warrant cannot be challenged as unconstitutional on the basis of allegations that the arresting authority had an improper motive. Pp. 735–740.

(a) Qualified immunity shields a government official from money damages unless (1) the official violated a statutory or constitutional right, and (2) that right was "clearly established" at the time of the challenged conduct. *Harlow* v. *Fitzgerald*, 457 U. S. 800, 818. Where, as here, a court considers both prongs of this inquiry, this Court has the discretion to correct the lower court's errors at each step. P. 735.

(b) Whether a detention is reasonable under the Fourth Amendment "is predominantly an objective inquiry." *Indianapolis* v. *Edmond*, 531 U. S. 32, 47. Courts ask whether "the circumstances, viewed objectively, justify [the challenged] action." *Scott* v. *United States*, 436 U. S. 128, 138. Except for cases that involve special needs, *e. g.*, *Vernonia School Dist. 47J* v. *Acton*, 515 U. S. 646, 653, or administrative searches, *e. g.*, *Michigan* v. *Clifford*, 464 U. S. 287, 294, this Court has almost uniformly rejected invitations to probe subjective intent. The

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Court of Appeals was mistaken in believing that *Edmond* established that " 'programmatic purpose' is relevant to Fourth Amendment analysis of programs of seizures without probable cause." 580 F. 3d 949, 968. It was not the absence of probable cause that triggered *Edmond*'s invalidating-purpose inquiry, but the checkpoints' failure to be based on "individualized suspicion." 531 U. S., at 47. Here a neutral Magistrate Judge issued a warrant authorizing al-Kidd's arrest, and the affidavit accompanying the warrant application gave individualized reasons to believe that he was a material witness who would soon disappear. A warrant based on individualized suspicion grants more protection than existed in most of this Court's cases eschewing inquiries into intent, *e. g.*, *Whren* v. *United States*, 517 U. S. 806, 813, and *Terry* v. *Ohio*, 392 U. S. 1, 21–22. Al-Kidd's contrary, narrow reading of those cases is rejected. Because he concedes that individualized suspicion supported the issuance of the material-witness arrest warrant; and does not assert that his arrest would have been unconstitutional absent the alleged pretext; there is no Fourth Amendment violation here. Pp. 735–740.

2. Ashcroft did not violate clearly established law and thus is entitled to qualified immunity. A Government official's conduct violates clearly established law when, at the time of the challenged conduct, "[t]he contours of [a] right [are] sufficiently clear" that every "reasonable official would have understood that what he is doing violates that right." *Anderson* v. *Creighton*, 483 U. S. 635, 640. Here, the asserted constitutional right falls far short of that threshold. At the time of al-Kidd's arrest, not a single judicial opinion had held that pretext could render an objectively reasonable arrest pursuant to a material-witness warrant unconstitutional. The Ninth Circuit's reliance on a District Court's footnoted dictum, irrelevant cases from this Court, and the Fourth Amendment's broad purposes and history is rejected. Because Ashcroft did not violate clearly established law, the question whether he enjoys absolute immunity need not be addressed. Pp. 741–743.

580 F. 3d 949, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, THOMAS, and ALITO, JJ., joined. KENNEDY, J., filed a concurring opinion, in which GINSBURG, BREYER, and SOTOMAYOR, JJ., joined as to Part I, *post*, p. 744. GINSBURG, J., filed an opinion concurring in the judgment, in which BREYER and SOTOMAYOR, JJ., joined, *post*, p. 747. SOTOMAYOR, J., filed an opinion concurring in the judgment, in which GINSBURG and BREYER, JJ., joined, *post*, p. 751. KAGAN, J., took no part in the consideration or decision of the case.

Acting Solicitor General Katyal argued the cause for petitioner. With him on the briefs were *Assistant Attorney General West*, *Acting Deputy Solicitor General Kruger*, *Eric D. Miller*, and *Matthew M. Collette*.

Lee Gelernt argued the cause for respondent. With him on the brief were *Steven R. Shapiro*, *Lucas Guttentag*, *Michael J. Wishnie*, and *Cynthia J. Woolley*.*

JUSTICE SCALIA delivered the opinion of the Court.

We decide whether a former Attorney General enjoys immunity from suit for allegedly authorizing federal prosecutors to obtain valid material-witness warrants for detention of terrorism suspects whom they would otherwise lack probable cause to arrest.

I

The federal material-witness statute authorizes judges to "order the arrest of [a] person" whose testimony "is material in a criminal proceeding . . . if it is shown that it may become impracticable to secure the presence of the person by subpoena." 18 U. S. C. §3144. Material witnesses enjoy the same constitutional right to pretrial release as other federal detainees, and federal law requires release if their testimony "can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice." *Ibid.*

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*Briefs of *amici curiae* urging reversal were filed for William P. Barr et al. by *Daniel J. Popeo* and *Richard A. Samp;* and for Wesley MacNeil Oliver by *Mr. Oliver, pro se.*

Briefs of *amici curiae* urging affirmance were filed for the Center for Justice and Accountability by *Jonathan C. Drimmer* and *Kathryn J. Gainey;* for Former Federal Prosecutors by *Aaron R. Marcu;* for Human Rights Watch et al. by *Joseph F. Tringali* and *Jeffrey L. Fisher;* for Legal History and Criminal Procedure Law Professors by *Stephanos Bibas* and *Peter C. Meier;* and for Legal Scholars by *Kevin K. Russell* and *Amy Howe.*

Christopher T. Handman and *Sharon Bradford Franklin* filed a brief for the Constitution Project as *amicus curiae.*

Because this case arises from a motion to dismiss, we accept as true the factual allegations in Abdullah al-Kidd's complaint. The complaint alleges that, in the aftermath of the September 11th terrorist attacks, then-Attorney General John Ashcroft authorized federal prosecutors and law enforcement officials to use the material-witness statute to detain individuals with suspected ties to terrorist organizations. It is alleged that federal officials had no intention of calling most of these individuals as witnesses, and that they were detained, at Ashcroft's direction, because federal officials suspected them of supporting terrorism but lacked sufficient evidence to charge them with a crime.

It is alleged that this pretextual detention policy led to the material-witness arrest of al-Kidd, a native-born United States citizen. FBI agents apprehended him in March 2003 as he checked in for a flight to Saudi Arabia. Two days earlier, federal officials had informed a Magistrate Judge that, if al-Kidd boarded his flight, they believed information "crucial" to the prosecution of Sami Omar al-Hussayen would be lost. App. 64. Al-Kidd remained in federal custody for 16 days and on supervised release until al-Hussayen's trial concluded 14 months later. Prosecutors never called him as a witness.

In March 2005, al-Kidd filed this *Bivens* action, see *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971), to challenge the constitutionality of Ashcroft's alleged policy; he also asserted several other claims not relevant here against Ashcroft and others. Ashcroft filed a motion to dismiss based on absolute and qualified immunity, which the District Court denied. A divided panel of the United States Court of Appeals for the Ninth Circuit affirmed, holding that the Fourth Amendment prohibits pretextual arrests absent probable cause of criminal wrongdoing, and that Ashcroft could not claim qualified or absolute immunity. See 580 F. 3d 949 (2009).

Judge Bea dissented, *id.*, at 981, and eight judges dissented from the denial of rehearing en banc, see 598 F. 3d 1129, 1137, 1142 (2010). We granted certiorari, 562 U. S. 980 (2010).

II

Qualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was "clearly established" at the time of the challenged conduct. *Harlow* v. *Fitzgerald*, 457 U. S. 800, 818 (1982). We recently reaffirmed that lower courts have discretion to decide which of the two prongs of qualified-immunity analysis to tackle first. See *Pearson* v. *Callahan*, 555 U. S. 223, 236 (2009).

Courts should think carefully before expending "scarce judicial resources" to resolve difficult and novel questions of constitutional or statutory interpretation that will "have no effect on the outcome of the case." *Id.*, at 236–237; see *id.*, at 237–242. When, however, a court of appeals does address both prongs of qualified-immunity analysis, we have discretion to correct its errors at each step. Although not necessary to reverse an erroneous judgment, doing so ensures that courts do not insulate constitutional decisions at the frontiers of the law from our review or inadvertently undermine the values qualified immunity seeks to promote. The former occurs when the constitutional-law question is wrongly decided; the latter when what is not clearly established is held to be so. In this case, the Court of Appeals' analysis at both steps of the qualified-immunity inquiry needs correction.

A

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." An arrest, of course, qualifies as a "seizure" of a "person" under this provi-

sion, *Dunaway* v. *New York*, 442 U. S. 200, 207–208 (1979), and so must be reasonable under the circumstances. Al-Kidd does not assert that Government officials would have acted unreasonably if they had used a material-witness warrant to arrest him for the purpose of securing his testimony for trial. See Brief for Respondent 16–17; Tr. of Oral Arg. 20–22. He contests, however (and the Court of Appeals here rejected), the reasonableness of using the warrant to detain him as a suspected criminal.

Fourth Amendment reasonableness "is predominantly an objective inquiry." *Indianapolis* v. *Edmond*, 531 U. S. 32, 47 (2000). We ask whether "the circumstances, viewed objectively, justify [the challenged] action." *Scott* v. *United States*, 436 U. S. 128, 138 (1978). If so, that action was reasonable "*whatever* the subjective intent" motivating the relevant officials. *Whren* v. *United States*, 517 U. S. 806, 814 (1996). This approach recognizes that the Fourth Amendment regulates conduct rather than thoughts, *Bond* v. *United States*, 529 U. S. 334, 338, n. 2 (2000); and it promotes evenhanded, uniform enforcement of the law, *Devenpeck* v. *Alford*, 543 U. S. 146, 153–154 (2004).

Two "limited exception[s]" to this rule are our special-needs and administrative-search cases, where "actual motivations" do matter. *United States* v. *Knights*, 534 U. S. 112, 122 (2001) (internal quotation marks omitted). A judicial warrant and probable cause are not needed where the search or seizure is justified by "special needs, beyond the normal need for law enforcement," such as the need to deter drug use in public schools, *Vernonia School Dist. 47J* v. *Acton*, 515 U. S. 646, 653 (1995) (internal quotation marks omitted), or the need to ensure that railroad employees engaged in train operations are not under the influence of drugs or alcohol, *Skinner* v. *Railway Labor Executives' Assn.*, 489 U. S. 602 (1989); and where the search or seizure is in execution of an administrative warrant authorizing, for example, an inspection of fire-damaged premises to determine the cause,

Michigan v. *Clifford*, 464 U. S. 287, 294 (1984) (plurality opinion), or an inspection of residential premises to ensure compliance with a housing code, *Camara* v. *Municipal Court of City and County of San Francisco*, 387 U. S. 523, 535–538 (1967). But those exceptions do not apply where the officer's purpose is not to attend to the special needs or to the investigation for which the administrative inspection is justified. See *Whren*, *supra*, at 811–812. The Government seeks to justify the present arrest on the basis of a properly issued judicial warrant—so that the special-needs and administrative-inspection cases cannot be the basis for a purpose inquiry here.

Apart from those cases, we have almost uniformly rejected invitations to probe subjective intent. See *Brigham City* v. *Stuart*, 547 U. S. 398, 404 (2006). There is one category of exception, upon which the Court of Appeals principally relied. In *Edmond*, *supra*, we held that the Fourth Amendment could not condone suspicionless vehicle checkpoints set up for the purpose of detecting illegal narcotics. Although we had previously approved vehicle checkpoints set up for the purpose of keeping off the road unlicensed drivers, *Delaware* v. *Prouse*, 440 U. S. 648, 663 (1979), or alcohol-impaired drivers, *Michigan Dept. of State Police* v. *Sitz*, 496 U. S. 444 (1990); and for the purpose of interdicting those who illegally cross the border, *United States* v. *Martinez-Fuerte*, 428 U. S. 543 (1976); we found the drug-detection purpose in *Edmond* invalidating because it was "ultimately indistinguishable from the general interest in crime control," 531 U. S., at 44. In the Court of Appeals' view, *Edmond* established that "'programmatic purpose' is relevant to Fourth Amendment analysis of programs of seizures without probable cause." 580 F. 3d, at 968.

That was mistaken. It was not the absence of probable cause that triggered the invalidating-purpose inquiry in *Edmond*. To the contrary, *Edmond* explicitly said that it would approve checkpoint stops for "general crime control

purposes" that were based upon merely "some quantum of individualized suspicion." 531 U. S., at 47. Purpose was relevant in *Edmond* because "programmatic purposes may be relevant to the validity of Fourth Amendment intrusions undertaken *pursuant to a general scheme without individualized suspicion*," *id.*, at 45–46 (emphasis added).[1]

Needless to say, warrantless, "suspicionless intrusions pursuant to a general scheme," *id.*, at 47, are far removed from the facts of this case. A warrant issued by a neutral Magistrate Judge authorized al-Kidd's arrest. The affidavit accompanying the warrant application (as al-Kidd concedes) gave individualized reasons to believe that he was a material witness and that he would soon disappear. The existence of a judicial warrant based on individualized suspicion takes this case outside the domain of not only our special-needs and administrative-search cases, but of *Edmond* as well.

A warrant based on individualized suspicion[2] in fact grants more protection against the malevolent and the incompetent than existed in most of our cases eschewing inquiries into intent. In *Whren*, *supra*, at 813, and *Devenpeck*, *supra*, at 153, we declined to probe the motives behind seizures supported by probable cause but lacking a warrant approved by a detached magistrate. *Terry* v. *Ohio*, 392 U. S. 1, 21–22

[1] The Court of Appeals also relied upon *Ferguson* v. *Charleston*, 532 U. S. 67 (2001), which held unconstitutional a program of mandatory drug testing of maternity patients. Like *Edmond*, that case involved a general scheme of searches without individualized suspicion. 532 U. S., at 77, n. 10.

[2] JUSTICE GINSBURG suggests that our use of the word "suspicion" is peculiar because that word "ordinarily" means "that the person suspected has engaged in wrongdoing." *Post*, at 749, n. 3 (opinion concurring in judgment). We disagree. No usage of the word is more common and idiomatic than a statement such as "I have a suspicion he knows something about the crime," or even "I have a suspicion she is throwing me a surprise birthday party." The many cases cited by JUSTICE GINSBURG, *post*, at 749–750, n. 3, which use the neutral word "suspicion" *in connection with* wrongdoing, prove nothing except that searches and seizures for reasons other than suspected wrongdoing are rare.

(1968), and *Knights,* 534 U. S., at 121–122, applied an objective standard to warrantless searches justified by a lesser showing of reasonable suspicion. We review even some suspicionless searches for objective reasonableness. See *Bond,* 529 U. S., at 335–336, 338, n. 2. If concerns about improper motives and pretext do not justify subjective inquiries in those less protective contexts, we see no reason to adopt that inquiry here.

Al-Kidd would read our cases more narrowly. He asserts that *Whren* establishes that we ignore subjective intent only when there exists "probable cause to believe that a violation of law has occurred," 517 U. S., at 811—which was not the case here. That is a distortion of *Whren.* Our unanimous opinion held that we would not look behind an objectively reasonable traffic stop to determine whether racial profiling or a desire to investigate other potential crimes was the real motive. See *id.,* at 810, 813. In the course of our analysis, we dismissed Whren's reliance on our inventory-search and administrative-inspection cases by explaining that those cases do not "endors[e] the principle that ulterior motives can invalidate police conduct that is justifiable on the basis of probable cause to believe that a violation of law has occurred," *id.,* at 811. But to say that ulterior motives do *not* invalidate a search that is legitimate because of probable cause to believe a crime has occurred is not to say that it *does* invalidate all searches that are legitimate for other reasons.

"[O]nly an undiscerning reader," *ibid.,* would think otherwise. We referred to probable cause to believe that a violation of law had occurred because that was the legitimating factor in the case at hand. But the analysis of our opinion swept broadly to reject inquiries into motive generally. See *id.,* at 812–815. We remarked that our special-needs and administrative-inspection cases are unusual in their concern for pretext, and do nothing more than "explain that the exemption from the need for probable cause (and warrant), which is accorded to searches made for the purpose of inven-

tory or administrative regulation, is not accorded to searches that are *not* made for those purposes," *id.*, at 811–812. And our opinion emphasized that we had at that time (prior to *Edmond*) rejected every request to examine subjective intent outside the narrow context of special needs and administrative inspections. See 517 U. S., at 812. Thus, al-Kidd's approach adds an "only" to a sentence plucked from the *Whren* opinion, and then elevates that sentence (as so revised) over the remainder of the opinion, and over the consistent holdings of our other cases.

Because al-Kidd concedes that individualized suspicion supported the issuance of the material-witness arrest warrant; and does not assert that his arrest would have been unconstitutional absent the alleged pretextual use of the warrant; we find no Fourth Amendment violation.[3] Efficient[4] and evenhanded application of the law demands that we look to whether the arrest is objectively justified, rather than to the motive of the arresting officer.

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[3] The concerns of JUSTICES GINSBURG and SOTOMAYOR about the validity of the warrant in this case are beside the point. See *post*, at 748–749 (GINSBURG, J., concurring in judgment); *post*, at 752 (SOTOMAYOR, J., concurring in judgment). The validity of the warrant is not *our* "opening assumption," *post*, at 749 (GINSBURG, J., concurring in judgment); it is the premise of al-Kidd's argument. Al-Kidd does not claim that Ashcroft is liable because the FBI agents failed to obtain a valid warrant. He takes the validity of the warrant as a given, and argues that his arrest nevertheless violated the Constitution because it was motivated by an illegitimate purpose. His separate Fourth Amendment and statutory claims against the FBI agents who sought the material-witness warrant, which are the focus of both concurrences, are not before us.

[4] We may note in passing that al-Kidd alleges that the Attorney General authorized the use of material-witness warrants for detention of suspected terrorists, but not that he forbade the use of those warrants to detain material witnesses. Which means that if al-Kidd's inquiry into actual motive is accepted, mere determination that the Attorney General promulgated the alleged policy would not alone decide the case. Al-Kidd would also have to prove that the officials who sought his material-arrest warrant were motivated by Ashcroft's policy, not by a desire to call al-Kidd as a witness.

B

A Government official's conduct violates clearly established law when, at the time of the challenged conduct, "[t]he contours of [a] right [are] sufficiently clear" that every "reasonable official would [have understood] that what he is doing violates that right." *Anderson* v. *Creighton*, 483 U. S. 635, 640 (1987). We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate. See *ibid.; Malley* v. *Briggs*, 475 U. S. 335, 341 (1986). The constitutional question in this case falls far short of that threshold.

At the time of al-Kidd's arrest, not a single judicial opinion had held that pretext could render an objectively reasonable arrest pursuant to a material-witness warrant unconstitutional. A district-court opinion had suggested, in a footnoted dictum devoid of supporting citation, that using such a warrant for preventive detention of suspects "is an illegitimate use of the statute"—implying (we accept for the sake of argument) that the detention would therefore be unconstitutional. *United States* v. *Awadallah*, 202 F. Supp. 2d 55, 77, n. 28 (SDNY 2002). The Court of Appeals thought nothing could "have given John Ashcroft fair[er] warning" that his conduct violated the Fourth Amendment, because the footnoted dictum *"call[ed] out Ashcroft by name"!* 580 F. 3d, at 972–973 (internal quotation marks omitted; emphasis added). We will indulge the assumption (though it does not seem to us realistic) that Justice Department lawyers bring to the Attorney General's personal attention all district judges' footnoted speculations that boldly "call him out by name." On that assumption, would it prove that for him (and for him only?) it became clearly established that pretextual use of the material-witness statute rendered the arrest unconstitutional? An extraordinary proposition. Even a district judge's *ipse dixit* of a holding is not "controlling authority" in any jurisdiction, much less in the entire United States; and his *ipse dixit* of a footnoted dictum falls far short

of what is necessary absent controlling authority: a robust "consensus of cases of persuasive authority." *Wilson* v. *Layne*, 526 U. S. 603, 617 (1999).

The Court of Appeals' other cases "clearly establishing" the constitutional violation are, of course, those we rejected as irrelevant in our discussion of whether there was any constitutional violation at all. And the Court of Appeals' reference to those cases here makes the same error of assuming that purpose is only disregarded when there is probable cause to suspect a violation of law.

The Court of Appeals also found clearly established law lurking in the broad "history and purposes of the Fourth Amendment." 580 F. 3d, at 971. We have repeatedly told courts—and the Ninth Circuit in particular, see *Brosseau* v. *Haugen*, 543 U. S. 194, 198–199 (2004) *(per curiam)*—not to define clearly established law at a high level of generality. See also, *e. g.*, *Wilson*, *supra*, at 615; *Anderson*, *supra*, at 639–640; cf. *Sawyer* v. *Smith*, 497 U. S. 227, 236 (1990). The general proposition, for example, that an unreasonable search or seizure violates the Fourth Amendment is of little help in determining whether the violative nature of particular conduct is clearly established. See *Saucier* v. *Katz*, 533 U. S. 194, 201–202 (2001); *Wilson*, *supra*, at 615.

The same is true of the Court of Appeals' broad historical assertions. The Fourth Amendment was a response to the English Crown's use of general warrants, which often allowed royal officials to search and seize whatever and whomever they pleased while investigating crimes or affronts to the Crown. See *Stanford* v. *Texas*, 379 U. S. 476, 481–485 (1965). According to the Court of Appeals, Ashcroft should have seen that a pretextual warrant similarly "gut[s] the substantive protections of the Fourth Amendmen[t]" and allows the State "to arrest upon the executive's mere suspicion." 580 F. 3d, at 972.

Ashcroft must be forgiven for missing the parallel, which escapes us as well. The principal evil of the general war-

rant was addressed by the Fourth Amendment's particularity requirement, *Stanford*, *supra*, at 485, which Ashcroft's alleged policy made no effort to evade. The warrant authorizing al-Kidd's arrest named al-Kidd and only al-Kidd. It might be argued, perhaps, that when, in response to the English abuses, the Fourth Amendment said that warrants could only issue "on probable cause" it meant only probable cause to suspect a violation of law, and not probable cause to believe that the individual named in the warrant was a material witness. But that would make *all* arrests pursuant to material-witness warrants unconstitutional, whether pretextual or not—and that is not the position taken by al-Kidd in this case.

While featuring a District Court's footnoted dictum, the Court of Appeals made no mention of this Court's affirmation in *Edmond* of the "predominan[t]" rule that reasonableness is an objective inquiry, 531 U. S., at 47. Nor did it mention *Whren*'s and *Knights*' statements that subjective intent mattered in a very limited subset of our Fourth Amendment cases; or *Terry*'s objective evaluation of investigatory searches premised on reasonable suspicion rather than probable cause; or *Bond*'s objective evaluation of a suspicionless investigatory search. The Court of Appeals seems to have cherry-picked the aspects of our opinions that gave colorable support to the proposition that the unconstitutionality of the action here was clearly established.

Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions. When properly applied, it protects "all but the plainly incompetent or those who knowingly violate the law." *Malley*, *supra*, at 341. Ashcroft deserves neither label, not least because eight Court of Appeals judges agreed with his judgment in a case of first impression. See *Wilson*, *supra*, at 618. He deserves qualified immunity even assuming—contrafactually—that his alleged detention policy violated the Fourth Amendment.

* * *

We hold that an objectively reasonable arrest and detention of a material witness pursuant to a validly obtained warrant cannot be challenged as unconstitutional on the basis of allegations that the arresting authority had an improper motive. Because Ashcroft did not violate clearly established law, we need not address the more difficult question whether he enjoys absolute immunity. 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 KAGAN took no part in the consideration or decision of this case.

JUSTICE KENNEDY, with whom JUSTICE GINSBURG, JUSTICE BREYER, and JUSTICE SOTOMAYOR join as to Part I, concurring.

I join the opinion of the Court in full. In holding that the Attorney General could be liable for damages based on an unprecedented constitutional rule, the Court of Appeals for the Ninth Circuit disregarded the purposes of the doctrine of qualified immunity. This concurring opinion makes two additional observations.

I

The Court's holding is limited to the arguments presented by the parties and leaves unresolved whether the Government's use of the material-witness statute in this case was lawful. See *ante*, at 740 (noting that al-Kidd "does not assert that his arrest would have been unconstitutional absent the alleged pretextual use of the warrant"). Under the statute, a magistrate judge may issue a warrant to arrest someone as a material witness upon a showing by affidavit that "the testimony of a person is material in a criminal proceeding" and "that it may become impracticable to secure the

presence of the person by subpoena." 18 U. S. C. § 3144. The scope of the statute's lawful authorization is uncertain. For example, a law-abiding citizen might observe a crime during the days or weeks before a scheduled flight abroad. It is unclear whether those facts alone might allow police to obtain a material witness warrant on the ground that it "may become impracticable" to secure the person's presence by subpoena. *Ibid.* The question becomes more difficult if one further assumes the traveler would be willing to testify if asked; and more difficult still if one supposes that authorities delay obtaining or executing the warrant until the traveler has arrived at the airport. These possibilities resemble the facts in this case. See *ante*, at 734.

In considering these issues, it is important to bear in mind that the material-witness statute might not provide for the issuance of warrants within the meaning of the Fourth Amendment's Warrant Clause. The typical arrest warrant is based on probable cause that the arrestee has committed a crime; but that is not the standard for the issuance of warrants under the material-witness statute. See *ante*, at 743 (reserving the possibility that probable cause for purposes of the Fourth Amendment's Warrant Clause means "only probable cause to suspect a violation of law"). If material witness warrants do not qualify as "Warrants" under the Fourth Amendment, then material witness arrests might still be governed by the Fourth Amendment's separate reasonableness requirement for seizures of the person. See *United States* v. *Watson*, 423 U. S. 411 (1976). Given the difficulty of these issues, the Court is correct to address only the legal theory put before it, without further exploring when material witness arrests might be consistent with statutory and constitutional requirements.

II

The fact that the Attorney General holds a high office in the Government must inform what law is clearly established

for the purposes of this case. *Mitchell* v. *Forsyth*, 472 U. S. 511, 525 (1985). Some federal officers perform their functions in a single jurisdiction, say, within the confines of one State or one federal judicial district. They "reasonably can anticipate when their conduct may give rise to liability for damages" and so are expected to adjust their behavior in accordance with local precedent. *Davis* v. *Scherer*, 468 U. S. 183, 195 (1984); see also *Anderson* v. *Creighton*, 483 U. S. 635, 639–640 (1987). In contrast the Attorney General occupies a national office and so sets policies implemented in many jurisdictions throughout the country. The official with responsibilities in many jurisdictions may face ambiguous and sometimes inconsistent sources of decisional law. While it may be clear that one court of appeals has approved a certain course of conduct, other courts of appeals may have disapproved it, or at least reserved the issue.

When faced with inconsistent legal rules in different jurisdictions, national officeholders should be given some deference for qualified immunity purposes, at least if they implement policies consistent with the governing law of the jurisdiction where the action is taken. As we have explained, qualified immunity is lost when plaintiffs point either to "cases of controlling authority in their jurisdiction at the time of the incident" or to "a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful." *Wilson* v. *Layne*, 526 U. S. 603, 617 (1999); see also *ante*, at 741–742. These standards ensure the officer has "fair and clear warning" of what the Constitution requires. *United States* v. *Lanier*, 520 U. S. 259, 271 (1997).

A national officeholder intent on retaining qualified immunity need not abide by the most stringent standard adopted anywhere in the United States. And the national officeholder need not guess at when a relatively small set of appellate precedents have established a binding legal rule. If national officeholders were subject to personal liability

whenever they confronted disagreement among appellate courts, those officers would be deterred from full use of their legal authority. The consequences of that deterrence must counsel caution by the Judicial Branch, particularly in the area of national security. See *Ashcroft* v. *Iqbal*, 556 U. S. 662, 685 (2009). Furthermore, too expansive a view of "clearly established law" would risk giving local judicial determinations the effect of rules with *de facto* national significance, contrary to the normal process of ordered appellate review.

The proceedings in this case illustrate these concerns. The Court of Appeals for the Ninth Circuit appears to have reasoned that a Federal District Court sitting in New York had authority to establish a legal rule binding on the Attorney General and, therefore, on federal law enforcement operations conducted nationwide. See 580 F. 3d 949, 972–973 (2009). Indeed, this case involves a material witness warrant issued in Boise, Idaho, and an arrest near Washington, D. C. Of course, district court decisions are not precedential to this extent. *Ante*, at 741–742. But nationwide security operations should not have to grind to a halt even when an appellate court finds those operations unconstitutional. The doctrine of qualified immunity does not so constrain national officeholders entrusted with urgent responsibilities.

JUSTICE GINSBURG, with whom JUSTICE BREYER and JUSTICE SOTOMAYOR join, concurring in the judgment.

Is a former U. S. Attorney General subject to a suit for damages on a claim that he instructed subordinates to use the material-witness statute, 18 U. S. C. § 3144, as a pretext to detain terrorist suspects preventively? Given *Whren* v. *United States*, 517 U. S. 806 (1996), I agree with the Court that no "clearly established law" renders Ashcroft answerable in damages for the abuse of authority al-Kidd charged. *Ante*, at 744. But I join JUSTICE SOTOMAYOR in objecting to the Court's disposition of al-Kidd's Fourth Amendment claim

on the merits; as she observes, *post*, at 751 (opinion concurring in judgment), that claim involves novel and trying questions that will "have no effect on the outcome of th[is] case." *Pearson* v. *Callahan*, 555 U. S. 223, 236–237 (2009).

In addressing al-Kidd's Fourth Amendment claim against Ashcroft, the Court assumes at the outset the existence of a *validly obtained* material witness warrant. *Ante*, at 733, 744. That characterization is puzzling. See *post*, at 752 (opinion of SOTOMAYOR, J.).[1] Is a warrant "validly obtained" when the affidavit on which it is based fails to inform the issuing Magistrate Judge that "the Government has no intention of using [al-Kidd as a witness] at [another's] trial," *post*, at 751, and does not disclose that al-Kidd had cooperated with FBI agents each of the several times they had asked to interview him, App. 26?

Casting further doubt on the assumption that the warrant was validly obtained, the Magistrate Judge was not told that al-Kidd's parents, wife, and children were all citizens and residents of the United States. In addition, the affidavit misrepresented that al-Kidd was about to take a one-way flight to Saudi Arabia, with a first-class ticket costing approximately $5,000; in fact, al-Kidd had a round-trip, coach-class ticket that cost $1,700.[2] Given these omissions and

[1] Nowhere in al-Kidd's complaint is there any concession that the warrant gained by the FBI agents was validly obtained. But cf. *ante*, at 740, n. 3 (majority opinion).

[2] Judicial officers asked to issue material witness warrants must determine whether the affidavit supporting the application shows that "the testimony of a person is material in a criminal proceeding" and that "it may become impracticable to secure the presence of the person by subpoena." 18 U. S. C. § 3144. Even if these conditions are met, issuance of the warrant is discretionary. *Ibid.* ("judicial officer *may* order the arrest of the person" (emphasis added)). Al-Kidd's experience illustrates the importance of vigilant exercise of this checking role by the judicial officer to whom the warrant application is presented.

The affidavit used to secure al-Kidd's detention was spare; it did not state with particularity the information al-Kidd purportedly possessed, nor did it specify how al-Kidd's knowledge would be material to Sami

misrepresentations, there is strong cause to question the Court's opening assumption—a valid material witness warrant—and equally strong reason to conclude that a merits determination was neither necessary nor proper.[3]

Omar al-Hussayen's prosecution. As to impracticability, the affidavit contained only this unelaborated statement: "It is believed that if Al-Kidd travels to Saudi Arabia, the United States Government will be unable to secure his presence at trial via subpoena." App. 64. Had the Magistrate Judge insisted on more concrete showings of materiality and impracticability, al-Kidd might have been spared the entire ordeal.

[3] The Court thrice states that the material witness warrant for al-Kidd's arrest was "based on individualized suspicion." *Ante*, at 738, 740. The word "suspicion," however, ordinarily indicates that the person suspected has engaged in wrongdoing. See Black's Law Dictionary 1585 (9th ed. 2009) (defining "reasonable suspicion" to mean "[a] particularized and objective basis, supported by specific and articulable facts, for suspecting a person of criminal activity"). Material witness status does not "involv[e] suspicion, or lack of suspicion," of the individual so identified. See *Illinois* v. *Lidster*, 540 U. S. 419, 424–425 (2004).

This Court's decisions, until today, have uniformly used the term "individualized suspicion" to mean "individualized suspicion *of wrongdoing.*" See *Indianapolis* v. *Edmond*, 531 U. S. 32, 37 (2000) (emphasis added); *Chandler* v. *Miller*, 520 U. S. 305, 313 (1997) (same). See also, *e. g.*, *Brigham City* v. *Stuart*, 547 U. S. 398, 405 (2006) (referring to "programmatic searches conducted without individualized suspicion—such as checkpoints to combat drunk driving or drug trafficking"); *Board of Ed. of Independent School Dist. No. 92 of Pottawatomie Cty.* v. *Earls*, 536 U. S. 822, 830 (2002) ("finding of individualized suspicion may not be necessary when a school conducts drug testing"); *Whren* v. *United States*, 517 U. S. 806, 817–818 (1996) (observed traffic violations give rise to individualized suspicion); *Michigan Dept. of State Police* v. *Sitz*, 496 U. S. 444, 451 (1990) ("Detention of particular motorists for more extensive field sobriety testing may require satisfaction of an individualized suspicion standard."); *Maryland* v. *Buie*, 494 U. S. 325, 334–335, n. 2 (1990) ("*Terry* [v. *Ohio*, 392 U. S. 1 (1968),] requires reasonable, individualized suspicion before a frisk for weapons can be conducted."); *Treasury Employees* v. *Von Raab*, 489 U. S. 656, 668 (1989) ("[I]n certain limited circumstances, the Government's need to discover . . . latent or hidden conditions, or to prevent their development, is sufficiently compelling to justify [search that intrudes] on privacy . . . without any measure of individualized suspicion."); *O'Connor* v. *Ortega*, 480 U. S. 709, 726 (1987) ("petitioners had an 'individualized suspicion' of

I also agree with JUSTICE KENNEDY that al-Kidd's treatment presents serious questions, unaddressed by the Court, concerning "the [legality of] the Government's use of the material-witness statute in this case." *Ante*, at 744 (concurring opinion). In addition to the questions JUSTICE KENNEDY poses, and even if the initial material witness classification had been proper, what even arguably legitimate basis could there be for the harsh custodial conditions to which al-Kidd was subjected: Ostensibly held only to secure his testimony, al-Kidd was confined in three different detention centers during his 16 days' incarceration, kept in high-security cells lit 24 hours a day, strip-searched and subjected to body-cavity inspections on more than one occasion, and handcuffed and shackled about his wrists, legs, and waist. App. 29–36; cf. *Bell* v. *Wolfish*, 441 U. S. 520, 539, n. 20 (1979) ("[L]oading a detainee with chains and shackles and throwing him in a dungeon may ensure his presence at trial and preserve the security of the institution. But it would be difficult to conceive of a situation where conditions so harsh,

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misconduct by Dr. Ortega"); *United States* v. *Montoya de Hernandez*, 473 U. S. 531, 538 (1985) ("Automotive travelers may be stopped at fixed checkpoints near the border without individualized suspicion . . . ."); *New Jersey* v. *T. L. O.*, 469 U. S. 325, 342, n. 8 (1985) ("the search of T. L. O.'s purse was based upon an individualized suspicion that she had violated school rules"); *Michigan* v. *Summers*, 452 U. S. 692, 699, n. 9 (1981) ("police executing a search warrant at a tavern could not . . . frisk a patron unless the officers had individualized suspicion that the patron might be armed or dangerous").

The Court's suggestion that the term "individualized suspicion" is more commonly associated with "know[ing] something about [a] crime" or "throwing . . . a surprise birthday party" than with criminal suspects, *ante*, at 738, n. 2 (internal quotation marks omitted), is hardly credible. The import of the term in legal argot is not genuinely debatable. When the evening news reports that a murder "suspect" is on the loose, the viewer is meant to be on the lookout for the perpetrator, not the witness. Ashcroft understood the term as lawyers commonly do: He spoke of detaining material witnesses as a means to "tak[e] *suspected terrorists* off the street." App. 41 (internal quotation marks omitted).

employed to achieve objectives that could be accomplished in so many alternative and less harsh methods, would not support a conclusion that the purpose for which they were imposed was to punish.").

However circumscribed al-Kidd's *Bivens* claim against Ashcroft may have been, see *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971); *ante*, at 740 (majority opinion); *ante*, at 744 (KENNEDY, J., concurring), his remaining claims against the FBI agents who apprehended him invite consideration of the issues JUSTICE KENNEDY identified.[4] His challenges to the brutal conditions of his confinement have been settled. But his ordeal is a grim reminder of the need to install safeguards against disrespect for human dignity, constraints that will control officialdom even in perilous times.

JUSTICE SOTOMAYOR, with whom JUSTICE GINSBURG and JUSTICE BREYER join, concurring in the judgment.

I concur in the Court's judgment reversing the Court of Appeals because I agree with the majority's conclusion that Ashcroft did not violate clearly established law. I cannot join the majority's opinion, however, because it unnecessarily "resolve[s] [a] difficult and novel questio[n] of constitutional . . . interpretation that will 'have no effect on the outcome of the case.'" *Ante*, at 735 (quoting *Pearson* v. *Callahan*, 555 U. S. 223, 237 (2009)).

Whether the Fourth Amendment permits the pretextual use of a material witness warrant for preventive detention of an individual whom the Government has no intention of using at trial is, in my view, a closer question than the major-

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[4] The District Court determined that al-Kidd's factual allegations against FBI agents regarding their "misrepresentations and omissions in the warrant application, if true, would negate the possibility of qualified immunity [for those agents]." Memorandum Order in No. cv:05–093 (D Idaho, Sept. 27, 2006), p. 18. The agents took no appeal from this threshold denial of their qualified immunity plea.

ity's opinion suggests. Although the majority is correct that a government official's subjective intent is generally "irrelevant in determining whether that officer's actions violate the Fourth Amendment," *Bond* v. *United States*, 529 U. S. 334, 338, n. 2 (2000), none of our prior cases recognizing that principle involved prolonged detention of an individual without probable cause to believe he had committed any criminal offense. We have never considered whether an official's subjective intent matters for purposes of the Fourth Amendment in that novel context, and we need not and should not resolve that question in this case. All Members of the Court agree that, whatever the merits of the underlying Fourth Amendment question, Ashcroft did not violate clearly established law.

The majority's constitutional ruling is a narrow one premised on the existence of a "valid material-witness warran[t]," *ante*, at 733—a premise that, at the very least, is questionable in light of the allegations set forth in al-Kidd's complaint. Based on those allegations, it is not at all clear that it would have been "impracticable to secure [al-Kidd's] presence . . . by subpoena" or that his testimony could not "adequately be secured by deposition." 18 U. S. C. § 3144; see First Amended Complaint in No. 05–093–EJL, ¶ 55, App. 26 ("Mr. al-Kidd would have complied with a subpoena had he been issued one or agreed to a deposition"). Nor is it clear that the affidavit supporting the warrant was sufficient; its failure to disclose that the Government had no intention of using al-Kidd as a witness at trial may very well have rendered the affidavit deliberately false and misleading. Cf. *Franks* v. *Delaware*, 438 U. S. 154, 155–156 (1978). The majority assumes away these factual difficulties, but in my view, they point to the artificiality of the way the Fourth Amendment question has been presented to this Court and provide further reason to avoid rendering an unnecessary holding on the constitutional question.

I also join Part I of JUSTICE KENNEDY's concurring opinion. As that opinion makes clear, this case does not present an occasion to address the proper scope of the material witness statute or its constitutionality as applied in this case. Indeed, nothing in the majority's opinion today should be read as placing this Court's *imprimatur* on the actions taken by the Government against al-Kidd. *Ante*, at 744 (KENNEDY, J., concurring) ("The Court's holding is limited to the arguments presented by the parties and leaves unresolved whether the Government's use of the material-witness statute in this case was lawful").

Syllabus

GLOBAL-TECH APPLIANCES, INC., ET AL. *v.* SEB S. A.

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

No. 10–6. Argued February 23, 2011—Decided May 31, 2011

After respondent SEB invented an innovative deep fryer, obtained a U. S. patent for its design, and began selling its fryer in this country, Sunbeam Products, Inc., asked petitioner Pentalpha Enterprises, Ltd., a Hong Kong home appliance maker and wholly owned subsidiary of petitioner Global-Tech Appliances, Inc., to supply Sunbeam with deep fryers meeting certain specifications. Pentalpha purchased an SEB fryer that was made for sale in a foreign market and thus lacked U. S. patent markings, copied all but the fryer's cosmetic features, and retained an attorney to conduct a right-to-use study without telling him it had copied directly from SEB's design. Failing to locate SEB's patent, the attorney issued an opinion letter stating that Pentalpha's deep fryer did not infringe any of the patents that he had found. Pentalpha then started selling its fryers to Sunbeam, which resold them in this country under its own trademarks at a price that undercut SEB's.

SEB then sued Sunbeam for patent infringement. Though Sunbeam notified Pentalpha of the lawsuit, Pentalpha went on to sell its fryers to other companies, which resold them in the U. S. market under their respective trademarks. After settling the Sunbeam lawsuit, SEB sued Pentalpha, asserting, as relevant here, that it had contravened 35 U. S. C. § 271(b) by actively inducing Sunbeam and the other purchasers of Pentalpha fryers to sell or offer to sell them in violation of SEB's patent rights. The jury found for SEB on the induced infringement theory, and the District Court entered judgment for SEB. Affirming, the Federal Circuit stated that induced infringement under § 271(b) requires a showing that the alleged infringer knew or should have known that his actions would induce actual infringements; declared that this showing includes proof that the alleged infringer knew of the patent; held that, although there was no direct evidence that Pentalpha knew of SEB's patent before it received notice of the Sunbeam suit, there was adequate proof that it deliberately disregarded a known risk that SEB had a protective patent; and said that such disregard is not different from, but a form of, actual knowledge.

Syllabus

Held:

1. Induced infringement under § 271(b) requires knowledge that the induced acts constitute patent infringement. Pp. 759–766.

(a) Section 271(b)'s text—"[w]hoever actively induces infringement of a patent shall be liable as an infringer"—is ambiguous as to the intent needed to impose liability. In referring to a party that "induces infringement," the provision may require merely that the inducer must lead another to engage in conduct that happens to amount to infringement. On the other hand, the reference to a party that "induces infringement" may also be read to mean that the inducer must persuade another to engage in conduct that the inducer knows is infringement. Pp. 760–761.

(b) Like § 271(b)'s language, the pre-1952 case law is susceptible to conflicting interpretations. However, *Aro Mfg. Co.* v. *Convertible Top Replacement Co.*, 377 U. S. 476 *(Aro II)*, resolves the question at issue. Pp. 761–764.

(c) Induced infringement was not considered a separate theory of indirect liability in the pre-1952 case law, but was treated as evidence of "contributory infringement," *i. e.*, the aiding and abetting of direct infringement by another party. When Congress enacted § 271, it separated the contributory infringement concept into two categories: induced infringement, covered by § 271(b), and sale of a component of a patented invention, covered by § 271(c). In the badly fractured *Aro II* decision, a majority concluded that a violator of § 271(c) must know "that the combination for which his component was especially designed was both patented and infringing." 377 U. S., at 488. That conclusion, now a fixture in the law, compels this same knowledge for liability under § 271(b), given that the two provisions have a common origin and create the same difficult interpretive choice. Pp. 764–766.

2. Deliberate indifference to a known risk that a patent exists does not satisfy the knowledge required by § 271(b). Nevertheless, the Federal Circuit's judgment must be affirmed because the evidence in this case was plainly sufficient to support a finding of Pentalpha's knowledge under the doctrine of willful blindness. Pp. 766–771.

(a) The doctrine of willful blindness is well established in criminal law. Many criminal statutes require proof that a defendant acted knowingly or willfully, and courts applying the doctrine have held that defendants cannot escape the reach of these statutes by deliberately shielding themselves from clear evidence of critical facts that are strongly suggested by the circumstances. The traditional rationale for the doctrine is that defendants who behave in this manner are just as culpable as those who have actual knowledge. This Court endorsed a

concept similar to willful blindness over a century ago in *Spurr* v. *United States*, 174 U. S. 728, 735, and every Federal Court of Appeals but one has fully embraced willful blindness. Given the doctrine's long history and wide acceptance in the Federal Judiciary, there is no reason why the doctrine should not apply in civil lawsuits for induced patent infringement under § 271(b). Pp. 766–769.

(b) Although the Courts of Appeals articulate the doctrine of willful blindness in slightly different ways, all agree on two basic requirements. First, the defendant must subjectively believe that there is a high probability that a fact exists. Second, the defendant must take deliberate actions to avoid learning of that fact. These requirements give willful blindness an appropriately limited scope that surpasses recklessness and negligence. Pp. 769–770.

(c) Although the Federal Circuit's test departs from the proper willful blindness standard in important respects, the evidence when viewed in the light most favorable to the verdict for SEB was sufficient under the correct standard. Pentalpha believed that SEB's fryer embodied advanced technology that would be valuable in the U. S. market as evidenced by its decision to copy all but the fryer's cosmetic features. Also revealing is Pentalpha's decision to copy an overseas model of SEB's fryer, aware that it would not bear U. S. patent markings. Even more telling is Pentalpha's decision not to inform its attorney that the product to be evaluated was simply a knockoff of SEB's fryer. Taken together, the evidence was more than sufficient for a jury to find that Pentalpha subjectively believed there was a high probability that SEB's fryer was patented and took deliberate steps to avoid knowing that fact, and that it therefore willfully blinded itself to the infringing nature of Sunbeam's sales. Pp. 770–771.

594 F. 3d 1360, affirmed.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, THOMAS, GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. KENNEDY, J., filed a dissenting opinion, *post*, p. 772.

William Dunnegan argued the cause for petitioners. With him on the briefs was *Laura Scileppi.*

R. Ted Cruz argued the cause for respondent. With him on the brief were *Allyson N. Ho*, *Norman H. Zivin*, and *Wendy E. Miller.**

*Briefs of *amici curiae* urging reversal were filed for the Business Software Alliance by *Andrew J. Pincus;* for Cisco Systems, Inc., et al. by *Seth P. Waxman*, *Mark C. Fleming*, *Anthony E. Peterman*, and *Tina M.*

JUSTICE ALITO delivered the opinion of the Court.

We consider whether a party who "actively induces infringement of a patent" under 35 U. S. C. § 271(b) must know that the induced acts constitute patent infringement.

I

This case concerns a patent for an innovative deep fryer designed by respondent SEB S. A., a French maker of home appliances. In the late 1980's, SEB invented a "cool-touch" deep fryer, that is, a deep fryer for home use with external surfaces that remain cool during the frying process. The cool-touch deep fryer consisted of a metal frying pot surrounded by a plastic outer housing. Attached to the housing was a ring that suspended the metal pot and insulated the housing from heat by separating it from the pot, creating air space between the two components. SEB obtained a U. S. patent for its design in 1991, and sometime later, SEB

Chappell; for the Clearing House Association et al. by *Michael S. Connor*, *Benjamin F. Sidbury*, *Theresa Conduah*, and *Kevin Carroll;* for Comcast Corp. et al. by *Thomas G. Hungar*, *Matthew D. McGill*, and *William G. Jenks;* for Google Inc. by *Robert S. Schwartz* and *Seth D. Greenstein;* for Newegg, Inc., by *Peter J. Brann;* for the Software Freedom Law Center by *Eben Moglen* and *Daniel Ravicher;* and for Yahoo! Inc. et al. by *Edward R. Reines*, *Kevin Kramer*, *Jacob Schatz*, *Paul Roeder*, and *Robert H. Tiller*.

Briefs of *amici curiae* urging affirmance were filed for the American Intellectual Property Law Association by *Peter A. Sullivan* and *William G. Barber;* for Hoffmann-La Roche Inc. et al. by *James W. Dabney*, *Stephen S. Rabinowitz*, *Henry C. Lebowitz*, *Randy C. Eisensmith*, and *John F. Duffy;* for Law Professors by *Ted Sichelman*, *pro se;* and for the William Mitchell College of Law Intellectual Property Institute by *R. Carl Moy*.

Briefs of *amici curiae* were filed for the Federal Circuit Bar Association by *Edgar H. Haug*, *Chiemi D. Suzuki*, and *Mark P. Walters;* for the Intellectual Property Owners Association by *Gary M. Hoffman*, *Jeffrey K. Sherwood*, *Douglas K. Norman*, and *Kevin Rhodes;* for the Motion Picture Association of America et al. by *Paul D. Clement*, *Daryl Joseffer*, and *Adam Conrad;* and for 41 Law, Economics, and Business Professors by *Mark A. Lemley*, *pro se*.

started manufacturing the cool-touch fryer and selling it in this country under its well-known "T-Fal" brand. Superior to other products in the American market at the time, SEB's fryer was a commercial success.

In 1997, Sunbeam Products, Inc., a U. S. competitor of SEB, asked petitioner Pentalpha Enterprises, Ltd., to supply it with deep fryers meeting certain specifications. Pentalpha is a Hong Kong maker of home appliances and a wholly owned subsidiary of petitioner Global-Tech Appliances, Inc.[1]

In order to develop a deep fryer for Sunbeam, Pentalpha purchased an SEB fryer in Hong Kong and copied all but its cosmetic features. Because the SEB fryer bought in Hong Kong was made for sale in a foreign market, it bore no U. S. patent markings. After copying SEB's design, Pentalpha retained an attorney to conduct a right-to-use study, but Pentalpha refrained from telling the attorney that its design was copied directly from SEB's.

The attorney failed to locate SEB's patent, and in August 1997 he issued an opinion letter stating that Pentalpha's deep fryer did not infringe any of the patents that he had found. That same month, Pentalpha started selling its deep fryers to Sunbeam, which resold them in the United States under its trademarks. By obtaining its product from a manufacturer with lower production costs, Sunbeam was able to undercut SEB in the U. S. market.

After SEB's customers started defecting to Sunbeam, SEB sued Sunbeam in March 1998, alleging that Sunbeam's sales infringed SEB's patent. Sunbeam notified Pentalpha of the lawsuit the following month. Undeterred, Pentalpha went on to sell deep fryers to Fingerhut Corp. and Montgomery Ward & Co., both of which resold them in the United States under their respective trademarks.

SEB settled the lawsuit with Sunbeam, and then sued Pentalpha, asserting two theories of recovery: First, SEB

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[1] We refer to both petitioners as "Pentalpha."

claimed that Pentalpha had directly infringed SEB's patent in violation of 35 U. S. C. § 271(a), by selling or offering to sell its deep fryers; and second, SEB claimed that Pentalpha had contravened § 271(b) by actively inducing Sunbeam, Fingerhut, and Montgomery Ward to sell or to offer to sell Pentalpha's deep fryers in violation of SEB's patent rights.

Following a 5-day trial, the jury found for SEB on both theories and also found that Pentalpha's infringement had been willful. Pentalpha filed post-trial motions seeking a new trial or judgment as a matter of law on several grounds. As relevant here, Pentalpha argued that there was insufficient evidence to support the jury's finding of induced infringement under § 271(b) because Pentalpha did not actually know of SEB's patent until it received the notice of the Sunbeam lawsuit in April 1998.

The District Court rejected Pentalpha's argument, as did the Court of Appeals for the Federal Circuit, which affirmed the judgment, *SEB S. A.* v. *Montgomery Ward & Co.*, 594 F. 3d 1360 (2010). Summarizing a recent en banc decision, the Federal Circuit stated that induced infringement under § 271(b) requires a "plaintiff [to] show that the alleged infringer knew or should have known that his actions would induce actual infringements" and that this showing includes proof that the alleged infringer knew of the patent. *Id.*, at 1376. Although the record contained no direct evidence that Pentalpha knew of SEB's patent before April 1998, the court found adequate evidence to support a finding that "Pentalpha deliberately disregarded a known risk that SEB had a protective patent." *Id.*, at 1377. Such disregard, the court said, "is not different from actual knowledge, but is a form of actual knowledge." *Ibid.*

We granted certiorari. 562 U. S. 960 (2010).

II

Pentalpha argues that active inducement liability under § 271(b) requires more than deliberate indifference to a

known risk that the induced acts may violate an existing patent. Instead, Pentalpha maintains, actual knowledge of the patent is needed.

A

In assessing Pentalpha's argument, we begin with the text of § 271(b)—which is short, simple, and, with respect to the question presented in this case, inconclusive. Section 271(b) states: "Whoever actively induces infringement of a patent shall be liable as an infringer."

Although the text of § 271(b) makes no mention of intent, we infer that at least some intent is required. The term "induce" means "[t]o lead on; to influence; to prevail on; to move by persuasion or influence." Webster's New International Dictionary 1269 (2d ed. 1945). The addition of the adverb "actively" suggests that the inducement must involve the taking of affirmative steps to bring about the desired result, see *id.*, at 27.

When a person actively induces another to take some action, the inducer obviously knows the action that he or she wishes to bring about. If a used car salesman induces a customer to buy a car, the salesman knows that the desired result is the purchase of the car. But what if it is said that the salesman induced the customer to buy a *damaged* car? Does this mean merely that the salesman induced the customer to purchase a car that happened to be damaged, a fact of which the salesman may have been unaware? Or does this mean that the salesman knew that the car was damaged? The statement that the salesman induced the customer to buy a damaged car is ambiguous.

So is § 271(b). In referring to a party that "induces infringement," this provision may require merely that the inducer lead another to engage in conduct that happens to amount to infringement, *i. e.*, the making, using, offering to sell, selling, or importing of a patented invention. See

§ 271(a).[2] On the other hand, the reference to a party that "induces infringement" may also be read to mean that the inducer must persuade another to engage in conduct that the inducer knows is infringement. Both readings are possible.

B

Finding no definitive answer in the statutory text, we turn to the case law that predates the enactment of § 271 as part of the Patent Act of 1952. As we recognized in *Aro Mfg. Co.* v. *Convertible Top Replacement Co.*, 377 U. S. 476 (1964) *(Aro II)*, "[t]he section was designed to 'codify in statutory form principles of contributory infringement' which had been 'part of our law for about 80 years.'" *Id.*, at 485–486, n. 6 (quoting H. R. Rep. No. 1923, 82d Cong., 2d Sess., 9 (1952)).

Unfortunately, the relevant pre-1952 cases are less clear than one might hope with respect to the question presented here. Before 1952, both the conduct now covered by § 271(b) (induced infringement) and the conduct now addressed by § 271(c) (sale of a component of a patented invention) were viewed as falling within the overarching concept of "contributory infringement." Cases in the latter category—*i. e.*, cases in which a party sold an item that was not itself covered by the claims of a patent but that enabled another party to make or use a patented machine, process, or combination—were more common.

The pre-1952 case law provides conflicting signals regarding the intent needed in such cases. In an oft-cited decision, then-Judge Taft suggested that it was sufficient if the seller of the component part intended that the part be used in an invention that happened to infringe a patent. He wrote that

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[2] Direct infringement has long been understood to require no more than the unauthorized use of a patented invention. See *Aro Mfg. Co.* v. *Convertible Top Replacement Co.*, 377 U. S. 476, 484 (1964); 3 A. Deller, Walker on Patents § 453, p. 1684 (1937) (hereinafter Deller). Thus, a direct infringer's knowledge or intent is irrelevant.

it was "well settled that where one makes and sells one element of a combination covered by a patent with the intention and for the purpose of bringing about its use in such a combination he is guilty of contributory infringement." *Thomson-Houston Elec. Co.* v. *Ohio Brass Co.*, 80 F. 712, 721 (CA6 1897).[3]

On the other hand, this Court, in *Henry* v. *A. B. Dick Co.*, 224 U. S. 1 (1912), overruled on other grounds, *Motion Picture Patents Co.* v. *Universal Film Mfg. Co.*, 243 U. S. 502 (1917), stated that "if the defendants [who were accused of contributory infringement] *knew of the patent* and that [the direct infringer] had unlawfully made the patented article . . . with the intent and purpose that [the direct infringer] should

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[3] For an article that is particularly clear on this point, see H. Howson, Paper Before American Association of Inventors and Manufacturers, Washington, D. C., Contributory Infringement of Patents 9 (Jan. 1895) (reading late 19th-century case law to require only that a party "intentionally contribut[e] to the *act*, which the Court holds to be an infringement" (emphasis in original)). Other authorities from this era likewise suggest that it was sufficient if the seller intended a component part to be used in a manner that happened to infringe a patent. See, *e. g., Morgan Envelope Co.* v. *Albany Perforated Wrapping Paper Co.*, 152 U. S. 425, 433 (1894) ("There are doubtless many cases to the effect that the manufacture and sale of a single element of a combination, with intent that it shall be united to the other elements, and so complete the combination, is an infringement"); *Individual Drinking Cup Co.* v. *Errett*, 297 F. 733, 739–740 (CA2 1924) ("[B]efore one may be held for contributory infringement, it must be shown that he had knowingly done some act without which the infringement would not have occurred"); *New York Scaffolding Co.* v. *Whitney*, 224 F. 452, 459 (CA8 1915) ("Contributory infringement is the intentional aiding of one person by another in the unlawful making, or selling, or using of a third person's patented invention"); 3 Deller § 507, at 1764–1765 ("[W]here a person furnishes one part of a patented combination, intending that it shall be assembled with the other parts thereof, and that the complete combination shall be used or sold; that person is liable to an action, as infringer of the patent on the complete combination"); 3 W. Robinson, Patents § 924, p. 101 (1890) ("To make or sell a single element with the intent that it shall be united to the other elements, and so complete the combination, is infringement").

use the infringing article . . . they would assist in her infringing use." 224 U. S., at 33 (emphasis added and deleted).[4] Our decision in *Metro-Goldwyn-Mayer Studios Inc.* v. *Grokster, Ltd.*, 545 U. S. 913 (2005), which looked to the law of contributory patent infringement for guidance in determining the standard to be applied in a case claiming contributory copyright infringement, contains dicta that may be read as interpreting the pre-1952 cases this way. In *Grokster*, we said that "[t]he inducement rule . . . premises liability on purposeful, culpable expression and conduct." *Id.*, at 937.

While both the language of § 271(b) and the pre-1952 case law that this provision was meant to codify are susceptible to conflicting interpretations, our decision in *Aro II* resolves the question in this case. In *Aro II*, a majority held that a violator of § 271(c) must know "that the combination for which his component was especially designed was both patented and infringing," 377 U. S., at 488, and as we explain

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[4] The earlier case of *Cortelyou* v. *Charles Eneu Johnson & Co.*, 207 U. S. 196 (1907), contains language that may be read as adopting a similar position. In that case, the Neostyle Company had a patent for a "stencil duplicating machine" called the "rotary Neostyle," and it licensed the use of its machine pursuant to a license requiring the licensee to use only Neostyle's ink. *Id.*, at 198. Another company, Charles Eneu Johnson & Co., sold its ink to a Neostyle licensee, and Neostyle sued the Johnson company, claiming that it was "inducing a breach of the license contracts" and was thus indirectly infringing Neostyle's patent rights. *Id.*, at 199. The Court held that the defendant did not have "sufficient evidence of notice" to support liability. *Id.*, at 200. The Court wrote:

"True, the defendant filled a few orders for ink to be used on a rotary Neostyle, but it does not appear that it ever solicited an order for ink to be so used, *that it was ever notified by the plaintiffs of the rights which they claimed*, or that anything which it did was considered by them an infringement upon those rights." *Ibid.* (emphasis added).

The italicized language above may suggest that it was necessary to show that the defendants had notice of Neostyle's patent rights. See also *Tubular Rivet & Stud Co.* v. *O'Brien*, 93 F. 200, 203 (CC Mass. 1898) ("[A] necessary condition of the defendant's guilt is his knowledge of the complainant's patent").

below, that conclusion compels this same knowledge for liability under § 271(b).

C

As noted above, induced infringement was not considered a separate theory of indirect liability in the pre-1952 case law. Rather, it was treated as evidence of "contributory infringement," that is, the aiding and abetting of direct infringement by another party. See Lemley, Inducing Patent Infringement, 39 U. C. D. L. Rev. 225, 227 (2005). When Congress enacted § 271, it separated what had previously been regarded as contributory infringement into two categories, one covered by § 271(b) and the other covered by § 271(c).

Aro II concerned § 271(c), which states in relevant part:

> "Whoever offers to sell or sells . . . a component of a patented [invention] . . . , constituting a material part of the invention, *knowing the same to be especially made or especially adapted for use in an infringement* of such patent, and not a staple article or commodity of commerce suitable for substantial noninfringing use, shall be liable as a contributory infringer." (Emphasis added.)

This language contains exactly the same ambiguity as § 271(b). The phrase "knowing [a component] to be especially made or especially adapted for use in an infringement" may be read to mean that a violator must know that the component is "especially adapted for use" in a product that happens to infringe a patent. Or the phrase may be read to require, in addition, knowledge of the patent's existence.

This question closely divided the *Aro II* Court. In a badly fractured decision, a majority concluded that knowledge of the patent was needed. 377 U. S., at 488, and n. 8; *id.*, at 514 (White, J., concurring); *id.*, at 524–527 (Black, J., dissenting).[5]

[5] Although Justice Black disagreed with the judgment and was thus in dissent, he was in the majority with respect to the interpretation of § 271(c), and his opinion sets out the reasoning of the majority on this point. Three other Justices joined his opinion, and a fourth, Justice

Justice Black's opinion, which explained the basis for the majority's view, concluded that the language of § 271(c) supported this interpretation. See *id.*, at 525. His opinion also relied on an amendment to this language that was adopted when the bill was in committee. *Id.*, at 525–527.

Four Justices disagreed with this interpretation and would have held that a violator of § 271(c) need know only that the component is specially adapted for use in a product that happens to infringe a patent. See *id.*, at 488–490, n. 8. These Justices thought that this reading was supported by the language of § 271(c) and the pre-1952 case law, and they disagreed with the inference drawn by the majority from the amendment of § 271(c)'s language. *Ibid.*

While there is much to be said in favor of both views expressed in *Aro II*, the "holding in *Aro II* has become a fixture in the law of contributory infringement under [section] 271(c)," 5 R. Moy, Walker on Patents § 15:20, p. 15–131 (4th ed. 2009)—so much so that SEB has not asked us to overrule it, see Brief for Respondent 19, n. 3. Nor has Congress seen fit to alter § 271(c)'s intent requirement in the nearly half a century since *Aro II* was decided. In light of the "'special force'" of the doctrine of *stare decisis* with regard to questions of statutory interpretation, see *John R. Sand & Gravel Co.* v. *United States*, 552 U. S. 130, 139 (2008), we proceed on the premise that § 271(c) requires knowledge of the existence of the patent that is infringed.

Based on this premise, it follows that the same knowledge is needed for induced infringement under § 271(b). As noted, the two provisions have a common origin in the pre-1952 understanding of contributory infringement, and the language of the two provisions creates the same difficult interpretive choice. It would thus be strange to hold that knowledge of the relevant patent is needed under § 271(c) but not under § 271(b).

White, endorsed his reasoning with respect to the interpretation of § 271(c). See 377 U. S., at 514 (White, J., concurring).

Accordingly, we now hold that induced infringement under § 271(b) requires knowledge that the induced acts constitute patent infringement.

III

Returning to Pentalpha's principal challenge, we agree that deliberate indifference to a known risk that a patent exists is not the appropriate standard under § 271(b). We nevertheless affirm the judgment of the Court of Appeals because the evidence in this case was plainly sufficient to support a finding of Pentalpha's knowledge under the doctrine of willful blindness.

A

The doctrine of willful blindness is well established in criminal law. Many criminal statutes require proof that a defendant acted knowingly or willfully, and courts applying the doctrine of willful blindness hold that defendants cannot escape the reach of these statutes by deliberately shielding themselves from clear evidence of critical facts that are strongly suggested by the circumstances. The traditional rationale for this doctrine is that defendants who behave in this manner are just as culpable as those who have actual knowledge. Edwards, The Criminal Degrees of Knowledge, 17 Mod. L. Rev. 294, 302 (1954) (hereinafter Edwards) (observing on the basis of English authorities that "up to the present day, no real doubt has been cast on the proposition that [willful blindness] is as culpable as actual knowledge"). It is also said that persons who know enough to blind themselves to direct proof of critical facts in effect have actual knowledge of those facts. See *United States* v. *Jewell*, 532 F. 2d 697, 700 (CA9 1976) (en banc).

This Court's opinion more than a century ago in *Spurr* v. *United States*, 174 U. S. 728 (1899),[6] while not using the term

[6] The doctrine emerged in English law almost four decades earlier and became firmly established by the end of the 19th century. Edwards 298–301. In American law, one of the earliest references to the doctrine ap-

"willful blindness," endorsed a similar concept. The case involved a criminal statute that prohibited a bank officer from "willfully" certifying a check drawn against insufficient funds. We said that a willful violation would occur "if the [bank] officer purposely keeps himself in ignorance of whether the drawer has money in the bank." *Id.*, at 735. Following our decision in *Spurr*, several federal prosecutions in the first half of the 20th century invoked the doctrine of willful blindness.[7] Later, a 1962 proposed draft of the Model Penal Code, which has since become official, attempted to incorporate the doctrine by defining "knowledge of the existence of a particular fact" to include a situation in which "a person is aware of a high probability of [the fact's] existence, unless he actually believes that it does not exist." ALI, Model Penal Code §2.02(7) (Proposed Official Draft 1962). Our Court has used the Code's definition as a guide in analyzing whether certain statutory presumptions of knowledge comported with due process. See *Turner* v. *United States*, 396 U. S. 398, 416–417 (1970); *Leary* v. *United States*, 395 U. S. 6, 46–47, and n. 93 (1969). And every Court of Appeals—with the possible exception of the District of

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pears in an 1882 jury charge in a federal prosecution. In the charge, the trial judge rejected the "great misapprehension" that a person may "close his eyes, when he pleases, upon all sources of information, and then excuse his ignorance by saying that he does not see anything." See *United States* v. *Houghton*, 14 F. 544, 547 (DC NJ).

[7] *United States* v. *Yasser*, 114 F. 2d 558, 560 (CA3 1940) (interpreting the crime of knowingly and fraudulently concealing property belonging to the estate of a bankrupt debtor to include someone who "closed his eyes to facts which made the existence of" the receiver or trustee "obvious"); *Rachmil* v. *United States*, 43 F. 2d 878, 881 (CA9 1930) *(per curiam)* (same); *United States* v. *Erie R. Co.*, 222 F. 444, 448–451 (DC NJ 1915) (approving a "willful ignorance" jury instruction to a charge that a rail carrier knowingly granted a concession to a shipper); *Grant Bros. Constr. Co.* v. *United States*, 13 Ariz. 388, 400, 114 P. 955, 959 (1911) (interpreting the crime of knowingly encouraging the importation of contract laborers to include those who "willfully and intentionally ignored facts and circumstances known to them, which would have led to [actual] knowledge").

Columbia Circuit, see n. 9, *infra*—has fully embraced willful blindness, applying the doctrine to a wide range of criminal statutes.

Given the long history of willful blindness and its wide acceptance in the Federal Judiciary, we can see no reason why the doctrine should not apply in civil lawsuits for induced patent infringement under 35 U. S. C. § 271(b).[8]

Pentalpha urges us not to take this step, arguing that § 271(b) demands more than willful blindness with respect to *the induced acts* that constitute infringement. See Reply Brief for Petitioners 13–14. This question, however, is not at issue here. There is no need to invoke the doctrine of willful blindness to establish that Pentalpha knew that the retailers who purchased its fryer were selling that product in the American market; Pentalpha was indisputably aware that its customers were selling its product in this country.

Pentalpha further contends that this Court in *Grokster* did not accept the Solicitor General's suggestion that Grokster and StreamCast could be held liable for inducing the infringement of copyrights under a theory of willful blindness. Reply Brief for Petitioners 14 (citing Brief for United States as *Amicus Curiae,* O. T. 2004, No. 04–480, pp. 29–30). But the Court had no need to consider the doctrine of willful blindness in that case because the Court found ample evidence that Grokster and StreamCast were fully aware—in the ordinary sense of the term—that their file-sharing software was routinely used in carrying out the acts that constituted infringement (the unauthorized sharing of copyrighted

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[8] Unlike the dissent, we do not think that utilitarian concerns demand a stricter standard for knowledge under § 271(b), see *post,* at 773 (opinion of KENNEDY, J.). The dissent does not explain—nor can we see—why promoting "'the Progress of Science and useful Arts,'" *ibid.*, requires protecting parties who actively encourage others to violate patent rights and who take deliberate steps to remain ignorant of those rights despite a high probability that the rights exist and are being infringed, see *infra,* at 769–770.

works) and that these acts violated the rights of copyright holders. See 545 U. S., at 922–927, 937–940.

B

While the Courts of Appeals articulate the doctrine of willful blindness in slightly different ways, all appear to agree on two basic requirements: (1) The defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact.[9] We think these requirements give willful blindness an appropriately limited scope that surpasses recklessness and negligence. Under this formulation, a willfully blind defendant is one who takes deliberate actions to avoid confirming a high probability of wrongdoing and who can almost be said to have actually known the critical facts. See G. Williams, Criminal Law § 57, p. 159 (2d ed.

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[9] *United States* v. *Pérez-Meléndez*, 599 F. 3d 31, 41 (CA1 2010); *United States* v. *Svoboda*, 347 F. 3d 471, 477–478 (CA2 2003); *United States* v. *Stadtmauer*, 620 F. 3d 238, 257 (CA3 2010); *United States* v. *Schnabel*, 939 F. 2d 197, 203 (CA4 1991) ("The willful blindness instruction allows the jury to impute the element of knowledge to the defendant if the evidence indicates that he purposely closed his eyes to avoid knowing what was taking place around him"); *United States* v. *Freeman*, 434 F. 3d 369, 378 (CA5 2005); *United States* v. *Holloway*, 731 F. 2d 378, 380–381 (CA6 1984) *(per curiam)* (upholding jury instruction on knowledge when "it prevent[ed] a criminal defendant from escaping conviction merely by deliberately closing his eyes to the obvious risk that he is engaging in unlawful conduct"); *United States* v. *Draves*, 103 F. 3d 1328, 1333 (CA7 1997) ("[K]nowledge may in some circumstances be inferred from strong suspicion of wrongdoing coupled with active indifference to the truth"); *United States* v. *Florez*, 368 F. 3d 1042, 1044 (CA8 2004) ("Ignorance is deliberate if the defendant was presented with facts that put her on notice that criminal activity was particularly likely and yet she intentionally failed to investigate those facts"); *United States* v. *Heredia*, 483 F. 3d 913, 917, 920 (CA9 2007) (en banc); *United States* v. *Glick*, 710 F. 2d 639, 643 (CA10 1983); *United States* v. *Perez-Tosta*, 36 F. 3d 1552, 1564 (CA11 1994). But see *United States* v. *Alston-Graves*, 435 F. 3d 331, 339–341 (CADC 2006).

1961) ("A court can properly find wilful blindness only where it can almost be said that the defendant actually knew"). By contrast, a reckless defendant is one who merely knows of a substantial and unjustified risk of such wrongdoing, see ALI, Model Penal Code § 2.02(2)(c) (1985), and a negligent defendant is one who should have known of a similar risk but, in fact, did not, see § 2.02(2)(d).

The test applied by the Federal Circuit in this case departs from the proper willful blindness standard in two important respects. First, it permits a finding of knowledge when there is merely a "known risk" that the induced acts are infringing. Second, in demanding only "deliberate indifference" to that risk, the Federal Circuit's test does not require active efforts by an inducer to avoid knowing about the infringing nature of the activities.

In spite of these flaws, we believe that the evidence when viewed in the light most favorable to the verdict for SEB is sufficient under the correct standard. The jury could have easily found that before April 1998 Pentalpha willfully blinded itself to the infringing nature of the sales it encouraged Sunbeam to make.[10]

SEB's cool-touch fryer was an innovation in the U. S. market when Pentalpha copied it. App. to Brief for Respondent 49. As one would expect with any superior product, sales of SEB's fryer had been growing for some time. *Ibid.* Pentalpha knew all of this, for its chief executive officer and president, John Sham, testified that, in developing a product for Sunbeam, Pentalpha performed "market research" and

[10] The District Court did not instruct the jury according to the standard we set out today, see App. to Brief for Respondent 26–27, and Pentalpha asks us to remand the case so it can move for a new trial. We reject that request. Pentalpha did not challenge the jury instructions in the Court of Appeals, see Brief for Appellants in No. 2009–1099 etc. (CA Fed.), pp. 21–22, and that court did not pass upon the issue. Finding no "exceptional" circumstances in this case, we follow our usual course and refuse to consider the issue. See *Youakim* v. *Miller*, 425 U. S. 231, 234 (1976) *(per curiam)*.

"gather[ed] information as much as possible." App. 23a. Pentalpha's belief that SEB's fryer embodied advanced technology that would be valuable in the U. S. market is evidenced by its decision to copy all but the cosmetic features of SEB's fryer.

Also revealing is Pentalpha's decision to copy an overseas model of SEB's fryer. Pentalpha knew that the product it was designing was for the U. S. market, and Sham—himself a named inventor on numerous U. S. patents, see *id.*, at 78a–86a—was well aware that products made for overseas markets usually do not bear U. S. patent markings, App. in No. 2009–1099 etc. (CA Fed.), pp. A–1904 to A–1906. Even more telling is Sham's decision not to inform the attorney from whom Pentalpha sought a right-to-use opinion that the product to be evaluated was simply a knockoff of SEB's deep fryer. On the facts of this case, we cannot fathom what motive Sham could have had for withholding this information other than to manufacture a claim of plausible deniability in the event that his company was later accused of patent infringement. Nor does Sham's testimony on this subject provide any reason to doubt that inference. Asked whether the attorney would have fared better had he known of SEB's design, Sham was nonresponsive. All he could say was that a patent search is not an "easy job" and that is why he hired attorneys to perform them. App. 112a.

Taken together, this evidence was more than sufficient for a jury to find that Pentalpha subjectively believed there was a high probability that SEB's fryer was patented, that Pentalpha took deliberate steps to avoid knowing that fact, and that it therefore willfully blinded itself to the infringing nature of Sunbeam's sales.

* * *

The judgment of the United States Court of Appeals for the Federal Circuit is

Affirmed.

JUSTICE KENNEDY, dissenting.

The Court is correct, in my view, to conclude that 35 U. S. C. § 271(b) must be read in tandem with § 271(c), and therefore that to induce infringement a defendant must know "the induced acts constitute patent infringement." *Ante*, at 766.

Yet the Court does more. Having interpreted the statute to require a showing of knowledge, the Court holds that willful blindness will suffice. This is a mistaken step. Willful blindness is not knowledge; and judges should not broaden a legislative proscription by analogy. See *United States* v. *Jewell*, 532 F. 2d 697, 706 (CA9 1976) (Kennedy, J., dissenting) ("When a statute specifically requires knowledge as an element of a crime, however, the substitution of some other state of mind cannot be justified even if the court deems that both are equally blameworthy"). In my respectful submission, the Court is incorrect in the definition it now adopts; but even on its own terms the Court should remand to the Court of Appeals to consider in the first instance whether there is sufficient evidence of knowledge to support the jury's finding of inducement.

The Court invokes willful blindness to bring those who lack knowledge within § 271(b)'s prohibition. Husak & Callender, Wilful Ignorance, Knowledge, and the "Equal Culpability" Thesis: A Study of the Deeper Significance of the Principle of Legality, 1994 Wis. L. Rev. 29, 35; see also L. Alexander & K. Ferzan, Crime and Culpability: A Theory of Criminal Law 34–35 (2009) (cautioning against the temptation to "distort" cases of willful blindness "into cases of knowledge"); G. Williams, Criminal Law: The General Part § 57, p. 157 (2d ed. 1961). The Court's definition of willful blindness reveals this basic purpose. One can believe that there is a "high probability" that acts might infringe a patent but nonetheless conclude they do not infringe. *Ante*, at 769; see also *ibid.* (describing a willfully blind defendant as one "who can almost be said to have actually known the critical

facts"). The alleged inducer who believes a device is noninfringing cannot be said to know otherwise.

The Court justifies its substitution of willful blindness for the statutory knowledge requirement in two ways, neither of which is convincing.

First, the Court appeals to moral theory by citing the "traditional rationale" that willfully blind defendants "are just as culpable as those who have actual knowledge." *Ante*, at 766. But the moral question is a difficult one. Is it true that the lawyer who knowingly suborns perjury is no more culpable than the lawyer who avoids learning that his client, a criminal defendant, lies when he testifies that he was not the shooter? See Hellman, Willfully Blind for Good Reason, 3 Crim. L. & Philosophy 301, 305–308 (2009); Luban, Contrived Ignorance, 87 Geo. L. J. 957 (1999). The answer is not obvious. Perhaps the culpability of willful blindness depends on a person's reasons for remaining blind. *E. g.*, *ibid.* Or perhaps only the person's justification for his conduct is relevant. *E. g.*, Alexander & Ferzan, *supra*, at 23–68. This is a question of morality and of policy best left to the political branches. Even if one were to accept the substitution of equally blameworthy mental states in criminal cases in light of the retributive purposes of the criminal law, those purposes have no force in the domain of patent law that controls in this case. The Constitution confirms that the purpose of the patent law is a utilitarian one, to "promote the Progress of Science and useful Arts," Art. I, § 8, cl. 8.

Second, the Court appeals to precedent, noting that a "similar concept" to willful blindness appears in this Court's cases as early as 1899. *Ante*, at 767. But this Court has never before held that willful blindness can substitute for a statutory requirement of knowledge. *Spurr* v. *United States*, 174 U. S. 728, 735 (1899), explained that "evil design may be presumed if the [bank] officer purposefully keeps himself in ignorance of whether the drawer has money in the bank or not, or is grossly indifferent to his duty in respect

to the ascertainment of that fact." The question in *Spurr* was whether the defendant's admitted violation was willful, and with this sentence the Court simply explained that wrongful intent may be inferred from the circumstances. It did not suggest that blindness can substitute for knowledge. Neither did *Turner* v. *United States*, 396 U. S. 398 (1970), or *Leary* v. *United States*, 395 U. S. 6 (1969). As the Court here explains, both cases held only that certain statutory presumptions of knowledge were consistent with due process. *Ante*, at 767. And although most courts of appeals have embraced willful blindness, counting courts in a circuit split is not this Court's usual method for deciding important questions of law.

The Court appears to endorse the willful blindness doctrine here for all federal criminal cases involving knowledge. It does so in a civil case where it has received no briefing or argument from the criminal defense bar, which might have provided important counsel on this difficult issue.

There is no need to invoke willful blindness for the first time in this case. Facts that support willful blindness are often probative of actual knowledge. Circumstantial facts like these tend to be the only available evidence in any event, for the jury lacks direct access to the defendant's mind. The jury must often infer knowledge from conduct, and attempts to eliminate evidence of knowledge may justify such inference, as where an accused inducer avoids further confirming what he already believes with good reason to be true. The majority's decision to expand the statute's scope appears to depend on the unstated premise that knowledge requires certainty, but the law often permits probabilistic judgments to count as knowledge. Cf. *Connecticut Mut. Life Ins. Co.* v. *Lathrop*, 111 U. S. 612, 620 (1884) (Harlan, J.) ("[B]eing founded on actual observation, and being consistent with common experience and the ordinary manifestations of the condition of the mind, it is knowledge, so far as the human intellect can acquire knowledge, upon such subjects").

The instant dispute provides a case in point. Pentalpha copied an innovative fryer. The model it copied bore no U. S. patent markings, but that could not have been a surprise, for Pentalpha knew that a fryer purchased in Hong Kong was unlikely to bear such markings. And Pentalpha failed to tell the lawyer who ran a patent search that it copied the SEB fryer. These facts may suggest knowledge that Pentalpha's fryers were infringing, and perhaps a jury could so find.

But examining the sufficiency of the evidence presented in the 5-day trial requires careful review of an extensive record. The trial transcript alone spans over 1,000 pages. If willful blindness is as close to knowledge and as far from the "'knew or should have known'" jury instruction provided in this case as the Court suggests, *ante*, at 759, then reviewing the record becomes all the more difficult. I would leave that task to the Court of Appeals in the first instance on remand.

For these reasons, and with respect, I dissent.

Syllabus

BOARD OF TRUSTEES OF THE LELAND STANFORD JUNIOR UNIVERSITY *v.* ROCHE MOLECULAR SYSTEMS, INC., ET AL.

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

No. 09–1159. Argued February 28, 2011—Decided June 6, 2011

In 1985, a small California research company called Cetus began to develop methods for quantifying blood-borne levels of human immunodeficiency virus (HIV), the virus that causes AIDS. A Nobel Prize winning technique developed at Cetus known as PCR was an integral part of these efforts.

In 1988, Cetus began to collaborate with scientists at Stanford University's Department of Infectious Diseases to test the efficacy of new AIDS drugs. Dr. Holodniy joined Stanford as a research fellow in the department around that time. When he did so, he signed an agreement stating that he "agree[d] to assign" to Stanford his "right, title and interest in" inventions resulting from his employment there. Holodniy's supervisor arranged for him to conduct research at Cetus to learn about PCR. As a condition of gaining access to Cetus, Holodniy was required to sign an agreement stating that he "will assign and do[es] hereby assign" to Cetus his "right, title, and interest in . . . the ideas, inventions and improvements" made "as a consequence of [his] access" to Cetus. Working with Cetus employees, Holodniy devised a PCR-based procedure for measuring the amount of HIV in a patient's blood. Upon returning to Stanford, he and other Stanford employees tested the procedure. Stanford secured three patents to the measurement process.

Roche Molecular Systems acquired Cetus's PCR-related assets. After conducting clinical trials on the HIV quantification method developed at Cetus, Roche commercialized the procedure. Today, its HIV test kits are used worldwide.

The University and Small Business Patent Procedures Act of 1980 (Bayh-Dole Act or Act) allocates rights in federally funded "subject invention[s]" between the Federal Government and federal contractors. 35 U. S. C. §§ 201(e), (c), 202(a). The Act defines "subject invention" as "any invention of the contractor conceived or first actually reduced to practice in the performance of work under a funding agreement," § 201(e), and provides that contractors may "elect to retain title to any subject invention," § 202(a). Because some of Stanford's research on

the HIV measurement technique was funded by the National Institutes of Health (NIH), the Bayh-Dole Act applied. In accordance with the Act's requirements, Stanford notified NIH that it was electing to retain title to the invention and conferred on the Government a license to use the patented procedure.

Petitioner, the Board of Trustees of Stanford University, filed suit against respondents (Roche), claiming that their HIV test kits infringed Stanford's patents. Roche responded that Holodniy's agreement with Cetus gave it co-ownership of the procedure, and thus Stanford lacked standing to sue it for patent infringement. Stanford countered that Holodniy had no rights to assign because the University had superior rights under the Bayh-Dole Act. The District Court agreed with Stanford and held that under the Bayh-Dole Act, Holodniy had no rights to assign to Cetus. The Court of Appeals for the Federal Circuit disagreed, concluding that Holodniy's agreement with Cetus assigned his rights to Cetus, and thus to Roche. It also found that the Bayh-Dole Act did not automatically void an inventor's rights in federally funded inventions. Thus, the Act did not extinguish Roche's ownership interest in the invention, and Stanford was deprived of standing.

Held: The Bayh-Dole Act does not automatically vest title to federally funded inventions in federal contractors or authorize contractors to unilaterally take title to such inventions. Pp. 784–793.

(a) Since 1790, patent law has operated on the premise that rights in an invention belong to the inventor. See, *e. g.*, *Gayler* v. *Wilder,* 10 How. 477, 493. In most cases, a patent may be issued only to an applying inventor, or—because an inventor's interest in his invention is assignable in law by an instrument in writing—an inventor's assignee. See *United States* v. *Dubilier Condenser Corp.,* 289 U. S. 178, 187. Absent an agreement to the contrary, an employer does not have rights in an invention "which is the original conception of the employee alone," *id.,* at 189; an inventor must expressly grant those rights to his employer, see *id.,* at 187. Pp. 784–786.

(b) Stanford and *amicus* United States contend that, when an invention is conceived or first reduced to practice with the support of federal funds, the Bayh-Dole Act vests title to those inventions in the inventor's employer—the federal contractor. Congress has in the past divested inventors of their rights in inventions by providing unambiguously that inventions created pursuant to certain specified federal contracts become the Government's property. Such unambiguous language is notably absent from the Bayh-Dole Act. Instead, the Act provides that contractors may "elect to retain title to any subject invention," § 202(a), defining a "subject invention" as "any invention of the contractor con-

ceived or first actually reduced to practice in the performance of work under a funding agreement," § 201(e).

Stanford contends that "invention of the contractor" means all inventions that a contractor's employees make with the aid of federal funds. That reading assumes that Congress subtly set aside two centuries of patent law in a statutory definition. This Court has rejected the idea that mere employment is sufficient to vest title to an employee's invention in the employer. Stanford's reading also renders the phrase "of the contractor" superfluous since the definition already covers inventions made under a funding agreement. Construing the phrase to refer instead to a particular category of inventions conceived or reduced to practice under a funding agreement—inventions "of the contractor," that is, those owned by or belonging to the contractor—makes the phrase meaningful in the statutory definition. And "invention owned by the contractor" or "invention belonging to the contractor" are natural readings of the phrase "invention of the contractor."

Section 202(a), which states that contractors may "elect to retain title," confirms that the Act does not *vest* title. Stanford reaches the opposite conclusion, but only because it reads "retain" to mean "acquire" and "receive." That is certainly not the common meaning of "retain," which is "to hold or continue to hold in possession or use." You cannot retain something unless you already have it. And § 210(a)—which provides that the Act "take[s] precedence over any other Act which would require a disposition of rights in subject inventions . . . that is inconsistent with" the Act—does not displace the basic principle that an inventor owns the rights to his invention. Only when an invention belongs to the contractor does the Bayh-Dole Act come into play. The Act's disposition of rights does nothing more than clarify the order of priority of rights between the Federal Government and a federal contractor in a federally funded invention that already belongs to the contractor.

The Act's isolated provisions dealing with inventors' rights in subject inventions are consistent with the Court's construction of the Act. See § 202(d). That construction is also bolstered by the Act's limited procedural protections, which expressly give contractors the right to challenge a Government-imposed impediment to retaining title to a subject invention, § 202(b)(3), but do not provide similar protection for inventor and third-party rights.

Stanford's contrary construction would permit title to an employee's inventions to vest in the University even if the invention was conceived before the inventor became an employee, so long as the invention's reduction to practice was supported by federal funding. It also suggests that the school would obtain title were even one dollar of federal funding applied toward an invention's conception or reduction to practice. It would be noteworthy enough for Congress to supplant one of the funda-

Syllabus

mental precepts of patent law and deprive inventors of rights in their own inventions. To do so under such unusual terms would be truly surprising. Had Congress intended such a sea change in intellectual property rights it would have said so clearly—not obliquely through an ambiguous definition of "subject invention" and an idiosyncratic use of the word "retain."

The Court's construction of the Act is also reflected in the common practice of contractors, who generally obtain assignments from their employees, and of agencies that fund federal contractors, who typically expect those contractors to obtain assignments. With effective assignments, federally funded inventions become "subject inventions" and the Act as a practical matter works pretty much the way Stanford says it should. The only significant difference is that it does so without violence to the basic patent law principle that inventors own their inventions. Pp. 786–793.

583 F. 3d 832, affirmed.

ROBERTS, C. J., delivered the opinion of the Court, in which SCALIA, KENNEDY, THOMAS, ALITO, SOTOMAYOR, and KAGAN, JJ., joined. SOTOMAYOR, J., filed a concurring opinion, *post*, p. 794. BREYER, J., filed a dissenting opinion, in which GINSBURG, J., joined, *post*, p. 794.

Donald B. Ayer argued the cause for petitioner. With him on the briefs were *Lawrence D. Rosenberg*, *Christian G. Vergonis*, *Jennifer L. Swize*, *Pamela S. Karlan*, *Ricardo Rodriguez*, *Stephen C. Neal*, *Lori R. E. Ploeger*, *Michelle S. Rhyu*, *Benjamin G. Damstedt*, *Debra L. Zumwalt*, and *Patrick H. Dunkley*.

Deputy Solicitor General Stewart argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Acting Solicitor General Katyal*, *Assistant Attorney General West*, *Deputy Assistant Attorney General Brinkmann*, *Nicole A. Saharsky*, and *Teal Luthy Miller*.

Mark C. Fleming argued the cause for respondents. With him on the brief were *Adrian M. Pruetz*, *Brian C. Cannon*, and *Paul R. Q. Wolfson*.*

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*Briefs of *amici curiae* urging reversal were filed for BayhDole25, Inc., by *Douglas D. Salyers*, *Jeffrey C. Morgan*, and *Susan Finston;* for the National Venture Capital Association by *Sri Srinivasan;* and for Alexan-

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Since 1790, the patent law has operated on the premise that rights in an invention belong to the inventor. The question here is whether the University and Small Business Patent Procedures Act of 1980—commonly referred to as the Bayh-Dole Act—displaces that norm and automatically vests title to federally funded inventions in federal contractors. We hold that it does not.

I

A

In 1985, a small California research company called Cetus began to develop methods for quantifying blood-borne levels of human immunodeficiency virus (HIV), the virus that causes AIDS. A Nobel Prize winning technique developed at Cetus—polymerase chain reaction, or PCR—was an integral part of these efforts. PCR allows billions of copies of DNA sequences to be made from a small initial blood sample.

In 1988, Cetus began to collaborate with scientists at Stanford University's Department of Infectious Diseases to test

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der M. Shukh by *Constantine John Gekas.* Briefs of *amici curiae* urging vacation were filed for the Association of American Universities et al. by *Douglas Hallward-Driemeier* and *James R. Myers;* and for John P. Sutton by *Mr. Sutton, pro se.*

Briefs of *amici curiae* urging affirmance were filed for the American Association of University Professors et al. by *David P. Swenson;* for the Biotechnology Industry Organization by *Carter G. Phillips, Jeffrey P. Kushan,* and *Rachel H. Townsend;* for Intel Corp. et al. by *Theodore B. Olson, Matthew D. McGill, William G. Jenks, Tina Chappell, Philip S. Johnson, Robert A. Armitage,* and *Alan Hammond;* and for the Pharmaceutical Research and Manufacturers of America by *Robert A. Long, Jr.,* and *Alan Pemberton.*

Briefs of *amici curiae* were filed for the American Intellectual Property Law Association by *David W. Hill;* for the Intellectual Property Owners Association by *George L. Graff, Victoria A. Cundiff, Douglas K. Norman,* and *Kevin H. Rhodes;* and for Birch Bayh by *William D. Coston, John F. Cooney,* and *Michael A. Gollin.*

the efficacy of new AIDS drugs. Dr. Mark Holodniy joined Stanford as a research fellow in the department around that time. When he did so, he signed a Copyright and Patent Agreement (CPA) stating that he "agree[d] to assign" to Stanford his "right, title and interest in" inventions resulting from his employment at the University. App. to Pet. for Cert. 118a–119a.

At Stanford Holodniy undertook to develop an improved method for quantifying HIV levels in patient blood samples, using PCR. Because Holodniy was largely unfamiliar with PCR, his supervisor arranged for him to conduct research at Cetus. As a condition of gaining access to Cetus, Holodniy signed a Visitor's Confidentiality Agreement (VCA). That agreement stated that Holodniy "will assign and do[es] hereby assign" to Cetus his "right, title, and interest in each of the ideas, inventions and improvements" made "as a consequence of [his] access" to Cetus. *Id.*, at 122a–124a.

For the next nine months, Holodniy conducted research at Cetus. Working with Cetus employees, Holodniy devised a PCR-based procedure for calculating the amount of HIV in a patient's blood. That technique allowed doctors to determine whether a patient was benefiting from HIV therapy.

Holodniy then returned to Stanford where he and other University employees tested the HIV measurement technique. Over the next few years, Stanford obtained written assignments of rights from the Stanford employees involved in refinement of the technique, including Holodniy, and filed several patent applications related to the procedure. Stanford secured three patents to the HIV measurement process.

In 1991, Roche Molecular Systems, a company that specializes in diagnostic blood screening, acquired Cetus's PCR-related assets, including all rights Cetus had obtained through agreements like the VCA signed by Holodniy. After conducting clinical trials on the HIV quantification method developed at Cetus, Roche commercialized the proce-

dure. Today, Roche's HIV test "kits are used in hospitals and AIDS clinics worldwide." Brief for Respondents 10–11.

B

In 1980, Congress passed the Bayh-Dole Act to "promote the utilization of inventions arising from federally supported research," "promote collaboration between commercial concerns and nonprofit organizations," and "ensure that the Government obtains sufficient rights in federally supported inventions." 35 U. S. C. § 200. To achieve these aims, the Act allocates rights in federally funded "subject invention[s]" between the Federal Government and federal contractors ("any person, small business firm, or nonprofit organization that is a party to a funding agreement"). §§ 201(e), (c), 202(a). The Act defines "subject invention" as "any invention of the contractor conceived or first actually reduced to practice in the performance of work under a funding agreement." § 201(e).

The Bayh-Dole Act provides that contractors may "elect to retain title to any subject invention." § 202(a). To be able to retain title, a contractor must fulfill a number of obligations imposed by the statute. The contractor must "disclose each subject invention to the [relevant] Federal agency within a reasonable time"; it must "make a written election within two years after disclosure" stating that the contractor opts to retain title to the invention; and the contractor must "file a patent application prior to any statutory bar date." §§ 202(c)(1)–(3). The "Federal Government may receive title" to a subject invention if a contractor fails to comply with any of these obligations. *Ibid.*

The Government has several rights in federally funded subject inventions under the Bayh-Dole Act. The agency that granted the federal funds receives from the contractor "a nonexclusive, nontransferrable, irrevocable, paid-up license to practice . . . [the] subject invention." § 202(c)(4). The agency also possesses "[m]arch-in rights," which permit the agency to grant a license to a responsible third party

under certain circumstances, such as when the contractor fails to take "effective steps to achieve practical application" of the invention. § 203. The Act further provides that when the contractor does not elect to retain title to a subject invention, the Government "may consider and after consultation with the contractor grant requests for retention of rights by the inventor." § 202(d).

Some of Stanford's research related to the HIV measurement technique was funded by the National Institutes of Health (NIH), thereby subjecting the invention to the Bayh-Dole Act. Accordingly, Stanford disclosed the invention, conferred on the Government a nonexclusive, nontransferable, paid-up license to use the patented procedure, and formally notified NIH that it elected to retain title to the invention.

C

In 2005, the Board of Trustees of Stanford University filed suit against Roche Molecular Systems, Inc., Roche Diagnostics Corporation, and Roche Diagnostics Operations, Inc. (collectively Roche), contending that Roche's HIV test kits infringed Stanford's patents. As relevant here, Roche responded by asserting that it was a co-owner of the HIV quantification procedure, based on Holodniy's assignment of his rights in the VCA. As a result, Roche argued, Stanford lacked standing to sue it for patent infringement. 487 F. Supp. 2d 1099, 1111, 1115 (ND Cal. 2007). Stanford claimed that Holodniy had no rights to assign because the University's HIV research was federally funded, giving the school superior rights in the invention under the Bayh-Dole Act. *Ibid.*[1]

The District Court held that the "VCA effectively assigned any rights that Holodniy had in the patented inven-

[1] Roche submitted a host of other claims to the District Court, including that it had "shop rights" to the patents and was entitled to a license to use the patents. See 583 F. 3d 832, 838 (CA Fed. 2009). None of those claims is now before us; we deal only with Roche's claim to co-ownership to rebut Stanford's standing to bring an infringement action.

tion to Cetus," and thus to Roche. *Id.*, at 1117. But because of the operation of the Bayh-Dole Act, "Holodniy had no interest to assign." *Id.*, at 1117, 1119. The court concluded that the Bayh-Dole Act "provides that the individual inventor may obtain title" to a federally funded invention "only after the government and the contracting party have declined to do so." *Id.*, at 1118.

The Court of Appeals for the Federal Circuit disagreed. First, the court concluded that Holodniy's initial agreement with Stanford in the CPA constituted a mere promise to assign rights in the future, unlike Holodniy's agreement with Cetus in the VCA, which itself assigned Holodniy's rights in the invention to Cetus. See 583 F. 3d 832, 841–842 (2009). Therefore, as a matter of contract law, Cetus obtained Holodniy's rights in the HIV quantification technique through the VCA.[2] Next, the court explained that the Bayh-Dole Act "does not automatically void ab initio the inventors' rights in government-funded inventions" and that the "statutory scheme did not automatically void the patent rights that Cetus received from Holodniy." *Id.*, at 844–845. The court held that "Roche possesse[d] an ownership interest in the patents-in-suit" that was not extinguished by the Bayh-Dole Act, "depriv[ing] Stanford of standing." *Id.*, at 836–837. The Court of Appeals then remanded the case with instructions to dismiss Stanford's infringement claim. *Id.*, at 849.

We granted certiorari. 562 U. S. 1001 (2010).

II

A

Congress has the authority "[t]o promote the Progress of Science and useful Arts, by securing . . . to Authors and

[2] Because the Federal Circuit's interpretation of the relevant assignment agreements is not an issue on which we granted certiorari, we have no occasion to pass on the validity of the lower court's construction of those agreements.

Inventors the exclusive Right to their respective Writings and Discoveries." U. S. Const., Art. I, § 8, cl. 8. The First Congress put that power to use by enacting the Patent Act of 1790. That Act provided "[t]hat upon the petition of any person or persons . . . setting forth, that he, she, or they, hath or have invented or discovered" an invention, a patent could be granted to "such petitioner or petitioners" or "their heirs, administrators or assigns." Act of Apr. 10, 1790, § 1, 1 Stat. 109–110. Under that law, the first patent was granted in 1790 to Samuel Hopkins, who had devised an improved method for making potash, America's first industrial chemical. U. S. Patent No. X1 (issued July 31, 1790).[3]

Although much in intellectual property law has changed in the 220 years since the first Patent Act, the basic idea that inventors have the right to patent their inventions has not. Under the law in its current form, "[w]hoever invents or discovers any new and useful process, machine, manufacture, or composition of matter . . . may obtain a patent therefor." 35 U. S. C. § 101. The inventor must attest that "he believes himself to be the original and first inventor of the [invention] for which he solicits a patent." § 115. In most cases, a patent may be issued only to an applying inventor, or—because an inventor's interest in his invention is "assignable in law by an instrument in writing"—an inventor's assignee. §§ 151, 152, 261.

Our precedents confirm the general rule that rights in an invention belong to the inventor. See, *e. g.*, *Gayler* v. *Wilder*, 10 How. 477, 493 (1851) ("the discoverer of a new and useful improvement is vested by law with an inchoate right to its exclusive use, which he may perfect and make absolute by proceeding in the manner which the law requires"); *Solo-*

[3] The patent was signed by President George Washington, Secretary of State Thomas Jefferson, and Attorney General Edmund Randolph. See Maxey, Samuel Hopkins, The Holder of the First U. S. Patent: A Study of Failure, 122 Pa. Magazine of Hist. and Biography 3, 6 (1998).

mons v. *United States*, 137 U. S. 342, 346 (1890) ("whatever invention [an inventor] may thus conceive and perfect is his individual property"); *United States* v. *Dubilier Condenser Corp.*, 289 U. S. 178, 188 (1933) (an inventor owns "the product of [his] original thought"). The treatises are to the same effect. See, *e. g.*, 8 D. Chisum, Patents § 22.01, p. 22–2 (2011) ("The presumptive owner of the property right in a patentable invention is the single human inventor").

It is equally well established that an inventor can assign his rights in an invention to a third party. See *Dubilier Condenser Corp.*, *supra,* at 187 ("A patent is property and title to it can pass only by assignment"); 8 Chisum, *supra*, § 22.01, at 22–2 ("The inventor . . . [may] transfer ownership interests by written assignment to anyone"). Thus, although others may acquire an interest in an invention, any such interest—as a general rule—must trace back to the inventor.

In accordance with these principles, we have recognized that unless there is an agreement to the contrary, an employer does not have rights in an invention "which is the original conception of the employee alone." *Dubilier Condenser Corp.,* 289 U. S., at 189. Such an invention "remains the property of him who conceived it." *Ibid.* In most circumstances, an inventor must expressly grant his rights in an invention to his employer if the employer is to obtain those rights. See *id.*, at 187 ("The respective rights and obligations of employer and employee, touching an invention conceived by the latter, spring from the contract of employment").

B

Stanford and the United States as *amicus curiae* contend that the Bayh-Dole Act reorders the normal priority of rights in an invention when the invention is conceived or first reduced to practice with the support of federal funds. In their view, the Act moves inventors from the front of the line to the back by vesting title to federally funded inventions in

the inventor's employer—the federal contractor. See Brief for Petitioner 26–27; Brief for United States as *Amicus Curiae* 6.

Congress has in the past divested inventors of their rights in inventions by providing unambiguously that inventions created pursuant to specified federal contracts become the property of the United States. For example, with respect to certain contracts dealing with nuclear material and atomic energy, Congress provided that title to such inventions "shall be vested in, and be the property of, the [Atomic Energy] Commission." 42 U. S. C. § 2182. Congress has also enacted laws requiring that title to certain inventions made pursuant to contracts with the National Aeronautics and Space Administration "shall be the exclusive property of the United States," Pub. L. 111–314, § 3, 124 Stat. 3339, 51 U. S. C. § 20135(b)(1), and that title to certain inventions under contracts with the Department of Energy "shall vest in the United States," 42 U. S. C. § 5908.

Such language is notably absent from the Bayh-Dole Act. Nowhere in the Act is title expressly vested in contractors or anyone else; nowhere in the Act are inventors expressly deprived of their interest in federally funded inventions. Instead, the Act provides that contractors may "elect to retain title to any subject invention." 35 U. S. C. § 202(a). A "subject invention" is defined as "any invention of the contractor conceived or first actually reduced to practice in the performance of work under a funding agreement." § 201(e).

Stanford asserts that the phrase "invention of the contractor" in this provision "is naturally read to include all inventions made by the contractor's employees with the aid of federal funding." Brief for Petitioner 32 (footnote omitted). That reading assumes that Congress subtly set aside two centuries of patent law in a statutory definition. It also renders the phrase "of the contractor" superfluous. If the phrase "of the contractor" were deleted from the definition of "subject invention," the definition would cover "any inven-

tion . . . conceived or first actually reduced to practice in the performance of work under a funding agreement." Reading "of the contractor" to mean "all inventions made by the contractor's employees with the aid of federal funding," as Stanford would, adds nothing that is not already in the definition, since the definition already covers inventions made under the funding agreement. That is contrary to our general "reluctan[ce] to treat statutory terms as surplusage." *Duncan* v. *Walker*, 533 U. S. 167, 174 (2001) (internal quotation marks omitted).

Construing the phrase to refer instead to a particular category of inventions conceived or reduced to practice under a funding agreement—inventions "of the contractor," that is, those owned by or belonging to the contractor—makes the phrase meaningful in the statutory definition. And "invention owned by the contractor" or "invention belonging to the contractor" are natural readings of the phrase "invention of the contractor." As we have explained, "[t]he use of the word 'of' denotes ownership." *Poe* v. *Seaborn*, 282 U. S. 101, 109 (1930); see *Flores-Figueroa* v. *United States*, 556 U. S. 646, 647, 657 (2009) (treating the phrase "identification [papers] of another person" as meaning such items belonging to another person (internal quotation marks omitted)); *Ellis* v. *United States*, 206 U. S. 246, 259 (1907) (interpreting the phrase "works of the United States" to mean "works . . . belonging to the United States" (internal quotation marks omitted)).

That reading follows from a common definition of the word "of." See Webster's Third New International Dictionary 1565 (2002) ("of" can be "used as a function word indicating a possessive relationship"); New Oxford American Dictionary 1180 (2d ed. 2005) (defining "of" as "indicating an association between two entities, typically one of belonging"); Webster's New Twentieth Century Dictionary 1241 (2d ed. 1979) (defining "of" as "belonging to").

Stanford's reading of the phrase "invention of the contractor" to mean "all inventions made by the contractor's em-

ployees" is plausible enough in the abstract; it is often the case that whatever an employee produces in the course of his employment belongs to his employer. No one would claim that an autoworker who builds a car while working in a factory owns that car. But, as noted, patent law has always been different: We have rejected the idea that mere employment is sufficient to vest title to an employee's invention in the employer. Against this background, a contractor's invention—an "invention of the contractor"—does not automatically include inventions made by the contractor's employees.[4]

The Bayh-Dole Act's provision stating that contractors may "elect to *retain* title" confirms that the Act does not *vest* title. 35 U. S. C. §202(a) (emphasis added). Stanford reaches the opposite conclusion, but only because it reads "retain" to mean "acquire" and "receive." Brief for Petitioner 36 (internal quotation marks omitted). That is certainly not the common meaning of "retain." "[R]etain" means "to hold or continue to hold in possession or use." Webster's Third, *supra*, at 1938; see Webster's New Collegiate Dictionary 980 (1980) ("to keep in possession or use"); American Heritage Dictionary 1109 (1969) ("[t]o keep or hold in one's possession"). You cannot retain something unless you already have it. See *Alaska* v. *United States*, 545 U. S. 75, 104 (2005) (interpreting the phrase "'the United States shall retain title to all property'" to mean that "[t]he United States . . . retained title to *its* property located within Alas-

[4] The dissent suggests that "we could interpret the Bayh-Dole Act as ordinarily assuming, and thereby ordinarily requiring, an assignment of patent rights by the federally funded employee to the federally funded employer." *Post*, at 801 (opinion of BREYER, J.). That suggestion is based in large part on Executive Order No. 10096, which "governs Federal Government employee-to-employer patent right assignments." *Post*, at 802. Lest there be any doubt, employees of nonfederal entities that have federal funding contracts—like Holodniy—are *not* federal employees. And there is no equivalent Executive Order governing invention rights with respect to federally funded research; that issue is of course addressed by the Bayh-Dole Act.

ka's borders" (emphasis added)). The Bayh-Dole Act does not confer title to federally funded inventions on contractors or authorize contractors to unilaterally take title to those inventions; it simply assures contractors that they may keep title to whatever it is they already have. Such a provision makes sense in a statute specifying the respective rights and responsibilities of federal contractors and the Government.

The Bayh-Dole Act states that it "take[s] precedence over any other Act which would require a disposition of rights in subject inventions . . . that is inconsistent with" the Act. 35 U. S. C. § 210(a). The United States as *amicus curiae* argues that this provision operates to displace the basic principle, codified in the Patent Act, that an inventor owns the rights to his invention. See Brief for United States 21. But because the Bayh-Dole Act, including § 210(a), applies only to "subject inventions"—"invention[s] of the contractor"—it does not displace an inventor's antecedent title to his invention. Only when an invention belongs to the contractor does the Bayh-Dole Act come into play. The Act's disposition of rights—like much of the rest of the Bayh-Dole Act—serves to clarify the order of priority of rights between the Federal Government and a federal contractor in a federally funded invention that already belongs to the contractor. Nothing more.[5]

The isolated provisions of the Bayh-Dole Act dealing with inventors' rights in subject inventions are consistent with our construction of the Act. Under the Act, a federal agency may "grant requests for retention of rights by the

[5] Far from superseding the Patent Act in such a backhanded way, it is clear that § 210(a)'s concern is far narrower. That provision specifies 21 different statutory provisions that the Bayh-Dole Act "take[s] precedence over," the vast majority of which deal with the division of ownership in certain inventions between a contractor and the Government. 35 U. S. C. §§ 210(a)(1)–(21); see, *e. g.*, §§ 210(a)(19)–(20) (the Bayh-Dole Act takes precedence over "section 6(b) of the Solar Photovoltaic Energy Research Development and Demonstration Act" and "section 12 of the Native Latex Commercialization and Economic Development Act").

inventor" "[i]f a contractor does not elect to retain title to a subject invention." § 202(d). If an employee inventor never had title to his invention because title vested in the contractor by operation of law—as Stanford submits—it would be odd to allow the Government to grant "requests for retention of rights by the inventor." By using the word "retention," § 202(d) assumes that the inventor had rights in the subject invention at some point, undermining the notion that the Act automatically vests title to federally funded inventions in federal contractors.[6]

The limited scope of the Act's procedural protections also bolsters our conclusion. The Bayh-Dole Act expressly confers on contractors the right to challenge a Government-imposed impediment to retaining title to a subject invention. § 202(b)(3) (2006 ed., Supp. III). As Roche correctly notes, however, "the Act contains not a single procedural protection for third parties that have neither sought nor received federal funds," such as cooperating private research institutions. Brief for Respondents 29. Nor does the Bayh-Dole Act allow inventors employed by federal contractors to contest their employer's claim to a subject invention. The Act, for example, does not expressly permit an interested third party or an inventor to challenge a claim that a particular invention was supported by federal funding. In a world in which there is frequent collaboration between private entities, inventors, and federal contractors, see Brief for Phar-

[6] Stanford contends that it cannot be the case "that the contractor can only 'retain title' to an invention that it already owns, while an inventor may be considered for 'retention' of title only when he has assigned title away." Reply Brief for Petitioner 8. That argument has some force. But there may be situations where an inventor, by the terms of an assignment, has subsidiary rights in an invention to which a contractor has title, as § 202(d) suggests. Compare § 202(d) ("retention of *rights*") with § 202(a) ("retain *title*") (emphasis added). And at the end of the day, it is Stanford's contention that "retain" must be "read as a synonym for 'acquire' or 'receive'" that dooms its argument on this point. Brief for Petitioner 37.

maceutical Research and Manufacturers of America as *Amicus Curiae* 22–23, that absence would be deeply troubling. But the lack of procedures protecting inventor and third-party rights makes perfect sense if the Act applies only when a federal contractor has already acquired title to an inventor's interest. In that case, there is no need to protect inventor or third-party rights, because the only rights at issue are those of the contractor and the Government.

The Bayh-Dole Act applies to subject inventions "conceived *or* first actually reduced to practice in the performance of work" "funded in whole *or in part* by the Federal Government." 35 U. S. C. §§ 201(e), 201(b) (2006 ed.) (emphasis added). Under Stanford's construction of the Act, title to one of its employee's inventions could vest in the University even if the invention was conceived before the inventor became a University employee, so long as the invention's reduction to practice was supported by federal funding. What is more, Stanford's reading suggests that the school would obtain title to one of its employee's inventions even if only one dollar of federal funding was applied toward the invention's conception or reduction to practice.

It would be noteworthy enough for Congress to supplant one of the fundamental precepts of patent law and deprive inventors of rights in their own inventions. To do so under such unusual terms would be truly surprising. We are confident that if Congress had intended such a sea change in intellectual property rights it would have said so clearly—not obliquely through an ambiguous definition of "subject invention" and an idiosyncratic use of the word "retain." Cf. *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457, 468 (2001) ("Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions").

Though unnecessary to our conclusion, it is worth noting that our construction of the Bayh-Dole Act is reflected in

the common practice among parties operating under the Act. Contractors generally institute policies to obtain assignments from their employees. See Brief for Respondents 34; Brief for Pharmaceutical Research and Manufacturers of America as *Amicus Curiae* 13–18. Agencies that grant funds to federal contractors typically expect those contractors to obtain assignments. So it is with NIH, the agency that granted the federal funds at issue in this case. In guidance documents made available to contractors, NIH has made clear that "[b]y law, an inventor has initial ownership of an invention" and that contractors should therefore "have in place employee agreements requiring an inventor to 'assign' or give ownership of an invention to the organization upon acceptance of Federal funds." NIH Policies, Procedures, and Forms, A "20–20" View of Invention Reporting to the National Institutes of Health (Sept. 22, 1995). Such guidance would be unnecessary if Stanford's reading of the statute were correct.

Stanford contends that reading the Bayh-Dole Act as not vesting title to federally funded inventions in federal contractors "fundamentally undermin[es]" the Act's framework and severely threatens its continued "successful application." Brief for Petitioner 45. We do not agree. As just noted, universities typically enter into agreements with their employees requiring the assignment to the university of rights in inventions. With an effective assignment, those inventions—if federally funded—become "subject inventions" under the Act, and the statute as a practical matter works pretty much the way Stanford says it should. The only significant difference is that it does so without violence to the basic principle of patent law that inventors own their inventions.

The judgment of the Court of Appeals for the Federal Circuit is affirmed.

It is so ordered.

JUSTICE SOTOMAYOR, concurring.

I agree with the Court's resolution of this case and with its reasoning. I write separately to note that I share JUSTICE BREYER's concerns as to the principles adopted by the Court of Appeals for the Federal Circuit in *FilmTec Corp.* v. *Allied-Signal Inc.*, 939 F. 2d 1568 (1991), and the application of those principles to agreements that implicate the Bayh-Dole Act. See *post*, at 799–803 (dissenting opinion). Because Stanford failed to challenge the decision below on these grounds, I agree that the appropriate disposition is to affirm. Like the dissent, however, I understand the majority opinion to permit consideration of these arguments in a future case. See *ante*, at 784, n. 2.

JUSTICE BREYER, with whom JUSTICE GINSBURG joins, dissenting.

The question presented in this case is:

> "Whether a federal contractor university's statutory right under the Bayh-Dole Act, 35 U. S. C. §§ 200–212, in inventions arising from federally funded research can be terminated unilaterally by an individual inventor through a separate agreement purporting to assign the inventor's rights to a third party." Brief for Petitioner i.

In my view, the answer to this question is likely no. But because that answer turns on matters that have not been fully briefed (and are not resolved by the opinion of the Court), I would return this case to the Federal Circuit for further argument.

I

The Bayh-Dole Act creates a three-tier system for patent rights ownership applicable to federally funded research conducted by nonprofit organizations, such as universities, and small businesses. It sets forth conditions that mean (1) the funded firm; (2) failing that, the United States Government;

and (3) failing that, the employee who made the invention, will likely obtain (or retain) any resulting patent rights (normally in that just-listed order). 35 U. S. C. §§ 202–203. The statute applies to "subject invention[s]" defined as "any *invention of the contractor* conceived or first actually reduced to practice in the performance of work under a funding agreement." § 201(e) (emphasis added). Since the "contractor" (*e. g.*, a university or small business) is unlikely to "conceiv[e]" of an idea or "reduc[e]" it "to practice" *other than* through its employees, the term "invention of the contractor" must refer to the work and ideas of those employees. We all agree that the term covers those employee inventions that the employee properly assigns to the contractor, *i. e.*, his or her employer. But does the term "subject invention" also include inventions that the employee fails to assign properly?

II

Congress enacted this statute against a background norm that often, but not always, denies individual inventors patent rights growing out of research for which the public has already paid. This legal norm reflects the fact that patents themselves have both benefits and costs. Patents, for example, help to elicit useful inventions and research and to ensure public disclosure of technological advances. See, *e. g.*, *Mazer* v. *Stein*, 347 U. S. 201, 219 (1954); *Bilski* v. *Kappos*, 561 U. S. 593, 601 (2010); *id.*, at 622 (Stevens, J., concurring in judgment). But patents sometimes mean unnecessarily high prices or restricted dissemination; and they sometimes discourage further innovation and competition by requiring costly searches for earlier, related patents or by tying up ideas, which, were they free, would more effectively spur research and development. See, *e. g.*, *Laboratory Corp. of America Holdings* v. *Metabolite Laboratories, Inc.*, 548 U. S. 124, 128 (2006) (BREYER, J., dissenting from dismissal of certiorari as improvidently granted); Heller & Eisenberg,

Can Patents Deter Innovation? The Anticommons in Biomedical Research, 280 Science 698 (1998).

Thus, Thomas Jefferson wrote of "the difficulty of drawing a line between the things which are worth to the public the embarrassment of an exclusive patent, and those which are not." Letter to Isaac McPherson (Aug. 13, 1813), in 6 Writings of Thomas Jefferson 181 (H. Washington ed. 1854). And James Madison favored the patent monopoly because it amounted to "compensation for" a community "benefit." Monopolies. Perpetuities. Corporations. Ecclesiastical Endowments., in J. Madison, Writings 756 (J. Rakove ed. 1999).

The importance of ensuring this community "benefit" is reflected in legal rules that may deny or limit the award of patent rights where the public has already paid to produce an invention, lest the public bear the potential costs of patent protection where there is no offsetting need for such protection to elicit that invention. Why should the public have to pay twice for the same invention?

Legal rules of this kind include an Executive Order that ordinarily gives to the Government "the entire right, title and interest" to inventions made by Government employees who "conduct or perform research, development work, or both." 37 CFR § 501.6 (2010) (codifying, as amended, Exec. Order No. 10096, 3 CFR 292 (1949–1953 Comp.)). See also *Heinemann* v. *United States*, 796 F. 2d 451, 455–456 (CA Fed. 1986) (holding Executive Order constitutional and finding "no 'taking' because the invention was not the property of Heinemann"). They also include statutes, which, in specific research areas, give the Government title to inventions made pursuant to Government contracts. See Atomic Energy Act of 1954, § 152, 68 Stat. 944 (codified as amended at 42 U. S. C. § 2182); National Aeronautics and Space Act of 1958, § 305, 72 Stat. 435 (codified at 42 U. S. C. § 2457), repealed by § 6, 124 Stat. 3444; Federal Nonnuclear Energy Research and Development Act of 1974, § 9, 88 Stat. 1887 (codified as amended at 42 U. S. C. § 5908(a)). And they have included

Government regulations, established prior to the Bayh-Dole Act's enactment, that work in roughly similar ways. See, *e. g.*, 45 CFR § 650.4(b) (1977) (National Science Foundation regulations providing that Foundation would "determine the disposition of the invention [made under the grant] and title to and rights under any patent application"); §§ 8.1(a), 8.2(d) (Department of Health, Education, and Welfare regulations providing that inventions made under Department grants "shall be subject to determination" by the agency and that the Department may "require that all domestic rights in the invention shall be assigned to the United States").

These legal rules provide the basic background against which Congress passed the Bayh-Dole Act. And the Act's provisions reflect a related effort to ensure that rights to inventions arising out of research for which the public has paid are distributed and used in ways that further specific important public interests. I agree with the majority that the Act does not simply take the individual inventors' rights and grant them to the Government. Rather, it assumes that the federal funds' recipient, say, a university or small business, will possess those rights. The Act leaves those rights in the hands of that recipient, not because it seeks to make the public pay twice for the same invention, but for a special public policy reason. In doing so, it seeks to encourage those institutions *to commercialize* inventions that otherwise might not realize their potentially beneficial public use. 35 U. S. C. § 200. The Act helps ensure that commercialization (while "promot[ing] free competition" and "protect[ing] the public," *ibid.*) by imposing a set of conditions upon the federal funds recipient, by providing that sometimes the Government will take direct control of the patent rights, and by adding that on occasion the Government will permit the individual inventor to retain those rights. §§ 202–203.

Given this basic statutory objective, I cannot so easily accept the majority's conclusion—that the individual inventor

can lawfully assign an invention (produced by public funds) to a third party, thereby taking that invention out from under the Bayh-Dole Act's restrictions, conditions, and allocation rules. That conclusion, in my view, is inconsistent with the Act's basic purposes. It may significantly undercut the Act's ability to achieve its objectives. It allows individual inventors, for whose invention the public has paid, to avoid the Act's corresponding restrictions and conditions. And it makes the commercialization and marketing of such an invention more difficult: A potential purchaser of rights from the contractor, say, a university, will not know if the university itself possesses the patent right in question or whether, as here, the individual, inadvertently or deliberately, has previously assigned the title to a third party.

Moreover, I do not agree that the language to which the majority points—the words "invention of the contractor" and "retain"—requires its result. As the majority concedes, Stanford's alternative reading of the phrase "'invention of the contractor'" is "plausible enough in the abstract." *Ante*, at 788–789. Nor do I agree that the Act's lack of an explicit provision for "an interested third party" to claim that an invention was not the result of federal funding "bolsters" the majority's interpretation. *Ante*, at 791. In any event, universities and businesses have worked out ways to protect the various participants to research. See Brief for Association of American Universities et al. as *Amici Curiae* 22–24 (hereinafter AAU Brief); App. 118–124 (Materials Transfer Agreement between Cetus and Stanford University).

Ultimately, the majority rejects Stanford's reading (and the Government's reading) of the Act because it believes that it is inconsistent with certain background norms of patent law, norms that ordinarily provide an individual inventor with full patent rights. *Ante*, at 789. But in my view, the competing norms governing rights in inventions for which the public has already paid, along with the Bayh-Dole Act's objectives, suggest a different result.

III

There are two different legal routes to what I consider an interpretation more consistent with the statute's objectives. First, we could set aside the Federal Circuit's interpretation of the licensing agreements and its related licensing doctrine. That doctrine governs interpretation of licensing agreements made *before* an invention is conceived or reduced to practice. Here, there are two such agreements. In the earlier agreement—that between Dr. Holodniy and Stanford University—Dr. Holodniy said, "I *agree to assign* . . . to Stanford . . . that right, title and interest in and to . . . such inventions as required by Contracts or Grants." App. to Pet. for Cert. 119a (emphasis added). In the later agreement—that between Dr. Holodniy and the private research firm Cetus—Dr. Holodniy said, "I will assign and *do hereby assign* to Cetus, my right, title, and interest in" here relevant "ideas" and "inventions." *Id.*, at 123a (emphasis added; capitalization omitted).

The Federal Circuit held that the earlier Stanford agreement's use of the words "agree to assign," when compared with the later Cetus agreement's use of the words "do hereby assign," made all the difference. It concluded that, once the invention came into existence, the latter words meant that the Cetus agreement trumped the earlier, Stanford agreement. 583 F. 3d 832, 841–842 (2009). That, in the Circuit's view, is because the latter words operated upon the invention automatically, while the former did not. Quoting its 1991 opinion in *FilmTec Corp.* v. *Allied-Signal Inc.*, 939 F. 2d 1568, 1572, the Circuit declared that "'[o]nce the invention is made and [the] application for [a] patent is filed, . . . legal title to the rights accruing thereunder would be in the assignee [*i. e.*, Cetus] . . . , and the assignor-inventor would have nothing remaining to assign.'" 583 F. 3d, at 842.

Given what seem only slight linguistic differences in the contractual language, this reasoning seems to make too much of too little. Dr. Holodniy executed his agreement with

Stanford in 1988. At that time, patent law appears to have long specified that a present assignment of future inventions (as in both contracts here) conveyed equitable, but not legal, title. See, *e. g.*, G. Curtis, A Treatise on the Law of Patents for Useful Inventions § 170, p. 155 (3d ed. 1867) ("A contract to convey a future invention . . . cannot alone authorize a patent to be taken by the party in whose favor such contract was intended to operate"); Comment, Contract Rights as Commercial Security: Present and Future Intangibles, 67 Yale L. J. 847, 854, n. 27 (1958) ("The rule generally applicable grants equitable enforcement to an assignment of an expectancy but demands a further act, either reduction to possession or further assignment of the right when it comes into existence").

Under this rule, both the initial Stanford and later Cetus agreements would have given rise only to equitable interests in Dr. Holodniy's invention. And as between these two claims in equity, the facts that Stanford's contract came first and that Stanford subsequently obtained a postinvention assignment as well should have meant that Stanford, not Cetus, would receive the rights its contract conveyed.

In 1991, however, the Federal Circuit, in *FilmTec*, adopted the new rule quoted above—a rule that distinguishes between these equitable claims and, in effect, says that Cetus must win. The Federal Circuit provided no explanation for what seems a significant change in the law. See 939 F. 2d, at 1572. Nor did it give any explanation for that change in its opinion in this case. See 583 F. 3d, at 841–842. The Federal Circuit's *FilmTec* rule undercuts the objectives of the Bayh-Dole Act. While the cognoscenti may be able to meet the *FilmTec* rule in future contracts simply by copying the precise words blessed by the Federal Circuit, the rule nonetheless remains a technical drafting trap for the unwary. See AAU Brief 35–36. But cf. *ante*, at 793 (assuming ease of obtaining effective assignments). It is unclear to me why,

where the Bayh-Dole Act is at issue, we should prefer the Federal Circuit's *FilmTec* rule to the rule, of apparently much longer vintage, that would treat both agreements in this case as creating merely equitable rights.

At the same time, the Federal Circuit's reasoning brings about an interpretation contrary to the intention of the parties to the earlier, Stanford, contract. See App. to Pet. for Cert. 120a (provision in Stanford contract promising that Dr. Holodniy "will not enter into any agreement creating copyright or patent obligations in conflict with this agreement"). And it runs counter to what may well have been the drafters' reasonable expectations of how courts would interpret the relevant language.

Second, we could interpret the Bayh-Dole Act as ordinarily assuming, and thereby ordinarily requiring, an assignment of patent rights by the federally funded employee to the federally funded employer. I concede that this interpretation would treat federally funded employees of contractors (subject to the Act) differently than the law ordinarily treats private sector employees. The Court long ago described the latter, private sector principles. In *United States* v. *Dubilier Condenser Corp.*, 289 U. S. 178 (1933), the Court explained that a "patent is property and title to it can pass only by assignment." *Id.*, at 187. It then described two categories of private sector employee-to-employer assignments as follows: First, a person who is

> "employed to make an invention, who succeeds, during his term of service, in accomplishing that task, is bound to assign to his employer any patent obtained." *Ibid.*

But, second,

> "if the employment be general, albeit it cover a field of labor and effort in the performance of which the employee conceived the invention for which he obtained a patent, the contract is not so broadly construed as to require an assignment of the patent." *Ibid.*

The Court added that, because of "the peculiar nature of the act of invention," courts are "reluctan[t] . . . to imply or infer an agreement by the employee to assign his patent." *Id.*, at 188. And it applied these same principles governing assignment to inventions made by employees of the United States. *Id.*, at 189–190.

Subsequently, however, the President promulgated Executive Order No. 10096. Courts have since found that this Executive Order, not *Dubilier*, governs Federal Government employee-to-employer patent right assignments. See, *e. g.*, *Kaplan* v. *Corcoran*, 545 F. 2d 1073, 1076–1077 (CA7 1976); *Heinemann*, 796 F. 2d, at 455–456; *Wright* v. *United States*, 164 F. 3d 267, 269 (CA5 1999) *(per curiam); Halas* v. *United States*, 28 Fed. Cl. 354, 364 (1993). The Bayh-Dole Act seeks objectives roughly analogous to the objectives of the Executive Order. At least one agency has promulgated regulations that require Bayh-Dole contractors to insist upon similar assignments. See NIH Policies, Procedures, and Forms, A "20–20" View of Invention Reporting to the National Institutes of Health (Sept. 22, 1995) (available in the Clerk of Court's case file) (requiring a Government contractor, such as Stanford University, to "have in place employee agreements requiring an inventor to 'assign' or give ownership of an invention to the organization upon acceptance of Federal funds," as the Bayh-Dole Act "require[s]"). And an *amicus* brief, filed by major associations of universities, scientists, medical researchers, and others, argues that we should interpret the rules governing assignments of the employees at issue here (and consequently the Act's reference to "invention[s] of the contractor") in a similar way. AAU Brief 5–14.

The District Court in this case adopted roughly this approach. 487 F. Supp. 2d 1099, 1118 (ND Cal. 2007) ("[A]lthough title still vests in the named inventor, the inventor remains under a legal obligation to assign his interest either to the government or the nonprofit contractor unless the in-

ventor acts within the statutory framework to retain title"). And since a university often enters into a grant agreement with the Government for a researcher's benefit and at his request, see J. Hall, Grant Management 205 (2010), implying such a presumption in favor of compliance with the grant agreement, and thus with the Bayh-Dole Act, would ordinarily be equitable.

IV

As I have suggested, these views are tentative. That is because the parties have not fully argued these matters (though one *amicus* brief raises the license interpretation question, see Brief for Alexander M. Shukh 18–24, and at least one other can be read as supporting something like the equitable presumption I have described, see AAU Brief 5–14). Cf. *ante,* at 784, n. 2. While I do not understand the majority to have foreclosed a similarly situated party from raising these matters in a future case, see *ibid.*, I believe them relevant to our efforts to answer the question presented here. Consequently, I would vacate the judgment of the Federal Circuit and remand this case to provide the parties with an opportunity to argue these, or related, matters more fully.

Because the Court decides otherwise, with respect, I dissent.

Syllabus

ERICA P. JOHN FUND, INC., FKA ARCHDIOCESE OF MILWAUKEE SUPPORTING FUND, INC. *v.* HALLIBURTON CO. ET AL.

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

No. 09–1403. Argued April 25, 2011—Decided June 6, 2011

Petitioner Erica P. John Fund, Inc. (EPJ Fund), is the lead plaintiff in a putative securities fraud class action filed against Halliburton Co. and one of its executives (collectively Halliburton). EPJ Fund alleges that Halliburton made various misrepresentations designed to inflate the company's stock price, in violation of § 10(b) of the Securities Exchange Act of 1934 and Securities and Exchange Commission Rule 10b–5. EPJ Fund also contends that Halliburton later made a number of corrective disclosures that caused the stock price to drop and, consequently, investors to lose money. EPJ Fund sought to have its proposed class certified pursuant to Federal Rule of Civil Procedure 23. The District Court found that the suit could proceed as a class action under Rule 23(b)(3), but for one problem: Fifth Circuit precedent required securities fraud plaintiffs to prove "loss causation"—*i. e.*, that the defendant's deceptive conduct caused the investors' claimed economic loss—in order to obtain class certification. The District Court concluded that EPJ Fund had failed to satisfy that requirement. The Court of Appeals agreed and affirmed the denial of class certification.

Held: Securities fraud plaintiffs need not prove loss causation in order to obtain class certification. Pp. 809–815.

(a) In order to certify a class under Rule 23(b)(3), a court must find "that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Considering whether "questions of law or fact common to class members predominate" begins, of course, with the elements of the underlying cause of action. The elements of a private securities fraud claim based on violations of § 10(b) and Rule 10b–5 are: "(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation." *Matrixx Initiatives, Inc.* v. *Siracusano*, *ante*, at 37–38.

Syllabus

Whether common questions of law or fact predominate in such an action often turns on the element of reliance. The traditional way a plaintiff can demonstrate reliance is by showing that he was aware of a company's statement and engaged in a relevant transaction—*e. g.*, purchasing common stock—based on that specific misrepresentation. The Court recognized in *Basic Inc.* v. *Levinson*, 485 U. S. 224, however, that "[r]equiring proof of individualized reliance from each member of the proposed plaintiff class effectively would" prevent such plaintiffs "from proceeding with a class action, since individual issues" would "overwhelm[ ] the common ones." *Id.*, at 242. The Court in *Basic* sought to alleviate that concern by permitting plaintiffs to invoke a rebuttable presumption of reliance based on what is known as the "fraud-on-the-market" theory. According to that theory, "the market price of shares traded on well-developed markets reflects all publicly available information, and, hence, any material misrepresentations." *Id.*, at 246. Under that doctrine, the Court explained, one can assume an investor relies on public misstatements whenever he "buys or sells stock at the price set by the market." *Id.*, at 247. The Court also made clear that the presumption could be rebutted by appropriate evidence. Pp. 809–811.

(b) It is undisputed that securities fraud plaintiffs must prove certain things in order to invoke *Basic*'s rebuttable presumption of reliance. According to the Court of Appeals, EPJ Fund had to prove the separate element of loss causation in order to trigger the presumption. That requirement is not justified by *Basic* or its logic. This Court has never mentioned loss causation as a precondition for invoking *Basic*'s rebuttable presumption. Loss causation addresses a matter different from whether an investor relied on a misrepresentation, presumptively or otherwise, when buying or selling a stock.

The Court has referred to the element of reliance in a private Rule 10b–5 action as "transaction causation," not loss causation. *Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U. S. 336, 341–342. Consistent with that description, when considering whether a plaintiff has relied on a misrepresentation, the Court has typically focused on facts surrounding the investor's decision to engage in the transaction. Loss causation, by contrast, requires a plaintiff to show that the misrepresentation caused a subsequent economic loss. That has nothing to do with whether an investor relied on that misrepresentation in the first place, either directly or through the fraud-on-the-market theory. The Court of Appeals' rule contravenes *Basic*'s fundamental premise—that an investor presumptively relies on a misrepresentation so long as it was reflected in the market price at the time of his transaction. Pp. 811–813.

(c) Halliburton concedes that securities fraud plaintiffs should not be required to prove loss causation in order to invoke *Basic*'s presump-

Syllabus

tion of reliance. Halliburton nonetheless defends the judgment below on the ground that the Court of Appeals did not actually require EPJ Fund to prove "loss causation" as the Court has used that term. According to Halliburton, "loss causation" was shorthand for a different analysis. The lower court's actual inquiry, Halliburton insists, was whether EPJ Fund had demonstrated "price impact"—that is, whether the alleged misrepresentations affected the market price in the first place.

The Court does not accept Halliburton's interpretation of the Court of Appeals' opinion. Loss causation is a familiar and distinct concept in securities law; it is not price impact. Whatever Halliburton thinks the Court of Appeals meant to say, what it said was loss causation. The Court takes the Court of Appeals at its word. Based on those words, the decision below cannot stand. Pp. 813–815.

597 F. 3d 330, vacated and remanded.

ROBERTS, C. J., delivered the opinion for a unanimous Court.

David Boies argued the cause for petitioner. With him on the briefs were *Carl E. Goldfarb*, *Justin D. Fitzdam*, *Lewis Kahn*, *Neil Rothstein*, and *E. Lawrence Vincent, Jr.*

Nicole A. Saharsky argued the cause for the United States as *amicus curiae* in support of petitioner. With her on the brief were *Acting Solicitor General Katyal*, *Deputy Solicitor General Stewart*, *Mark D. Cahn*, *Jacob H. Stillman*, and *Michael A. Conley.*

David D. Sterling argued the cause for respondents. With him on the brief were *Aaron M. Streett*, *Evan A. Young*, *Robb L. Voyles*, *Jeffrey A. Lamken*, *Martin V. Totaro*, *R. Alan York*, and *Donald E. Godwin.**

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*Briefs of *amici curiae* urging reversal were filed for AARP et al. by *Jay E. Sushelsky* and *Rex A. Staples;* for Financial Economists by *Ernest A. Young*, *William C. Fredericks*, and *Ann M. Lipton;* for Law Professors by *Jill E. Fisch*, *pro se;* for the National Association of Shareholder and Consumer Attorneys by *Michael J. Miarmi* and *Daniel P. Chiplock;* for the National Conference on Public Employee Retirement Systems by *Robert D. Klausner;* for Public Justice, P. C., by *Arthur Bryant*, *F. Paul Bland, Jr.*, and *Lisa M. Mezzetti;* and for 16 Public Pension Funds by *David C. Frederick*, *Gregory W. Smith*, *Cynthia L. Collins*, *Michael A. Cardozo*, *Robert L. Pratter*, *Mr. Fredericks*, *Ms. Lipton*, *Jay*

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

To prevail on the merits in a private securities fraud action, investors must demonstrate that the defendant's deceptive conduct caused their claimed economic loss. This requirement is commonly referred to as "loss causation." The question presented in this case is whether securities fraud plaintiffs must also prove loss causation in order to obtain class certification. We hold that they need not.

I

Petitioner Erica P. John Fund, Inc. (EPJ Fund), is the lead plaintiff in a putative securities fraud class action filed against Halliburton Co. and one of its executives (collectively Halliburton). The suit was brought on behalf of all investors who purchased Halliburton common stock between June 3, 1999, and December 7, 2001.

EPJ Fund alleges that Halliburton made various misrepresentations designed to inflate its stock price, in violation of § 10(b) of the Securities Exchange Act of 1934 and Securities and Exchange Commission Rule 10b–5. See 48 Stat. 891, 15 U. S. C. § 78j(b); 17 CFR § 240.10b–5 (2010). The

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W. Eisenhofer, *Geoffrey C. Jarvis*, *Jason S. Cowart*, and *Richard A. Lockridge*.

Briefs of *amici curiae* urging affirmance were filed for the American Institute of Certified Public Accountants by *Robert L. Byer* and *Richard I. Miller;* for the American Insurance Association et al. by *Mark A. Perry;* for the Chamber of Commerce of the United States of America by *Richard D. Bernstein* and *Robin S. Conrad;* for DRI—The Voice of the Defense Bar by *R. Matthew Cairns*, *Timothy R. McCormick*, *George Lucas Ashley*, and *Richard B. Phillips, Jr.;* for Law Professors by *John P. Elwood* and *David R. Woodcock, Jr.;* for the Pharmaceutical Research and Manufacturers of America by *Steven O. Kramer*, *John M. Landry*, *Jonathan D. Moss*, and *Robert J. Stumpf, Jr.;* for the Securities Industry and Financial Markets Association by *Charles E. Davidow*, *John H. Longwell*, *Richard A. Rosen*, *Walter Rieman*, and *Kevin M. Carroll;* and for the Washington Legal Foundation by *Daniel J. Popeo* and *Richard A. Samp*.

complaint asserts that Halliburton deliberately made false statements about (1) the scope of its potential liability in asbestos litigation, (2) its expected revenue from certain construction contracts, and (3) the benefits of its merger with another company. EPJ Fund contends that Halliburton later made a number of corrective disclosures that caused its stock price to drop and, consequently, investors to lose money.

After defeating a motion to dismiss, EPJ Fund sought to have its proposed class certified pursuant to Federal Rule of Civil Procedure 23. The parties agreed, and the District Court held, that EPJ Fund satisfied the general requirements for class actions set out in Rule 23(a): The class was sufficiently numerous, there were common questions of law or fact, the claims of the representative parties were typical, and the representative parties would fairly and adequately protect the interests of the class. See App. to Pet. for Cert. 3a.

The District Court also found that the action could proceed as a class action under Rule 23(b)(3), but for one problem: Circuit precedent required securities fraud plaintiffs to prove "loss causation" in order to obtain class certification. *Id.*, at 4a, and n. 2 (citing *Oscar Private Equity Invs.* v. *Allegiance Telecom, Inc.*, 487 F. 3d 261, 269 (CA5 2007)). As the District Court explained, loss causation is the "'causal connection between the material misrepresentation and the [economic] loss'" suffered by investors. App. to Pet. for Cert. 5a, and n. 3 (quoting *Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U. S. 336, 342 (2005)). After reviewing the alleged misrepresentations and corrective disclosures, the District Court concluded that it could not certify the class in this case because EPJ Fund had "failed to establish loss causation with respect to any" of its claims. App. to Pet. for Cert. 54a. The court made clear, however, that absent "this stringent loss causation requirement," it would have granted EPJ Fund's certification request. *Ibid.*

The Court of Appeals affirmed the denial of class certification. See 597 F. 3d 330 (CA5 2010). It confirmed that, "[i]n order to obtain class certification on its claims, [EPJ Fund] was required to prove loss causation, i. e., that the corrected truth of the former falsehoods actually caused the stock price to fall and resulted in the losses." *Id.*, at 334. Like the District Court, the Court of Appeals concluded that EPJ Fund had failed to meet the "requirements for proving loss causation at the class certification stage." *Id.*, at 344.

We granted EPJ Fund's petition for certiorari, 562 U. S. 1127 (2011), to resolve a conflict among the Circuits as to whether securities fraud plaintiffs must prove loss causation in order to obtain class certification. Compare 597 F. 3d, at 334 (case below), with *In re Salomon Analyst Metromedia Litigation*, 544 F. 3d 474, 483 (CA2 2008) (not requiring investors to prove loss causation at class certification stage); *Schleicher* v. *Wendt*, 618 F. 3d 679, 687 (CA7 2010) (same); *In re DVI, Inc. Securities Litigation*, 639 F. 3d 623, 636–637 (CA3 2011) (same; decided after certiorari was granted).

II

EPJ Fund contends that the Court of Appeals erred by requiring proof of loss causation for class certification. We agree.

A

As noted, the sole dispute here is whether EPJ Fund satisfied the prerequisites of Rule 23(b)(3). In order to certify a class under that Rule, a court must find "that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. Rule Civ. Proc. 23(b)(3). Considering whether "questions of law or fact common to class members predominate" begins, of course, with the elements of the underlying cause of action. The elements of a private securities fraud claim based

on violations of § 10(b) and Rule 10b–5 are: "'(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation.'" *Matrixx Initiatives, Inc.* v. *Siracusano*, *ante*, at 37–38 (quoting *Stoneridge Investment Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U. S. 148, 157 (2008)).

Whether common questions of law or fact predominate in a securities fraud action often turns on the element of reliance. The courts below determined that EPJ Fund had to prove the separate element of loss causation in order to establish that reliance was capable of resolution on a common, class-wide basis.

"Reliance by the plaintiff upon the defendant's deceptive acts is an essential element of the § 10(b) private cause of action." *Id.*, at 159. This is because proof of reliance ensures that there is a proper "connection between a defendant's misrepresentation and a plaintiff's injury." *Basic Inc.* v. *Levinson*, 485 U. S. 224, 243 (1988). The traditional (and most direct) way a plaintiff can demonstrate reliance is by showing that he was aware of a company's statement and engaged in a relevant transaction—*e. g.*, purchasing common stock—based on that specific misrepresentation. In that situation, the plaintiff plainly would have relied on the company's deceptive conduct. A plaintiff unaware of the relevant statement, on the other hand, could not establish reliance on that basis.

We recognized in *Basic*, however, that limiting proof of reliance in such a way "would place an unnecessarily unrealistic evidentiary burden on the Rule 10b–5 plaintiff who has traded on an impersonal market." *Id.*, at 245. We also observed that "[r]equiring proof of individualized reliance from each member of the proposed plaintiff class effectively would" prevent such plaintiffs "from proceeding with a class action, since individual issues" would "overwhelm[ ] the common ones." *Id.*, at 242.

The Court in *Basic* sought to alleviate those related concerns by permitting plaintiffs to invoke a rebuttable presumption of reliance based on what is known as the "fraud-on-the-market" theory. According to that theory, "the market price of shares traded on well-developed markets reflects all publicly available information, and, hence, any material misrepresentations." *Id.*, at 246. Because the market "transmits information to the investor in the processed form of a market price," we can assume, the Court explained, that an investor relies on public misstatements whenever he "buys or sells stock at the price set by the market." *Id.*, at 244, 247 (internal quotation marks omitted); see also *Stoneridge*, *supra*, at 159; *Dura Pharmaceuticals*, 544 U. S., at 341–342. The Court also made clear that the presumption was just that, and could be rebutted by appropriate evidence. See *Basic*, *supra*, at 248.

B

It is undisputed that securities fraud plaintiffs must prove certain things in order to invoke *Basic*'s rebuttable presumption of reliance. It is common ground, for example, that plaintiffs must demonstrate that the alleged misrepresentations were publicly known (else how would the market take them into account?), that the stock traded in an efficient market, and that the relevant transaction took place "between the time the misrepresentations were made and the time the truth was revealed." *Basic*, 485 U. S., at 248, n. 27; *id.*, at 241–247; see also *Stoneridge*, *supra*, at 159.

According to the Court of Appeals, EPJ Fund also had to establish loss causation at the certification stage to "trigger the fraud-on-the-market presumption." 597 F. 3d, at 335 (internal quotation marks omitted); see *ibid.* (EPJ Fund must "establish a causal link between the alleged falsehoods and its losses in order to invoke the fraud-on-the-market presumption"). The court determined that, in order to invoke a rebuttable presumption of reliance, EPJ Fund needed to prove that the decline in Halliburton's stock was

"because of the correction to a prior misleading statement" and "that the subsequent loss could not otherwise be explained by some additional factors revealed then to the market." *Id.*, at 336 (emphasis deleted). This is the loss causation requirement as we have described it. See *Dura Pharmaceuticals*, *supra*, at 342; see also 15 U. S. C. § 78u–4(b)(4).

The Court of Appeals' requirement is not justified by *Basic* or its logic. To begin, we have never before mentioned loss causation as a precondition for invoking *Basic*'s rebuttable presumption of reliance. The term "loss causation" does not even appear in our *Basic* opinion. And for good reason: Loss causation addresses a matter different from whether an investor relied on a misrepresentation, presumptively or otherwise, when buying or selling a stock.

We have referred to the element of reliance in a private Rule 10b–5 action as "transaction causation," not loss causation. *Dura Pharmaceuticals*, *supra*, at 341–342 (citing *Basic*, *supra*, at 248–249). Consistent with that description, when considering whether a plaintiff has relied on a misrepresentation, we have typically focused on facts surrounding the investor's decision to engage in the transaction. See *Dura Pharmaceuticals*, *supra*, at 342. Under *Basic*'s fraud-on-the-market doctrine, an investor presumptively relies on a defendant's misrepresentation if that "information is reflected in [the] market price" of the stock at the time of the relevant transaction. See *Basic*, *supra*, at 247.

Loss causation, by contrast, requires a plaintiff to show that a misrepresentation that affected the integrity of the market price *also* caused a subsequent economic loss. As we made clear in *Dura Pharmaceuticals*, the fact that a stock's "price on the date of purchase was inflated because of [a] misrepresentation" does not necessarily mean that the misstatement is the cause of a later decline in value. 544 U. S., at 342 (emphasis deleted; internal quotation marks omitted). We observed that the drop could instead be the

result of other intervening causes, such as "changed economic circumstances, changed investor expectations, new industry-specific or firm-specific facts, conditions, or other events." *Id.*, at 342–343. If one of those factors were responsible for the loss or part of it, a plaintiff would not be able to prove loss causation to that extent. This is true even if the investor purchased the stock at a distorted price, and thereby presumptively relied on the misrepresentation reflected in that price.

According to the Court of Appeals, however, an inability to prove loss causation would prevent a plaintiff from invoking the rebuttable presumption of reliance. Such a rule contravenes *Basic*'s fundamental premise—that an investor presumptively relies on a misrepresentation so long as it was reflected in the market price at the time of his transaction. The fact that a subsequent loss may have been caused by factors other than the revelation of a misrepresentation has nothing to do with whether an investor relied on the misrepresentation in the first place, either directly or presumptively through the fraud-on-the-market theory. Loss causation has no logical connection to the facts necessary to establish the efficient market predicate to the fraud-on-the-market theory.

The Court of Appeals erred by requiring EPJ Fund to show loss causation as a condition of obtaining class certification.

C

Halliburton concedes that securities fraud plaintiffs should not be required to prove loss causation in order to invoke *Basic*'s presumption of reliance or otherwise achieve class certification. See Tr. of Oral Arg. 26–29. Halliburton nonetheless defends the judgment below on the ground that the Court of Appeals did not actually require plaintiffs to prove "loss causation" as we have used that term. See *id.*, at 27 ("it's not loss causation as this Court knows it in *Dura*"). According to Halliburton, "loss causation" was

merely "shorthand" for a different analysis. Brief for Respondents 18. The lower court's actual inquiry, Halliburton insists, was whether EPJ Fund had demonstrated "price impact"—that is, whether the alleged misrepresentations affected the market price in the first place. See, *e. g.*, *id.*, at 16–19, 24–27, 50–51; see also Tr. of Oral Arg. 27 (stating that the Court of Appeals' "test is simply price impact" and that EPJ Fund's "only burden under the Fifth Circuit case law was to show price impact").*

"Price impact" simply refers to the effect of a misrepresentation on a stock price. Halliburton's theory is that if a misrepresentation does not affect market price, an investor cannot be said to have relied on the misrepresentation merely because he purchased stock at that price. If the price is unaffected by the fraud, the price does not reflect the fraud.

We do not accept Halliburton's wishful interpretation of the Court of Appeals' opinion. As we have explained, loss causation is a familiar and distinct concept in securities law; it is not price impact. While the opinion below may include some language consistent with a "price impact" approach, see, *e. g.*, 597 F. 3d, at 336, we simply cannot ignore the Court of Appeals' repeated and explicit references to "loss causation," see *id.*, at 334 (three times), 334, n. 2, 335 (twice), 335, n. 10 (twice), 335, n. 11, 336, 336, n. 19, 336, n. 20, 337, 338, 341 (twice), 341, n. 46, 342, n. 47, 343, 344 (three times).

Whatever Halliburton thinks the Court of Appeals meant to say, what it said was loss causation: "[EPJ Fund] was required to prove loss causation, i. e., that the corrected

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*Halliburton further concedes that, even if its conception of what the Court of Appeals meant by "loss causation" is correct, the Court of Appeals erred by placing the initial burden on EPJ Fund. See Tr. of Oral Arg. 29 ("We agree . . . that the Fifth Circuit put the initial burden of production on the plaintiff and that's contrary to *Basic*"). According to Halliburton a plaintiff must prove price impact only after *Basic*'s presumption has been successfully rebutted by the defendant. Tr. of Oral Arg. 28, 38–40. We express no views on the merits of such a framework.

truth of the former falsehoods actually caused the stock price to fall and resulted in the losses." *Id.*, at 334; see *id.*, at 335 ("we require plaintiffs to establish loss causation in order to trigger the fraud-on-the-market presumption" (internal quotation marks omitted)). We take the Court of Appeals at its word. Based on those words, the decision below cannot stand.

* * *

Because we conclude the Court of Appeals erred by requiring EPJ Fund to prove loss causation at the certification stage, we need not, and do not, address any other question about *Basic*, its presumption, or how and when it may be rebutted. To the extent Halliburton has preserved any further arguments against class certification, they may be addressed in the first instance by the Court of Appeals on remand.

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.

Syllabus

McNEILL *v.* UNITED STATES

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

No. 10–5258. Argued April 25, 2011—Decided June 6, 2011

Under the Armed Career Criminal Act (ACCA), a felon unlawfully in possession of a firearm, 18 U. S. C. § 922(g)(1), is subject to a 15-year minimum prison sentence if he has three prior convictions for a "violent felony" or "serious drug offense." As relevant here, a "serious drug offense" is defined as "an offense under State law . . . , for which a maximum term of imprisonment of ten years or more is prescribed by law," § 924(e)(2)(A)(ii). In sentencing petitioner McNeill for violating § 922(g), the District Court determined that he qualified for ACCA's sentencing enhancement based in part on six prior North Carolina drug-trafficking convictions. When McNeill committed those crimes, each carried a 10-year maximum sentence, which McNeill in fact received. However, because the State later reduced the maximum sentence for those offenses to fewer than 10 years, McNeill argued that none of his six prior convictions were for "serious drug offenses" within the meaning of § 924(e)(2)(A)(ii). The District Court rejected McNeill's request that it look to current state law and instead relied on the 10-year maximum sentence that applied at the time he committed his state offenses. The Fourth Circuit affirmed.

Held:

1. A federal sentencing court must determine whether "an offense under State law" is a "serious drug offense" by consulting the "maximum term of imprisonment" applicable to a defendant's prior state drug offense at the time of the defendant's conviction for that offense. § 924(e)(2)(A)(ii). Pp. 819–823.

(a) ACCA's plain text requires this result by mandating that the court determine whether a "previous conviction" was for a serious drug offense. The only way to answer this backward-looking question is to consult the law that applied at the time of that conviction. ACCA's use of the present tense in defining a "serious drug offense" as, *inter alia*, "an offense . . . for which a maximum [10-year] term . . . is prescribed by law" does not suggest otherwise. McNeill's argument that this language looks to the state law in effect at the time of the federal sentencing ignores ACCA's focus on convictions that have already occurred. Pp. 819–821.

(b) The statute's broader context, specifically the adjacent definition of "violent felony," confirms this interpretation. Although Congress used the present tense in defining "violent felony," see § 924(e)(2)(B), this Court has repeatedly turned to the version of state law that the defendant was actually convicted of violating in determining whether he was convicted of such a felony, see, *e. g.*, *Taylor* v. *United States*, 495 U. S. 575, 602. The Court sees no reason to interpret "serious drug offenses" any differently. Cf. *Nijhawan* v. *Holder*, 557 U. S. 29, 39. Pp. 821–822.

(c) This natural reading of ACCA also avoids the absurd results that would follow from consulting current state law to define a previous offense. Pp. 822–823.

2. The District Court properly applied ACCA's sentencing enhancement to McNeill because all six of his prior drug convictions were for "serious drug offenses." Pp. 823–824.

598 F. 3d 161, affirmed.

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

Stephen C. Gordon argued the cause for petitioner. With him on the briefs were *G. Alan DuBois*, *James E. Todd, Jr.*, *Eric J. Brignac*, *Jeffrey T. Green*, and *Sarah O'Rourke Schrup*.

Curtis E. Gannon argued the cause for the United States. With him on the briefs were *Acting Solicitor General Katyal*, *Assistant Attorney General Breuer*, *Deputy Solicitor General Dreeben*, and *Richard A. Friedman*.*

JUSTICE THOMAS delivered the opinion of the Court.

Under the Armed Career Criminal Act (ACCA), a prior state drug-trafficking conviction is for a "serious drug offense" if "a maximum term of imprisonment of ten years or more is prescribed by law" for the offense. 18 U. S. C. § 924(e)(2)(A)(ii). The question in this case concerns how a federal court should determine the maximum sentence for a prior state drug offense for ACCA purposes. We hold that

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Jonathan D. Hacker, *Meaghan McLaine VerGow*, *Norman L. Reimer*, and *Mary Price* filed a brief for the National Association of Criminal Defense Lawyers et al. as *amici curiae* urging vacation.

the "maximum term of imprisonment" for a defendant's prior state drug offense is the maximum sentence applicable to his offense when he was convicted of it.

I

After an extended chase, police officers in Fayetteville, North Carolina, apprehended petitioner Clifton Terelle McNeill. McNeill was caught with 3.1 grams of crack cocaine packaged for distribution and a .38-caliber revolver. In August 2008, he pleaded guilty to unlawful possession of a firearm by a felon, 18 U. S. C. § 922(g)(1), and possession with intent to distribute cocaine base, 21 U. S. C. § 841(a)(1).

At sentencing, the District Court determined that McNeill qualified for ACCA's sentencing enhancement. Under ACCA, a person who violates 18 U. S. C. § 922(g) and "has three previous convictions . . . for a violent felony or a serious drug offense" is subject to a 15-year minimum prison sentence. § 924(e)(1). McNeill conceded that two of his prior convictions—assault with a deadly weapon and robbery—were for "violent felonies."

McNeill argued, however, that none of his six state drug-trafficking convictions were for "serious drug offense[s]" because those crimes no longer carried a "maximum term of imprisonment of ten years or more." § 924(e)(2)(A)(ii). When McNeill committed those crimes between 1991 and 1994, each carried a 10-year maximum sentence, and McNeill in fact received 10-year sentences. See N. C. Gen. Stat. §§ 14–1.1(a)(8), 90–95(a)(1) and (b)(1) (Michie 1993) (sale of cocaine and possession with intent to sell cocaine). But as of October 1, 1994, North Carolina reduced the maximum sentence for selling cocaine to 38 months and the maximum sentence for possessing cocaine with intent to sell to 30 months. See N. C. Gen. Stat. Ann. §§ 15A–1340.17(c) and (d), 90–95(a)(1) and (b)(1) (Lexis 2009).

The District Court rejected McNeill's request that it look to current state law and instead relied on the 10-year

maximum sentence that applied to McNeill's drug offenses at the time he committed them. No. 5:08–CR–2–D–1 (EDNC, Jan. 26, 2009), App. 118. Finding that McNeill therefore had three prior convictions for violent felonies or serious drug offenses, the court applied ACCA's sentencing enhancement. The court then departed upward from the advisory Sentencing Guidelines range and sentenced McNeill to 300 months in prison in light of his "long and unrelenting history of serious criminal conduct" and "near certain likelihood of recidivism." *Id.*, at 119, 121.

The Court of Appeals for the Fourth Circuit affirmed. Although the court consulted the maximum sentence under *current* state law, it reached the same conclusion as the District Court because North Carolina's revised sentencing scheme does not apply to crimes committed before October 1, 1994. 598 F. 3d 161, 165 (2010) (agreeing with *United States* v. *Hinojosa*, 349 F. 3d 200 (CA5 2003), and disagreeing with *United States* v. *Darden*, 539 F. 3d 116 (CA2 2008)). Thus, even if McNeill were convicted today for his 1991, 1992, and September 1994 drug offenses, he would still be subject to the old 10-year statutory maximum. 598 F. 3d, at 165 (citing N. C. Gen. Stat. § 15A–1340.10 and *State* v. *Branch*, 134 N. C. App. 637, 639–640, 518 S. E. 2d 213, 215 (1999)). We granted certiorari, 562 U. S. 1128 (2011), and now affirm, albeit for a different reason.

II

A

As in all statutory construction cases, we begin with "the language itself [and] the specific context in which that language is used." *Robinson* v. *Shell Oil Co.*, 519 U. S. 337, 341 (1997). ACCA's sentencing enhancement applies to individuals who have "three previous convictions . . . for a violent felony or a serious drug offense." § 924(e)(1). As relevant here, the statute defines a "serious drug offense" as "an offense under State law, involving manufacturing, distributing,

or possessing with intent to manufacture or distribute, a controlled substance . . . , for which a maximum term of imprisonment of ten years or more is prescribed by law." § 924(e)(2)(A)(ii).

The plain text of ACCA requires a federal sentencing court to consult the maximum sentence applicable to a defendant's previous drug offense at the time of his conviction for that offense. The statute requires the court to determine whether a "previous convictio[n]" was for a serious drug offense. The only way to answer this backward-looking question is to consult the law that applied at the time of that conviction. We did precisely that in *United States* v. *Rodriquez*, 553 U. S. 377 (2008), where we addressed whether the "maximum term of imprisonment" includes recidivism enhancements. In assessing the "maximum term of imprisonment" for Rodriguez's state drug offenses, we consulted the version of state law "that [he] was convicted of violating," that is, the 1994 statutes and penalties that applied to his offenses at the time of his state convictions. *Id.*, at 380–381.

Use of the present tense in the definition of "serious drug offense" does not suggest otherwise. McNeill argues that the present-tense verb in the phrase "is prescribed by law" requires federal courts to determine the maximum sentence for a potential predicate offense by looking to the state law in effect at the time of the federal sentencing, as if the state offense were committed on the day of federal sentencing. That argument overlooks the fact that ACCA is concerned with convictions that have already occurred. Whether the prior conviction was for an offense "involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance" can only be answered by reference to the law under which the defendant was convicted. Likewise, the maximum sentence that "is prescribed by law" for that offense must also be determined according to the law applicable at that time.

McNeill's interpretation contorts the plain meaning of the statute. Although North Carolina courts actually sentenced him to 10 years in prison for his drug offenses, McNeill now contends that the "maximum term of imprisonment" for those offenses is 30 or 38 months. We find it "hard to accept the proposition that a defendant may lawfully [have] be[en] sentenced to a term of imprisonment that exceeds the 'maximum term of imprisonment . . . prescribed by law.'" *Id.*, at 383.

B

The "broader context of the statute as a whole," specifically the adjacent definition of "violent felony," confirms this interpretation. *Robinson*, *supra*, at 341. ACCA defines "violent felony" in part as a crime that "*has* as an element the use, attempted use, or threatened use of physical force against the person of another" or "*is* burglary, arson, or extortion, *involves* use of explosives, or otherwise *involves* conduct that presents a serious potential risk of physical injury to another." § 924(e)(2)(B) (emphasis added).

Despite Congress' use of present tense in that definition, when determining whether a defendant was convicted of a "violent felony," we have turned to the version of state law that the defendant was actually convicted of violating. In *Taylor* v. *United States*, 495 U. S. 575 (1990), the Court held that whether Taylor's 1963 and 1971 convictions were for a crime that "*is* burglary" depended on the "former Missouri statutes defining second-degree burglary" that "were the bases for Taylor's prior convictions." *Id.*, at 602; see *id.*, at 578, n. 1 (noting a subsequent change in state law, but relying on the burglary statutes in force "[i]n those years" in which Taylor was convicted). Similarly, in *James* v. *United States*, 550 U. S. 192 (2007), this Court looked to the versions of Florida's burglary and criminal attempt statutes that were in effect "at the time of James' [1993 state] conviction." *Id.*, at 197; see *ibid.* (quoting the 1993 versions of the Florida statutes). The present-tense verbs in the

definition of "violent felony" did not persuade us to look anywhere other than the law under which the defendants were actually convicted to determine the elements of their offenses.

Having repeatedly looked to the historical statute of conviction in the context of violent felonies, we see no reason to interpret "serious drug offense[s]" in the adjacent section of the same statute any differently. In both definitions, Congress used the present tense to refer to past convictions. Cf. *Nijhawan* v. *Holder*, 557 U. S. 29, 39 (2009) ("Where, as here, Congress uses similar statutory language . . . in two adjoining provisions, it normally intends similar interpretations").

C

This natural reading of ACCA also avoids the absurd results that would follow from consulting current state law to define a previous offense. See *United States* v. *Wilson*, 503 U. S. 329, 334 (1992) ("[A]bsurd results are to be avoided").

For example, McNeill concedes that under his approach, a prior conviction could "disappear" entirely for ACCA purposes if a State reformulated the offense between the defendant's state conviction and federal sentencing. Tr. of Oral Arg. 12–13. The Sixth Circuit confronted a similar scenario in *Mallett* v. *United States*, 334 F. 3d 491 (2003), where Ohio had substantially changed how drug quantities were measured since Mallett's state drug conviction. *Id.*, at 502 (addressing this issue in the context of the career offender provision of the Sentencing Guidelines). The Sixth Circuit could not "determine how Mallett would now be sentenced under Ohio's revised drug laws" because the offense for which he had been convicted "no longer exist[ed] and no conversion between the former and amended statutes [wa]s facially apparent." *Ibid.* The court therefore was compelled to look to state law "as of the time of the state-court

conviction" to determine the maximum possible sentence for Mallet's prior offense. *Id.*, at 503.

It cannot be correct that subsequent changes in state law can erase an earlier conviction for ACCA purposes. A defendant's history of criminal activity—and the culpability and dangerousness that such history demonstrates—does not cease to exist when a State reformulates its criminal statutes in a way that prevents precise translation of the old conviction into the new statutes. Congress based ACCA's sentencing enhancement on prior convictions and could not have expected courts to treat those convictions as if they had simply disappeared. To the contrary, Congress has expressly directed that a prior violent felony conviction remains a "conviction" unless it has been "expunged, or set aside or [the] person has been pardoned or has had civil rights restored." 18 U. S. C. § 921(a)(20); see also *Custis* v. *United States*, 511 U. S. 485, 491 (1994) (explaining that § 921(a)(20) "creates a clear negative implication that courts *may* count a conviction that has *not* been set aside").

In addition, McNeill's interpretation would make ACCA's applicability depend on the timing of the federal sentencing proceeding. McNeill cannot explain why two defendants who violated § 922(g) on the same day and who had identical criminal histories—down to the dates on which they committed and were sentenced for their prior offenses—should receive dramatically different federal sentences solely because one's § 922(g) sentencing happened to occur after the state legislature amended the punishment for one of the shared prior offenses. In contrast, the interpretation we adopt permits a defendant to know even before he violates § 922(g) whether ACCA would apply.

III

Applying our holding to this case, we conclude that the District Court properly applied ACCA's sentencing enhance-

ment to McNeill. In light of his two admitted violent felony convictions, McNeill needed only one conviction for a "serious drug offense" to trigger ACCA, but we note that all six of his prior drug convictions qualify.

In November 1992, McNeill pleaded guilty and was sentenced in a North Carolina court for five offenses: selling cocaine on four separate occasions in October 1991 and possessing cocaine with intent to sell on one occasion in February 1992. At the time of McNeill's November 1992 conviction and sentencing, North Carolina law dictated that the maximum sentence for selling cocaine in 1991 and the maximum sentence for possessing cocaine with intent to sell in 1992 was 10 years in prison. See N. C. Gen. Stat. §§ 14–1.1(a)(8), 90–95(a)(1) and (b)(1) (Michie 1993). McNeill's 1992 convictions were therefore for "serious drug offense[s]" within the meaning of ACCA.

McNeill's sixth drug offense was possessing cocaine with intent to sell in September 1994. He pleaded guilty and was sentenced in a North Carolina court in April 1995. By April 1995, North Carolina had changed the sentence applicable to that type of drug offense but still provided that the maximum sentence for possessing cocaine with intent to sell in September 1994 was 10 years in prison. See 1993 N. C. Sess. Laws, ch. 538, § 2 (repealing N. C. Gen. Stat. § 14–1.1); 1993 N. C. Sess. Laws, ch. 538, § 56 (as modified by Extra Session 1994 N. C. Sess. Laws, ch. 24, § 14(b)) ("This act becomes effective October 1, 1994, and applies only to offenses occurring on or after that date. Prosecutions for, or sentences based on, offenses occurring before the effective date of this act [are controlled by] the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act"). Therefore, McNeill's 1995 conviction was also for a "serious drug offense."

* * *

We conclude that a federal sentencing court must determine whether "an offense under State law" is a "serious drug offense" by consulting the "maximum term of imprisonment" applicable to a defendant's previous drug offense at the time of the defendant's state conviction for that offense.* § 924(e)(2)(A)(ii). The judgment of the United States Court of Appeals for the Fourth Circuit is affirmed.

It is so ordered.

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*As the Government notes, this case does not concern a situation in which a State subsequently lowers the maximum penalty applicable to an offense and makes that reduction available to defendants previously convicted and sentenced for that offense. Brief for United States 18, n. 5; cf. 18 U. S. C. § 3582(c)(2). We do not address whether or under what circumstances a federal court could consider the effect of that state action.

Syllabus

FOX *v.* VICE, AS EXECUTRIX OF THE ESTATE OF VICE, ET AL.

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

No. 10–114. Argued March 22, 2011—Decided June 6, 2011

Claiming that he was subjected to dirty tricks during his successful campaign to become the police chief of Vinton, La., petitioner Fox filed a state-court suit against Vice, the incumbent chief, and the town (Vice, for short). Fox's suit asserted both state-law claims, including defamation, and federal civil rights claims under 42 U. S. C. § 1983, including interference with Fox's right to seek public office. Vice removed the case to federal court based on the § 1983 claims. After discovery, he sought summary judgment on the federal claims, which Fox conceded were not valid. The District Court accordingly dismissed them with prejudice and remanded the remaining claims to state court, noting that Vice's attorneys' work could be useful in the state-court proceedings. Vice then asked the federal court for attorney's fees under § 1988, submitting attorney billing records estimating the time spent on the entire suit, without differentiating between time spent on the now-dismissed federal claims and on the remaining state claims. The court granted the motion on the ground that Fox's federal claims were frivolous, awarding Vice fees for all work his attorneys had performed in the suit. Although the state-law allegations had not been found frivolous, the court did not require Vice to separate out the work the attorneys had done on the two sets of claims. It also declined to reduce the fee award to reflect the surviving state-law claims, noting that both sides had focused on the frivolous § 1983 claims. The Fifth Circuit affirmed, rejecting Fox's argument that every claim in a suit must be frivolous for the defendant to recover any fees, and agreeing with the District Court that the litigation had focused on the frivolous federal claims.

Held:

1. When a plaintiff's suit involves both frivolous and non-frivolous claims, a court may grant reasonable fees to the defendant, but only for costs that the defendant would not have incurred but for the frivolous claims. Pp. 832–839.

(a) Section 1988 allows the award of "a reasonable attorney's fee" to "the prevailing party" in certain civil rights cases, including § 1983 suits. While most of this Court's § 1988 decisions have concerned fees to prevailing plaintiffs, § 1988 also authorizes a fee award to a prevailing defendant "upon a finding that the plaintiff's action was frivolous, un-

reasonable, or without foundation." *Christiansburg Garment Co.* v. *EEOC*, 434 U. S. 412, 421. Just as plaintiffs may receive fees under § 1988 even if they are not victorious on every claim, *Hensley* v. *Eckerhart*, 461 U. S. 424, 435, so too may a defendant be reimbursed for costs under § 1988 even if the plaintiff's suit is not wholly frivolous, *ibid.*, n. 10. The defendant is not entitled to fees arising from these non-frivolous charges, see *Christiansburg*, 434 U. S., at 420–421, but the presence of reasonable allegations does not immunize the plaintiff against paying for the fees that his frivolous claims imposed. Pp. 832–835.

(b) The question then becomes how to allocate fees in a lawsuit having both frivolous and non-frivolous claims. Congress's purpose in enacting § 1988—to relieve defendants of the burdens associated with fending off frivolous litigation—points to the proper standard: Section 1988 allows a defendant to recover reasonable attorney's fees incurred because of, but only because of, a frivolous claim; *i. e.*, § 1988 permits the defendant to receive only the portion of his fees that he would not have paid but for the frivolous claim. A standard allowing more expansive fee-shifting would furnish windfalls to some defendants, who would be relieved of normal litigation costs merely because the plaintiff's suit also included frivolous claims. This "but-for" standard may, in some instances, allow compensation to a defendant for attorney work relating to both frivolous and non-frivolous claims, for instance, if the frivolous claim requires a lawyer to do more work because of the defendant's greater financial exposure on that claim. The dispositive question is not whether attorney costs at all relate to a non-frivolous claim, but whether the costs would have been incurred in the absence of the frivolous allegation. The answers to those inquiries will usually track each other, but when they diverge, it is the second one that matters. The determination of fees "should not result in a second major litigation." *Hensley*, 461 U. S., at 437. The essential goal in shifting fees is to do rough justice, not to achieve auditing perfection. The trial court has wide discretion, but must apply the correct but-for standard. And the appeals court must determine whether the trial court asked and answered this but-for question, rather than some other. Pp. 835–839.

2. The lower courts used an incorrect standard in awarding fees to Vice. The District Court's analysis suggests that Vice's attorneys would have done much the same work even if Fox had not brought his frivolous claims. The charges arose out of Vice's conduct in the campaign, and with respect both to the frivolous federal claims and to the non-frivolous state-law claims, his "defense entailed proof or denial of essentially the same facts." It thus seems likely that Vice's attorneys would have, *e. g.*, taken many of the same depositions. Although the

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District Court noted the usefulness of the attorneys' work in defending against the state-law claims, it failed to take proper account of the overlap between the frivolous and non-frivolous claims. Its reasoning—that the close relationship between the federal and state-law claims supported the award—cannot be squared with the congressional policy of sparing defendants from the costs only of frivolous litigation. Nor did the Fifth Circuit uphold the award on the proper ground. It seemed to think Vice could receive fees for any work useful to defending against a frivolous claim, even if his lawyers would have done that work regardless. On this record, the case must be returned to the lower courts. Pp. 839–841.

594 F. 3d 423, vacated and remanded.

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

E. Joshua Rosenkranz argued the cause for petitioner. With him on the briefs were *Jessica S. Pers*, *Michael K. Gottlieb*, *J. Steven Broussard*, and *Randall E. Hart.*

Mark T. Stancil argued the cause for respondents. With him on the brief were *Christopher P. Ieyoub*, *Kendrick J. Guidry*, *Toby J. Heytens*, *Daniel R. Ortiz*, *J. Mark Miller*, *Joseph B. Stamey*, and *John P. Elwood.**

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*Briefs of *amici curiae* urging reversal were filed for the American Civil Liberties Union et al. by *Andrew G. Celli, Jr.*, and *Debra L. Greenberger;* and for the Liberty Institute et al. by *Mark C. Fleming*, *Sydenham B. Alexander III*, *Hiram S. Sasser III*, *Ilya Shapiro*, *Randall L. Wenger*, *Matthew R. Miller*, *James Bopp, Jr.*, and *Jeffrey Gallant.*

Briefs of *amici curiae* urging affirmance were filed for the State of Arkansas et al. by *Dustin McDaniel*, Attorney General of Arkansas, and *Ali M. Brady*, Assistant Attorney General, and by the Attorneys General for their respective States as follows: *Luther Strange* of Alabama, *John Suthers* of Colorado, *Joseph R. Biden III* of Delaware, *Samuel S. Olens* of Georgia, *David M. Louie* of Hawaii, *Lawrence G. Wasden* of Idaho, *James D. "Buddy" Caldwell* of Louisiana, *William J. Schneider* of Maine, *Jim Hood* of Mississippi, *E. Scott Pruitt* of Oklahoma, *Alan Wilson* of South Carolina, *Greg Abbott* of Texas, *Mark L. Shurtleff* of Utah, *Kenneth T. Cuccinelli II* of Virginia, *Robert M. McKenna* of Washington, and *Bruce A. Salzburg* of Wyoming; and for the National Conference of State Legislatures et al. by *Pierre H. Bergeron.*

JUSTICE KAGAN delivered the opinion of the Court.

Federal law authorizes a court to award a reasonable attorney's fee to the prevailing party in certain civil rights cases. See 42 U. S. C. § 1988. We have held that a defendant may receive such an award if the plaintiff's suit is frivolous. In this case, the plaintiff asserted both frivolous and non-frivolous claims. We hold today that a court may grant reasonable fees to the defendant in this circumstance, but only for costs that the defendant would not have incurred but for the frivolous claims. A trial court has wide discretion in applying this standard. But here we must vacate the judgment below because the court used a different and incorrect standard in awarding fees.

I

This case arises out of an election for chief of police in the town of Vinton, Louisiana. The candidates were petitioner Ricky Fox (the challenger) and respondent Billy Ray Vice (the incumbent).[1] By Fox's account, Vice resorted to an assortment of dirty tricks to try to force Fox out of the race. In particular, Vice sent an anonymous letter to Fox threatening to publish damaging charges against him if he remained a candidate. Vice also arranged for a third party to publicly accuse Fox of using racial slurs and then to file a criminal complaint against Fox repeating those allegations. And when prosecutors ignored that faux complaint, Vice leaked it to the press. Yet all of these machinations failed; Fox won the election. And Vice got an even greater comeuppance: He was subsequently convicted of criminal extortion for his election-related conduct.

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[1] Vice died during the course of this litigation. Pursuant to this Court's Rule 35.1, we substituted the executor of his estate as respondent. 562 U. S. 1282 (2011). But for the sake of clarity, we refer to the respondent as Vice.

Fox, however, chose not to let the matter rest; he filed this suit in Louisiana state court against Vice and the town of Vinton, also a respondent here. Fox's complaint asserted both state-law claims, including defamation, and federal civil rights claims under 42 U. S. C. § 1983, including interference with his right to seek public office. Vice and the town (Vice, for short) removed the case to federal court on the basis of the § 1983 claims.

At the end of discovery in the suit, Vice moved for summary judgment on Fox's federal claims. Fox conceded that the claims were "no[t] valid," App. 169, and the District Court accordingly dismissed them with prejudice. In the same ruling, the court declined to exercise supplemental jurisdiction over the remaining state-law claims. Docket No. 2:06–cv–135 (WD La., Oct. 16, 2007), App. to Pet. for Cert. 38a–40a. The court instead remanded the now slimmed-down case to state court for adjudication. In doing so, the District Court observed that "[a]ny trial preparation, legal research, and discovery may be used by the parties in the state court proceedings." *Id.*, at 40a.

Vice then asked the federal court for an award of attorney's fees under § 1988, arguing that Fox's federal claims were "baseless and without merit." App. 198. Vice stated that his lawyers had had to participate in five lengthy depositions and review numerous records to defend against Fox's charges. *Id.*, at 199. In support of his fee request, Vice submitted attorney billing records estimating the time spent on the whole suit, without differentiating between the federal and state-law claims. See Supp. App. 8–67.

The District Court granted the motion for attorney's fees on the ground that Fox's federal claims were frivolous. Although the state-law allegations had not been found frivolous (and indeed remained live), the court did not require Vice to separate out the work his attorneys had done on the two sets of claims. Docket No. 2:06–cv–135 (WD La., Sept. 22, 2008), App. to Pet. for Cert. 28a. According to the court, such

"segregation" was unnecessary because the "various claims arose out of the same transaction and were so interrelated that their prosecution or defense entailed proof or denial of essentially the same facts." *Ibid.* (internal quotation marks omitted). Similarly, the court declined to reduce the fee award to reflect the surviving state-law claims. "[T]hroughout the litigation," the court stated, both sides "focus[ed]" on Fox's frivolous § 1983 claims. *Id.*, at 32a–33a. The court therefore concluded that Vice should receive all of the fees he reasonably incurred in defending the suit—a total of $48,681. *Id.*, at 34a.

A divided Court of Appeals affirmed. 594 F. 3d 423 (CA5 2010). The majority first rejected Fox's contention that all claims in a suit must be frivolous for the defendant to recover any fees. That rule, the court explained, would "'allow plaintiffs to prosecute frivolous claims without consequenc[e]'" so long as they added a single non-frivolous claim. *Id.*, at 428 (quoting *Tutor-Saliba Corp.* v. *Hailey*, 452 F. 3d 1055, 1064 (CA9 2006)). The Court of Appeals then turned to the District Court's decision that Vice was entitled to fees for all time thus far spent on the case, even though state-law claims remained unadjudicated. Repeating the trial court's view that the whole litigation had focused on the frivolous federal claims, the Fifth Circuit upheld the fee award. See 594 F. 3d, at 428.

Judge Southwick dissented. He agreed that Vice was entitled to some reimbursement for fees. *Id.*, at 430. But he thought the District Court had erred in declining to "allocate the fees separately between the successful claims and the unsuccessful" ones just because all of them were "interrelated." *Ibid.* "[W]hen some claims are dismissed as frivolous and others are not," he stated, the defendants should receive fees only for "the legal work allocable solely or dominantly to the dismissed" claims. *Id.*, at 431. Because in this case "almost all of the defendant[s'] discovery and factual analysis would have been necessary even if no federal

claims had been brought," he concluded, the fee award should have been much smaller. *Ibid.*

The Fifth Circuit's decision deepened a Circuit split about whether and to what extent a court may award fees to a defendant under § 1988 when a plaintiff asserts both frivolous and non-frivolous claims.[2] One Court of Appeals has forbidden any compensation unless all of the plaintiff's claims are frivolous. See *Balmer* v. *HCA, Inc.*, 423 F. 3d 606, 617 (CA6 2005). Others have rejected this approach, but struggled with how to allocate fees in a suit that involves a mix of frivolous and non-frivolous claims. Compare, *e. g.*, 594 F. 3d 423 (CA5 2010) (opinion below), with *Colombrito* v. *Kelly*, 764 F. 2d 122, 132 (CA2 1985) (declining to award fees when the frivolous claim "added no additional testimony or expense to the trial"). We granted certiorari to resolve these questions. 562 U. S. 1002 (2010).

II

Our legal system generally requires each party to bear his own litigation expenses, including attorney's fees, regardless whether he wins or loses. Indeed, this principle is so firmly entrenched that it is known as the "American Rule." See *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U. S. 240, 247 (1975). But Congress has authorized courts to deviate from this background rule in certain types of cases by shifting fees from one party to another. See *Burlington* v. *Dague*, 505 U. S. 557, 562 (1992) (listing federal fee-shifting provisions).

The statute involved here, 42 U. S. C. § 1988, allows the award of "a reasonable attorney's fee" to "the prevailing

[2] The parties do not dispute for purposes of argument here that this case involves both kinds of claims. The District Court deemed the federal claims frivolous, and Fox has not asked us to disturb that ruling. See Brief for Petitioner 26, and n. 2. The court remanded the state-law claims to state court, and Vice has assumed in this Court that they are not frivolous. See Brief for Respondents 8, n. 5.

party" in various kinds of civil rights cases, including suits brought under § 1983. Most of our decisions addressing this provision have concerned the grant of fees to prevailing plaintiffs. When a plaintiff succeeds in remedying a civil rights violation, we have stated, he serves "as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority." *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U. S. 400, 402 (1968) *(per curiam)*. He therefore "should ordinarily recover an attorney's fee" from the defendant—the party whose misconduct created the need for legal action. *Christiansburg Garment Co.* v. *EEOC*, 434 U. S. 412, 416 (1978) (internal quotation marks omitted). Fee-shifting in such a case at once reimburses a plaintiff for "what it cos[t] [him] to vindicate [civil] rights," *Riverside* v. *Rivera*, 477 U. S. 561, 577–578 (1986) (internal quotation marks omitted), and holds to account "a violator of federal law," *Christiansburg*, 434 U. S., at 418.

In *Christiansburg*, we held that § 1988 also authorizes a fee award to a prevailing defendant, but under a different standard reflecting the "quite different equitable considerations" at stake. *Id.*, at 419. In enacting § 1988, we stated, Congress sought "to protect defendants from burdensome litigation having no legal or factual basis." *Id.*, at 420. Accordingly, § 1988 authorizes a district court to award attorney's fees to a defendant "upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation." *Id.*, at 421; see also *Kentucky* v. *Graham*, 473 U. S. 159, 165, n. 9 (1985).

These standards would be easy to apply if life were like the movies, but that is usually not the case. In Hollywood, litigation most often concludes with a dramatic verdict that leaves one party fully triumphant and the other utterly prostrate. The court in such a case would know exactly how to award fees (even if that anti-climactic scene is generally left on the cutting-room floor). But in the real world, litigation is more complex, involving multiple claims for relief that im-

plicate a mix of legal theories and have different merits. Some claims succeed; others fail. Some charges are frivolous; others (even if not ultimately successful) have a reasonable basis. In short, litigation is messy, and courts must deal with this untidiness in awarding fees.

Given this reality, we have made clear that plaintiffs may receive fees under § 1988 even if they are not victorious on every claim. A civil rights plaintiff who obtains meaningful relief has corrected a violation of federal law and, in so doing, has vindicated Congress's statutory purposes. That "result is what matters," we explained in *Hensley* v. *Eckerhart*, 461 U. S. 424, 435 (1983): A court should compensate the plaintiff for the time his attorney reasonably spent in achieving the favorable outcome, even if "the plaintiff failed to prevail on every contention." *Ibid.* The fee award, of course, should not reimburse the plaintiff for work performed on claims that bore no relation to the grant of relief: Such work "cannot be deemed to have been expended in pursuit of the ultimate result achieved." *Ibid.* (internal quotation marks omitted). But the presence of these unsuccessful claims does not immunize a defendant against paying for the attorney's fees that the plaintiff reasonably incurred in remedying a breach of his civil rights.

Analogous principles indicate that a defendant may deserve fees even if not all the plaintiff's claims were frivolous. In this context, § 1988 serves to relieve a defendant of expenses attributable to frivolous charges. The plaintiff acted wrongly in leveling such allegations, and the court may shift to him the reasonable costs that those claims imposed on his adversary. See *Christiansburg*, 434 U. S., at 420–421. That remains true when the plaintiff's suit also includes non-frivolous claims. The defendant, of course, is not entitled to any fees arising from these non-frivolous charges. See *ibid.* But the presence of reasonable allegations in a suit does not immunize the plaintiff against paying for the fees that his frivolous claims imposed.

Indeed, we have previously said exactly this much. In *Hensley*, we noted the possibility that a plaintiff might prevail on one contention in a suit while also asserting an unrelated frivolous claim. In this situation, we explained, a court could properly award fees to both parties—to the plaintiff, to reflect the fees he incurred in bringing the meritorious claim; and to the defendant, to compensate for the fees he paid in defending against the frivolous one. See 461 U. S., at 435, n. 10. We thus made clear that a court may reimburse a defendant for costs under § 1988 even if a plaintiff's suit is not wholly frivolous. Fee-shifting to recompense a defendant (as to recompense a plaintiff) is not all-or-nothing: A defendant need not show that every claim in a complaint is frivolous to qualify for fees.

The question then becomes one of allocation: In a lawsuit involving a mix of frivolous and non-frivolous claims, what work may the defendant receive fees for? Vice concedes, as he must, that a defendant may not obtain compensation for work unrelated to a frivolous claim. Brief for Respondents 42, n. 13. Similarly, we think Fox would have to concede (once he has lost the argument that the presence of any non-frivolous claim precludes a fee award) that the defendant may receive reasonable fees for work related exclusively to a frivolous claim. The question in dispute concerns work that helps defend against non-frivolous and frivolous claims alike—for example, a deposition eliciting facts relevant to both allegations.

Vice proposes authorizing the trial court to award fees for work that is "fairly attributable" to the frivolous portion of the lawsuit. See, *e. g.*, Tr. of Oral Arg. 41, 45. But that standard is in truth no standard at all. The very question under consideration is: What fees may be fairly attributed to frivolous claims under § 1988? To answer "Those that are fairly attributable to frivolous claims" is just to restate this question. And that non-response response would leave to each and every trial court not only the implementation, but

also the invention, of the applicable legal standard. We do not think trial courts would appreciate that lack of guidance. And yet more important, we do not think such an empty and amorphous test would ensure that all fee awards to defendants comport with Congress's purpose in enacting § 1988.

That congressional policy points to a different and more meaningful standard: Section 1988 allows a defendant to recover reasonable attorney's fees incurred because of, but only because of, a frivolous claim. Or what is the same thing stated as a but-for test: Section 1988 permits the defendant to receive only the portion of his fees that he would not have paid but for the frivolous claim. Recall that the relevant purpose of § 1988 is to relieve defendants of the burdens associated with fending off frivolous litigation. See *supra*, at 833. So if a frivolous claim occasioned the attorney's fees at issue, a court may decide that the defendant should not have to pay them. But if the defendant would have incurred those fees anyway, to defend against *non*-frivolous claims, then a court has no basis for transferring the expense to the plaintiff. Suppose, for example, that a defendant's attorney conducts a deposition on matters relevant to both a frivolous and a non-frivolous claim—and more, that the lawyer would have taken and committed the same time to this deposition even if the case had involved only the non-frivolous allegation. In that circumstance, the work does not implicate Congress's reason for allowing defendants to collect fees. The defendant would have incurred the expense in any event; he has suffered no incremental harm from the frivolous claim. In short, the defendant has never shouldered the burden that Congress, in enacting § 1988, wanted to relieve. The basic American Rule thus continues to operate.[3]

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[3] The test set out here differs from the one we adopted in *Hensley* v. *Eckerhart*, 461 U. S. 424, 435 (1983), to govern fee awards to plaintiffs in cases involving both successful and unsuccessful claims. See *supra*, at 834. That difference reflects the disparate legislative purposes we have recognized in the two settings. See *Christiansburg Garment Co.* v. *EEOC*, 434 U. S. 412, 419–420 (1978); *supra*, at 833. Congress authorized

A standard allowing more expansive fee-shifting would furnish windfalls to some defendants, making them better off because they were subject to a suit including frivolous claims. For under any more permissive test, the simple presence of a frivolous claim would allow the court to shift to the plaintiff some of the costs of defending against regular, non-frivolous charges. So two defendants (call them Vice and Rice) could face identical non-frivolous allegations, but because Vice also confronted a frivolous claim, he might end by paying less than Rice to his attorneys. The chance assertion—for Vice, the downright lucky assertion—of the frivolous claim could relieve him not only of the incremental costs of that claim but also of costs that he, like Rice, would have had to pay in its absence. Section 1988 provides no warrant for that peculiar result; that statute was "never intended to produce windfalls" for parties. See *Farrar* v. *Hobby*, 506 U. S. 103, 115 (1992) (internal quotation marks omitted).

At the same time, the "but-for" standard we require may in some cases allow compensation to a defendant for attorney work relating to both frivolous and non-frivolous claims. Suppose, for example, that a plaintiff asserts one frivolous and one non-frivolous claim, but that only the frivolous allegation can legally result in a damages award. If an attorney performs work useful to defending against both, but did so only because of the defendant's monetary exposure on the frivolous charge, a court may decide to shift fees. Or similarly, imagine that the frivolous claim enables removal of the case to federal court, which in turn drives up litigation expenses. Here too, our standard would permit awarding fees

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fees to plaintiffs to compensate them for the costs of redressing civil rights violations; accordingly, a plaintiff may receive fees for all work relating to the accomplishment of that result, even if "the plaintiff failed to prevail on every contention raised." *Hensley*, 461 U. S., at 435. By contrast, Congress authorized fees to defendants to remove the burden associated with fending off frivolous claims; accordingly, a defendant may recover for fees that those claims caused him to incur. In each context, the standard for allocating fees in "mixed" cases matches the relevant congressional purpose.

for work relevant to both claims in order to reflect the increased costs (if any) of the federal forum. And frivolous claims may increase the cost of defending a suit in ways that are not reflected in the number of hours billed. If a defendant could prove, for example, that a frivolous claim involved a specialized area that reasonably caused him to hire more expensive counsel for the entire case, then the court may reimburse the defendant for the increased marginal cost. As all these examples show, the dispositive question is not whether attorney costs at all relate to a non-frivolous claim, but whether the costs would have been incurred in the absence of the frivolous allegation. The answers to those inquiries will usually track each other, but when they diverge, it is the second that matters.

We emphasize, as we have before, that the determination of fees "should not result in a second major litigation." *Hensley,* 461 U. S., at 437. The fee applicant (whether a plaintiff or a defendant) must, of course, submit appropriate documentation to meet "the burden of establishing entitlement to an award." *Ibid.* But trial courts need not, and indeed should not, become green-eyeshade accountants. The essential goal in shifting fees (to either party) is to do rough justice, not to achieve auditing perfection. So trial courts may take into account their overall sense of a suit, and may use estimates in calculating and allocating an attorney's time. And appellate courts must give substantial deference to these determinations, in light of "the district court's superior understanding of the litigation." *Ibid.;* see *Webb* v. *Dyer County Bd. of Ed.*, 471 U. S. 234, 244 (1985). We can hardly think of a sphere of judicial decisionmaking in which appellate micromanagement has less to recommend it.

But the trial court must apply the correct standard, and the appeals court must make sure that has occurred. See *Perdue* v. *Kenny A.*, 559 U. S. 542, 548 (2010) ("Determining a 'reasonable attorney's fee' is a matter that is committed to the sound discretion of a trial judge, . . . but the judge's

discretion is not unlimited"); cf. *Koon* v. *United States*, 518 U. S. 81, 100 (1996) ("A district court by definition abuses its discretion when it makes an error of law"). That means the trial court must determine whether the fees requested would not have accrued but for the frivolous claim. And the appeals court must determine whether the trial court asked and answered that question, rather than some other. A trial court has wide discretion when, but only when, it calls the game by the right rules.

III

The task remains of applying these principles to the fee award Vice received. The District Court's analysis suggests that Vice's attorneys would have done much the same work even if Fox had not brought his frivolous claims. As noted earlier, see *supra*, at 830–831, the court acknowledged that Fox's federal and state-law claims were "interrelated," App. to Pet. for Cert. 28a (internal quotation marks omitted). The charges "arose out of the same transaction"—Vice's conduct in the campaign—and their "defense entailed proof or denial of essentially the same facts." *Ibid.* (internal quotation marks omitted). It therefore seems likely that Vice's attorneys would at least have conducted similar fact-gathering activities—taken many of the same depositions, produced and reviewed many of the same documents, and so forth. Indeed, the District Court highlighted the usefulness of the attorneys' work to defending against the state-law claims: In its order remanding those claims, the court noted that the "trial preparation, legal research, and discovery" done in the federal court could "be used by the parties in the state court proceedings." *Id.*, at 40a.

The District Court's decision to award full attorney's fees to Vice failed to take proper account of this overlap between the frivolous and non-frivolous claims. Rather than apply the but-for standard we have set out, the court indicated that the paramount factor was the parties' "focus" in the litigation. *Id.*, at 33a. The court did not address whether the

"interrelated[ness]" of the claims meant that Vice would have incurred part or most of his fees even if Fox had asserted only the non-frivolous state-law claims. To the contrary, the court suggested that the close relationship between the federal and state-law claims supported Vice's request to recover *all* of his attorney's fees. See *id.*, at 28a; *supra*, at 830–831. That reasoning stands the appropriate analysis on its head. It cannot be squared with the congressional policy of sparing defendants from the costs of *frivolous* litigation.

Nor did the Court of Appeals uphold the award of fees on the ground that we would require. The majority articulated a standard that, taken alone, might be read as consistent with our opinion; according to the court, a defendant should receive fees for "work which can be distinctly traced to a plaintiff's frivolous claims." 594 F. 3d, at 429. But the court seemed to think that its test permitted awarding Vice fees for any work useful to defending against a frivolous claim, even if lawyers would have done that work regardless. Indeed, this very point divided the majority and the dissent. Judge Southwick objected to the fee award on the ground that "almost all [of] the defendant[s'] discovery and factual analysis would have been necessary even if no federal claims had been brought." *Id.*, at 431. But the majority never responded to that argument or otherwise engaged this crucial question. The majority instead merely reiterated the District Court's reasoning that the parties had principally "focus[ed]" on the § 1983 allegations. That finding, as we have explained, is irrelevant if Vice's attorneys would have performed the same work to defend against the state-law claims.

On this record, we must return the case to the lower courts. See, *e. g.*, *Perdue*, 559 U. S., at 557–560; *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, 478 U. S. 546, 566–568 (1986); *Hensley*, 461 U. S., at 438–440. In a suit of this kind, involving both frivolous and non-frivolous claims, a defendant may recover the reasonable attorney's

fees he expended solely because of the frivolous allegations. And that is all. Consistent with the policy underlying § 1988, the defendant may not receive compensation for any fees that he would have paid in the absence of the frivolous claims. We therefore vacate the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

Reporter's Note

The next page is purposely numbered 901. The numbers between 841 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 MARCH 28 THROUGH
JUNE 6, 2011

MARCH 28, 2011

Appeal Dismissed

No. 10–950. DAVIS *v.* HUMPHREY, WARDEN. Appeal from D. C. S. D. Ga. dismissed, and petition for writ of habeas corpus and common-law writ of certiorari denied.

Certiorari Dismissed

No. 10–8588. JAMESON *v.* YATES, WARDEN. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 10–8795. SIMON *v.* BICKELL 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)*.

No. 10–9197. SUKUP *v.* UNITED STATES. 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. JUSTICE KAGAN took no part in the consideration or decision of this motion and this petition.

Miscellaneous Orders

No. 10A583. ANTHONY *v.* UNITED STATES. Application for certificate of appealability, addressed to JUSTICE SOTOMAYOR and referred to the Court, denied.

No. 10M84. SHIPLET *v.* VILSACK, SECRETARY OF AGRICULTURE. Motion for leave to file petition for writ of certiorari with supplemental appendix under seal denied without prejudice to

filing a renewed motion together with either a redacted supplemental appendix or an explanation as to why the supplemental appendix may not be redacted within 30 days.

No. 10M89. COSTLEY *v.* GATHINGS ET AL.;

No. 10M92. JACKSON *v.* FARMERS INSURANCE GROUP/FIRE INSURANCE EXCHANGE; and

No. 10M93. REDD *v.* UNITED STATES. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 10M90. BAMIGBADE *v.* STATE FARM MUTUAL AUTO INSURANCE CO. ET AL. Motion to direct the Clerk to file petition for writ of certiorari out of time under this Court's Rule 14.5 denied.

No. 10M91. NOSSAMAN LLP ET AL. *v.* UNITED STATES. Motion for leave to file petition for writ of certiorari with the supplemental appendix under seal granted.

No. 09–1533. DEPIERRE *v.* UNITED STATES. C. A. 1st Cir. [Certiorari granted, 562 U. S. 960.] Motion of petitioner to dispense with printing the joint appendix granted.

No. 10–174. AMERICAN ELECTRIC POWER CO., INC., ET AL. *v.* CONNECTICUT ET AL. C. A. 2d Cir. [Certiorari granted, 562 U. S. 1091.] Motion of the Acting Solicitor General for divided argument and enlargement of time for oral argument granted. JUSTICE SOTOMAYOR took no part in the consideration or decision of this motion.

No. 10–844. CARACO PHARMACEUTICAL LABORATORIES, LTD., ET AL. *v.* NOVO NORDISK A/S ET AL. C. A. Fed. Cir. The Acting Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 10–8150. COHEN *v.* FEDERAL EXPRESS CORP. C. A. 2d Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [562 U. S. 1215] denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this motion.

No. 10–8580. SHAHIN *v.* STROSSER ET AL. C. A. 3d Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until April 18, 2011, within which to pay the

docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33.1 of the Rules of this Court.

No. 08–1443. IN RE DAVIS;
No. 10–9233. IN RE HIEN ANH DAO;
No. 10–9244. IN RE RIVERA;
No. 10–9286. IN RE ROATH;
No. 10–9301. IN RE THOMPSON; and
No. 10–9343. IN RE LESTER. Petitions for writs of habeas corpus denied.

No. 10–8521. IN RE BURGESS. Petition for writ of mandamus denied.

No. 10–1052. IN RE HOVIND. Petition for writ of mandamus denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

No. 10–8672. IN RE CATANZARO. Petition for writ of mandamus and/or prohibition denied.

No. 10–9109. IN RE SPRINGER. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of mandamus and/or prohibition dismissed. See this Court's Rule 39.8. JUSTICE KAGAN took no part in the consideration or decision of this motion and this petition.

Certiorari Granted

No. 10–553. HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ET AL. C. A. 6th Cir. Motions of International Mission Board of the Southern Baptist Convention et al., Religious Organizations and Institutions, and Christian Reformed Church in North America et al. for leave to file briefs as *amici curiae* granted. Certiorari granted. Reported below: 597 F. 3d 769.

Certiorari Denied. (See also No. 10–950, *supra.*)

No. 10–740. EMIGRANT SAVINGS BANK *v.* METAVANTE CORP. C. A. 7th Cir. Certiorari denied. Reported below: 619 F. 3d 748.

No. 10–834. COUNCIL TREE INVESTORS, INC., ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 619 F. 3d 235.

No. 10–840. SHERPA *v.* HOLDER, ATTORNEY GENERAL. C. A. 2d Cir. Certiorari denied. Reported below: 393 Fed. Appx. 819.

No. 10–939. MUKAMAL, LIQUIDATING TRUSTEE AND DIRECTOR AND OFFICER TRUSTEE OF FAR & WIDE CORP., ET AL. *v.* BAKES ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 378 Fed. Appx. 890.

No. 10–949. DAVIS *v.* HUMPHREY, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 625 F. 3d 716.

No. 10–953. FIELD ET AL. *v.* MCMASTER ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 398 Fed. Appx. 894.

No. 10–954. NASH *v.* MICHIGAN. Cir. Ct. Ingham County, Mich. Certiorari denied.

No. 10–956. EDGELL ET AL. *v.* MCKENNA. C. A. 6th Cir. Certiorari denied. Reported below: 617 F. 3d 432.

No. 10–958. CELANESE CORP. *v.* MARTIN K. EBY CONSTRUCTION CO., INC. C. A. 5th Cir. Certiorari denied. Reported below: 620 F. 3d 529.

No. 10–971. WOODARD *v.* WILSON COUNTY, NORTH CAROLINA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 393 Fed. Appx. 125.

No. 10–982. KAMAU ET VIR *v.* HOLDER, ATTORNEY GENERAL. C. A. 5th Cir. Certiorari denied. Reported below: 398 Fed. Appx. 57.

No. 10–989. CHAHINE *v.* HOLDER, ATTORNEY GENERAL. C. A. 6th Cir. Certiorari denied.

No. 10–991. ISAKSON *v.* CUSTER ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 379 Fed. Appx. 279.

No. 10–995. PENNSYLVANIA PRISON SOCIETY *v.* CORTES, SECRETARY OF COMMONWEALTH OF PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 622 F. 3d 215.

No. 10–1025. MAUER *v.* MINNESOTA. C. A. 8th Cir. Certiorari denied. Reported below: 625 F. 3d 489.

No. 10–1037. GREAT WESTERN MINING & MINERAL CO. *v.* FOX ROTHSCHILD LLP ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 615 F. 3d 159.

No. 10–1039. NALLS *v.* PLATTSMIER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 394 Fed. Appx. 90.

No. 10–1055. COLETTE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 397 Fed. Appx. 292.

No. 10–6805. VOSBURGH *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 602 F. 3d 512.

No. 10–7243. BUNTON *v.* ATHERTON, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 613 F. 3d 973.

No. 10–7690. ALEXANDER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 609 F. 3d 1250.

No. 10–7693. WILLIAMS ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 612 F. 3d 1057.

No. 10–7712. LAFARGA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 395 Fed. Appx. 257.

No. 10–7728. TAYLOR *v.* BOWERSOX, SUPERINTENDENT, SOUTH CENTRAL CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 10–7975. COWAN *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 50 Cal. 4th 401, 236 P. 3d 1074.

No. 10–8118. GRAY *v.* EPPS, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 616 F. 3d 436.

No. 10–8440. CARLIN *v.* LEAHY-CARLIN. Ct. Sp. App. Md. Certiorari denied. Reported below: 191 Md. App. 751 and 758.

No. 10–8457. ERWIN *v.* WYOMING DEPARTMENT OF FAMILY SERVICES ET AL. Sup. Ct. Wyo. Certiorari denied. Reported below: 237 P. 3d 409.

No. 10–8459. GARCIA *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 42 So. 3d 239.

No. 10–8461. GIBBS *v.* BOSTIC ET AL. Sup. Ct. S. C. Certiorari denied.

No. 10–8478. FUALAAU *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 155 Wash. App. 347, 228 P. 3d 771.

No. 10–8491. ROSENFELD *v.* HACKETT ET AL. C. A. 9th Cir. Certiorari denied.

No. 10–8496. BOYD *v.* CONTRA COSTA COMMUNITY COLLEGE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 384 Fed. Appx. 681.

No. 10–8507. YOWELL *v.* LAFLER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 10–8509. TRAINI *v.* CURTIN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 10–8513. JONES *v.* ROTHENBERG, JUDGE, CIRCUIT COURT OF FLORIDA, MIAMI-DADE COUNTY. C. A. 11th Cir. Certiorari denied.

No. 10–8517. MATHIS *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied.

No. 10–8518. JUDD *v.* NEW MEXICO. Ct. App. N. M. Certiorari denied.

No. 10–8520. BAILEY *v.* RAMIREZ, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 409 Fed. Appx. 101.

No. 10–8528. BEASLEY *v.* BUSS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 10–8541. RIOS *v.* BENNETT ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 384 Fed. Appx. 248.

No. 10–8557. MARSHALL *v.* BUSS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 610 F. 3d 576.

No. 10–8564. CROSBY *v.* COURT OF COMMON PLEAS OF PENNSYLVANIA, PHILADELPHIA COUNTY. Sup. Ct. Pa. Certiorari denied. Reported below: 607 Pa. 309, 5 A. 3d 816.

No. 10–8566. DEAN *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 10–8574. HOOKS *v.* DOTSON, WARDEN. Ct. Crim. App. Tenn. Certiorari denied.

No. 10–8575. HAMPTON *v.* METRISH, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 10–8579. SUGGS *v.* BUSS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 609 F. 3d 1218.

No. 10–8581. BARDES *v.* MAGERA, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS STATE'S ATTORNEY FOR SOUTH CAROLINA DEPARTMENT OF SOCIAL SERVICES, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 403 Fed. Appx. 862.

No. 10–8586. PORTER *v.* NEOTTI, ACTING WARDEN. C. A. 9th Cir. Certiorari denied.

No. 10–8592. DALRYMPLE *v.* PURDUM. Ct. App. Ohio, Ross County. Certiorari denied. Reported below: 2010-Ohio-2750.

No. 10–8593. DEHAVEN *v.* CATE, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION. C. A. 9th Cir. Certiorari denied. Reported below: 401 Fed. Appx. 264.

No. 10–8596. SHELTON *v.* KNOWLES, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 406 Fed. Appx. 126.

No. 10–8603. PASCHAL *v.* BUSS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla. Certiorari denied. Reported below: 51 So. 3d 1155.

No. 10–8604. JOHNSON *v.* KELLY, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 395 Fed. Appx. 65.

No. 10–8606. LEWIS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 625 F. 3d 1224.

No. 10–8610. NEAL *v.* HOOD ET AL. C. A. 6th Cir. Certiorari denied.

No. 10–8613. THORNTON *v.* HARMON, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied.

No. 10–8614. ZURCHER *v.* FRANKE, SUPERINTENDENT, TWO RIVERS CORRECTIONAL INSTITUTION. C. A. 9th Cir. Certiorari denied. Reported below: 384 Fed. Appx. 550.

No. 10–8622. WILLIAMS *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 10–8633. BEAN *v.* PERTTU. C. A. 6th Cir. Certiorari denied.

No. 10–8634. COMER *v.* BASINGER, SUPERINTENDENT, WABASH VALLEY CORRECTIONAL FACILITY. C. A. 7th Cir. Certiorari denied.

No. 10–8635. DEAN *v.* JONES ET AL. C. A. 9th Cir. Certiorari denied.

No. 10–8638. DAVIS *v.* HAMPTON PUBLIC SCHOOL DISTRICT/SPECIAL EDUCATION. C. A. 4th Cir. Certiorari denied. Reported below: 396 Fed. Appx. 960.

No. 10–8642. COOKS *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 10–8645. EGBUONU *v.* YOUNG, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 10–8647. CRAIG *v.* ARIZONA. Ct. App. Ariz. Certiorari denied.

No. 10–8650. PITRE *v.* HENDERSON, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 10–8651. COSTLEY *v.* H. E. BUTT GROCERY CO., AKA H. E. BUTT GROCERY CO., L. P., DBA H. E. B. STORE WACO 06 #11. Ct. App. Tex., 10th Dist. Certiorari denied.

No. 10–8652. CARTER *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 10–8657. CISNEROS *v.* KANSAS. Ct. App. Kan. Certiorari denied. Reported below: 42 Kan. App. 2d xviii, 218 P. 3d 1197.

No. 10–8664. TYLICKI *v.* SCHWARTZ. C. A. 2d Cir. Certiorari denied. Reported below: 401 Fed. Appx. 603.

No. 10–8675. BACON *v.* BUSS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 10–8677. SINGLETON *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied.

No. 10–8679. RAMESES *v.* KERNAN, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 377 Fed. Appx. 593.

No. 10–8684. MARSHALL *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 319 S. W. 3d 352.

No. 10–8686. BUSBY *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 397 Ill. App. 3d 1106, 988 N. E. 2d 241.

No. 10–8690. DESAVAGE *v.* LAWLER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 10–8691. DRIVER *v.* VIRGA, ACTING WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 395 Fed. Appx. 392.

No. 10–8692. DICKERSON *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 10–8693. DEAN *v.* TONI ET AL. C. A. 9th Cir. Certiorari denied.

No. 10–8725. WEST *v.* PALMER, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 10–8743. D. G. *v.* LOUISIANA. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 40 So. 3d 409.

No. 10–8753. AARON *v.* HARRIS, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied.

No. 10–8754. ARMANT *v.* RADER, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 10–8758. PATEL *v.* UNITED STATES ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 399 Fed. Appx. 355.

No. 10–8799. BELL *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 4 A. 3d 690.

No. 10–8802. JANUARY *v.* ASTRUE, COMMISSIONER OF SOCIAL SECURITY. C. A. 5th Cir. Certiorari denied. Reported below: 400 Fed. Appx. 929.

No. 10–8817. GALLARDO *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 225 Ariz. 560, 242 P. 3d 159.

No. 10–8826. SANCHES *v.* HEDGPETH, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 381 Fed. Appx. 710.

No. 10–8895. HALE *v.* FLORIDA PAROLE COMMISSION. Sup. Ct. Fla. Certiorari denied. Reported below: 51 So. 3d 1154.

No. 10–8897. GRAY *v.* LARKINS, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 10–8898. IHSAN, AKA MAYWEATHER *v.* WILKINSON, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied.

No. 10–8962. DUBBERLY *v.* BUSS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 10–8992. FLORES, EXECUTRIX OF THE ESTATE OF FLORES, DECEASED *v.* FOX, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 394 Fed. Appx. 170.

No. 10–8998. KRAUSE *v.* WENGLER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 10–9002. KING *v.* ARIZONA. Super. Ct. Ariz., County of Maricopa. Certiorari denied.

No. 10–9046. STANTON *v.* SALZBURG, ATTORNEY GENERAL OF WYOMING. C. A. 10th Cir. Certiorari denied. Reported below: 401 Fed. Appx. 313.

No. 10–9055. COSCO *v.* LAMPERT, DIRECTOR, WYOMING DEPARTMENT OF CORRECTIONS, ET AL. Sup. Ct. Wyo. Certiorari denied. Reported below: 229 P. 3d 962.

No. 10–9064. BIGELOW *v.* FLORIDA PAROLE COMMISSION ET AL. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 56 So. 3d 769.

No. 10–9074. ELLIS *v.* BERKEBILE, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 406 Fed. Appx. 817.

No. 10–9082. WHITE *v.* MCDONALD, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 401 Fed. Appx. 181.

No. 10–9097. VICOL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 404 Fed. Appx. 1.

No. 10–9107. JONES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 388 Fed. Appx. 314.

No. 10–9112. RASOOL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 10–9113. ANTONUCCI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 10–9120. PIERCE *v.* SMEAL ET AL. C. A. 3d Cir. Certiorari denied.

No. 10–9131. WINNINGHAM *v.* SHULMAN ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 377 Fed. Appx. 23.

No. 10–9135. WHITE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 380 Fed. Appx. 483.

No. 10–9137. TILLMAN ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 413 Fed. Appx. 562.

No. 10–9140. COBB *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 397 Fed. Appx. 128.

No. 10–9145. ALLISON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 398 Fed. Appx. 862.

No. 10–9147. LARIOS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 403 Fed. Appx. 437.

No. 10–9156. BROWN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 401 Fed. Appx. 994.

No. 10–9163. DOE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 10–9164. OSEGUERA RODRIGUEZ *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 404 Fed. Appx. 727.

No. 10–9166. PODHORN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 406 Fed. Appx. 42.

No. 10–9171. SMITH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 10–9173. BLOUNT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 401 Fed. Appx. 132.

No. 10–9174. BORBOA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 10–9175. BRUMMETT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 402 Fed. Appx. 126.

No. 10–9178. THURMAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 625 F. 3d 1053.

No. 10–9179. WOJCIKIEWICZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 403 Fed. Appx. 483.

No. 10–9184. PEARCE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 10–9190. VILLAGRANA LOPEZ *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 409 Fed. Appx. 604.

No. 10–9193. RONQUILLO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 402 Fed. Appx. 922.

No. 10–9195. VALENZUELA-CARRANZA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 413 Fed. Appx. 978.

No. 10–9199. MYTON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 10–9201. LUJAN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 398 Fed. Appx. 347.

No. 10–9203. NEWBY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 403 Fed. Appx. 809.

No. 10–9207. DIXON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 405 Fed. Appx. 19.

No. 10–9212. LUNA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 10–9224. BREWER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 624 F. 3d 900.

No. 10–9254. HOWARD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 403 Fed. Appx. 858.

No. 10–548. KAISER EAGLE MOUNTAIN, INC., ET AL. *v.* NATIONAL PARKS & CONSERVATION ASSN. ET AL. C. A. 9th Cir. Motions of Coachella Valley Economic Partnership, New Kaiser Voluntary Employees' Beneficiary Association, Pacific Legal Foundation, County Sanitation District No. 2 of Los Angeles County, and Judge Craig Manson et al. for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 606 F. 3d 1058.

No. 10–976. FREEDOM HOLDINGS, INC., ET AL. *v.* SCHNEIDERMAN, ATTORNEY GENERAL OF NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 624 F. 3d 38.

No. 10–8787. FLORES *v.* HOLDER, ATTORNEY GENERAL, ET AL. C. A. 5th Cir. Certiorari before judgment denied.

No. 10–9206. DEJARNETTE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 403 Fed. Appx. 188.

No. 10–9251. THOMAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 411 Fed. Appx. 742.

Rehearing Denied

No. 10–7140. EDWARDS *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL., 562 U. S. 1146;

No. 10–7514. BAXTER *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL., 562 U. S. 1154;

No. 10–7554. MENDOZA *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, 562 U. S. 1186;

No. 10–7597. DRUM *v.* CALHOUN ET AL., 562 U. S. 1188;

No. 10–7600. HALL *v.* KORESKI, 562 U. S. 1202; and

No. 10–7713. LUCAS *v.* UNITED STATES, 562 U. S. 1159. Petitions for rehearing denied.

No. 10–7678. BROWN *v.* UNITED STATES, 562 U. S. 1170. Petition for rehearing denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

No. 10–6846. BITTICK *v.* KOSTER, ATTORNEY GENERAL OF MISSOURI, ET AL., 562 U. S. 1112; and

No. 10–7378. JAMES *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL., 562 U. S. 1152. Motions for leave to file petitions for rehearing denied.

MARCH 29, 2011

Certiorari Denied

No. 10–9703 (10A950). KING *v.* ARIZONA. Super. Ct. Ariz., County of Maricopa. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Certiorari denied.

MARCH 30, 2011

Dismissal Under Rule 46

No. 10–1060. NATIONAL RAILROAD PASSENGER CORPORATION *v.* COLLINS. Ct. App. Md. Certiorari dismissed under this Court's Rule 46.1. Reported below: 417 Md. 217, 9 A. 3d 56.

MARCH 31, 2011

Certiorari Denied

No. 10–9774 (10A957). BOYD *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.

APRIL 4, 2011

Affirmed for Absence of Quorum

No. 10–8943. JONES *v.* SUPREME COURT OF THE UNITED STATES ET AL. C. A. D. C. Cir. Because the Court lacks a quorum, 28 U. S. C. § 1, and since the qualified Justices are of the opinion that the case cannot be heard and determined at the next Term of the Court, the judgment is affirmed under 28 U. S. C. § 2109, which provides that under these circumstances "the court shall enter its order affirming the judgment of the court from which the case was brought for review with the same effect as upon affirmance by an equally divided court." THE CHIEF JUSTICE, JUSTICE SCALIA, JUSTICE KENNEDY, JUSTICE THOMAS, and

JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 405 Fed. Appx. 508.

Certiorari Granted—Vacated and Remanded

No. 09–1361. CITY OF RENO, NEVADA, ET AL. *v.* CONN ET AL. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Connick* v. *Thompson*, *ante*, p. 51. Reported below: 591 F. 3d 1081.

Certiorari Dismissed

No. 10–8765. SNIPES *v.* CALIFORNIA. Sup. Ct. Cal. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 10–8774. WARREN *v.* OWENS 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: 475 Fed. Appx. 508.

Miscellaneous Orders

No. 10A768. PLATTS *v.* UNITED STATES. Application for certificate of appealability, addressed to JUSTICE SOTOMAYOR and referred to the Court, denied.

No. 10A824. SHOVE *v.* CULLEN, WARDEN. Application for certificate of appealability, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. 126, Orig. KANSAS *v.* NEBRASKA ET AL. Motion for leave to file petition granted. It is ordered that William J. Kayatta, Jr., Esq., of Portland, Me., is appointed Special Master in this case with authority to fix the time and conditions for the filing of additional pleadings, to direct subsequent proceedings, summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem it necessary to call for. The Special Master is directed to submit reports as he may deem appropriate.

The compensation of the Special Master, the allowances to him, the compensation paid to his legal, technical, stenographic, and clerical assistants, the cost of printing his reports, and all other proper expenses, including travel expenses, shall be charged against and be borne by the parties in such proportion as the

Court may hereafter direct. [For earlier order herein, see, *e. g.*, 562 U. S. 820.]

No. 09–11328. DAVIS *v.* UNITED STATES. C. A. 11th Cir. [Certiorari granted, 562 U. S. 1002.] Motion of petitioner for appointment of counsel granted. William W. Whatley, Esq., of Montgomery, Ala., is appointed to serve as counsel for petitioner in this case.

No. 10–290. MICROSOFT CORP. *v.* I4I LIMITED PARTNERSHIP ET AL. C. A. Fed. Cir. [Certiorari granted, 562 U. S. 1060.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. THE CHIEF JUSTICE took no part in the consideration or decision of this motion.

No. 10–779. SORRELL, ATTORNEY GENERAL OF VERMONT, ET AL. *v.* IMS HEALTH INC. ET AL. C. A. 2d Cir. [Certiorari granted, 562 U. S. 1127.] Motion of respondents for divided argument denied.

No. 10–5400. TAPIA *v.* UNITED STATES. C. A. 9th Cir. [Certiorari granted, 562 U. S. 1104.] Motion of the Acting Solicitor General for divided argument granted.

No. 10–7786. SIMPSON *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 4th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [562 U. S. 1210] denied.

No. 10–8744. CARNEY *v.* CARNEY. Dist. Ct. App. Fla., 1st Dist.;

No. 10–8784. FAYIGA *v.* CASSAGNOL ET AL. Dist. Ct. App. Fla., 3d Dist.;

No. 10–8794. ANTONELLIS *v.* CUMBERLAND COUNTY SCHOOLS BOARD OF EDUCATION ET AL. Ct. App. N. C.;

No. 10–9069. MONROE *v.* KRIPPEL ET AL. C. A. 4th Cir.; and

No. 10–9253. EVANS *v.* UNITED STATES. C. A. 8th Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until April 25, 2011, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 10–9742 (10A955). COOK *v.* ARIZONA. Super. Ct. Ariz., County of Mohave. Application for stay of execution of sentence

of death, presented to JUSTICE KENNEDY, and by him referred to the Court, granted pending disposition of the petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for writ of certiorari is granted, the stay shall terminate upon the issuance of the mandate of this Court.

No. 10–9404. IN RE HILL; and

No. 10–9461. IN RE PENNICK. Petitions for writs of habeas corpus denied.

No. 10–8761. IN RE TAEK SANG YOON. Petition for writ of mandamus and/or prohibition denied.

Certiorari Granted

No. 10–637. GREENE, AKA TRICE *v.* FISHER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT SMITHFIELD, ET AL. C. A. 3d Cir. Certiorari granted. Reported below: 606 F. 3d 85.

No. 10–945. FLORENCE *v.* BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF BURLINGTON ET AL. C. A. 3d Cir. Certiorari granted. Reported below: 621 F. 3d 296.

Certiorari Denied

No. 10–439. AL ODAH ET AL. *v.* UNITED STATES ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 611 F. 3d 8.

No. 10–623. ASTELLO *v.* FAYRAM, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 10–631. CUSTABLE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 615 F. 3d 824.

No. 10–720. GEISEN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 612 F. 3d 471.

No. 10–727. IREY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 612 F. 3d 1160.

No. 10–728. NADER ET AL. *v.* NAGO, CHIEF ELECTION OFFICER, STATE OF HAWAII. C. A. 9th Cir. Certiorari denied. Reported below: 620 F. 3d 1214.

No. 10–736. AWAD *v.* OBAMA, PRESIDENT OF THE UNITED STATES, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 608 F. 3d 1.

No. 10–873. SAENZ ET AL. *v.* CITY OF MCALLEN, TEXAS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 396 Fed. Appx. 173.

No. 10–973. SMITH *v.* FRIEDMAN ET AL. Ct. Sp. App. Md. Certiorari denied.

No. 10–977. CAPITAL ONE BANK (USA), N. A. *v.* RUBIO, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED. C. A. 9th Cir. Certiorari denied. Reported below: 613 F. 3d 1195.

No. 10–983. ANDERSON *v.* KITCHEN ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 389 Fed. Appx. 838.

No. 10–985. OGBODIEGWU *v.* TEXAS. Ct. App. Tex., 3d Dist. Certiorari denied.

No. 10–1066. RODRIGUEZ *v.* UNITED STATES TAX COURT. C. A. D. C. Cir. Certiorari denied. Reported below: 398 Fed. Appx. 614.

No. 10–1071. AHMADI *v.* TEXAS. Ct. App. Tex., 14th Dist. Certiorari denied.

No. 10–1081. FRIEDLANDER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 395 Fed. Appx. 577.

No. 10–1094. THOMAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 612 F. 3d 1107.

No. 10–1095. WEBSTER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 623 F. 3d 901.

No. 10–7434. GONZALEZ-RODRIGUEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 10–7588. PETSOULES *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied.

No. 10–7815. DALE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 614 F. 3d 942.

No. 10–7817. DELEON-ARCHILA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 394 Fed. Appx. 406.

No. 10–7835. JOHNSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 614 F. 3d 942.

No. 10–8008. WALKER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 390 Fed. Appx. 854.

No. 10–8059. RILEY *v.* LOUISIANA STATE BAR ASSN. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 402 Fed. Appx. 856.

No. 10–8164. JORDAN *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. Reported below: 325 S. W. 3d 1.

No. 10–8166. STEVENS *v.* EPPS, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 618 F. 3d 489.

No. 10–8167. SMITH *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 10–8248. STOREY *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 10–8250. STANFORD *v.* OLIN. Ct. App. Cal., 4th App. Dist., Div. 3. Certiorari denied.

No. 10–8261. HENRETTA *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. Reported below: 325 S. W. 3d 112.

No. 10–8374. FARMER *v.* ALASKA ET AL. Sup. Ct. Alaska. Certiorari denied. Reported below: 235 P. 3d 1012.

No. 10–8694. EILAND *v.* BRITTON, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HOUTZDALE, ET AL. C. A. 3d Cir. Certiorari denied.

No. 10–8695. LOOSE *v.* COLORADO MENTAL HEALTH INSTITUTE AT PUEBLO ET AL. C. A. 10th Cir. Certiorari denied.

No. 10–8700. BRIGHT *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 192 Md. App. 780.

No. 10–8705. WILLIAMS *v.* ALFA INSURANCE COS. Ct. Civ. App. Ala. Certiorari denied. Reported below: 84 So. 3d 172.

No. 10–8709. BEAN *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 10–8710. PRICE *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 154 Wash. App. 480, 228 P. 3d 1276.

No. 10–8715. EDWARDS *v.* TEXAS. Ct. App. Tex., 5th Dist. Certiorari denied.

No. 10–8722. ROBERSON *v.* SOUTH CAROLINA DEPARTMENT OF CORRECTIONS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 396 Fed. Appx. 968.

No. 10–8727. LIGGON-REDDING *v.* FIDELITY NATIONAL TITLE INSURANCE CO. ET AL. Super. Ct. N. J., App. Div. Certiorari denied.

No. 10–8742. M. V. *v.* FLORIDA DEPARTMENT OF CHILDREN AND FAMILIES. Sup. Ct. Fla. Certiorari denied. Reported below: 46 So. 3d 47.

No. 10–8746. MONTGOMERY *v.* UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT. C. A. 9th Cir. Certiorari denied.

No. 10–8750. CORCOLES *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist., Div. 3. Certiorari denied.

No. 10–8756. DYSON *v.* WALSH, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT DALLAS, ET AL. C. A. 3d Cir. Certiorari denied.

No. 10–8759. STEINER *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied.

No. 10–8760. HERTZ *v.* BUSS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 401 Fed. Appx. 424.

No. 10–8766. ROQUE *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 10–8771. WHITE *v.* JONES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 406 Fed. Appx. 711.

No. 10–8775. TAYLOR *v.* WOODS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 10–8783. EDMOND *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 10–8785. ALLEN *v.* GUNN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 396 Fed. Appx. 132.

No. 10–8789. BLAIR *v.* ALASKAN COPPER & BRASS CO. C. A. 9th Cir. Certiorari denied. Reported below: 401 Fed. Appx. 228.

No. 10–8791. RICHARD *v.* WENEROWICZ, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD. C. A. 3d Cir. Certiorari denied.

No. 10–8793. SIMMONS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 398 Ill. App. 3d 1104, 988 N. E. 2d 1124.

No. 10–8796. CLARK *v.* O'BRIEN, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 399 Fed. Appx. 397.

No. 10–8803. WILLIAMS *v.* STEWART, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 10–8804. CELLI *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 49 So. 3d 240.

No. 10–8809. CORNELISON *v.* MOTLEY, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 395 Fed. Appx. 268.

No. 10–8821. BRUMMETT *v.* TESKE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 344 Fed. Appx. 373.

No. 10–8863. LOEBER *v.* RADER, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 10–8864. BROWN *v.* NOTTOWAY CORRECTIONAL CENTER ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 408 Fed. Appx. 773.

No. 10–8868. EVANS *v.* SUTER, CLERK, SUPREME COURT OF THE UNITED STATES, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 10–8877. KAKAYGEESICK *v.* SALAZAR, SECRETARY OF THE INTERIOR, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 389 Fed. Appx. 580.

No. 10–8881. EVANS *v.* CATE, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 385 Fed. Appx. 655.

No. 10–8889. DORSEY *v.* SHINSEKI, SECRETARY OF VETERANS AFFAIRS. C. A. Fed. Cir. Certiorari denied. Reported below: 408 Fed. Appx. 348.

No. 10–8900. GAUTIER *v.* WALL, DIRECTOR, RHODE ISLAND DEPARTMENT OF CORRECTIONS, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 620 F. 3d 58.

No. 10–8903. GUILAS *v.* BRAUER ET AL. C. A. 9th Cir. Certiorari denied.

No. 10–8913. MASSEY *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 399 Ill. App. 3d 1248, 990 N. E. 2d 941.

No. 10–8921. ELLIS *v.* PALMER, WARDEN, ET AL. Sup. Ct. Nev. Certiorari denied. Reported below: 126 Nev. 708.

No. 10–8929. GODFREY *v.* WENEROWICZ, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD, ET AL. C. A. 3d Cir. Certiorari denied.

No. 10–8954. HOWELL *v.* HEATH, SUPERINTENDENT, SING SING CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 10–8958. GIBSON *v.* LEE, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 10–8961. MAREK *v.* RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied.

No. 10–8978. LORRENTE ECHAVARRIA *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 126 Nev. 707.

No. 10–8980. SISNEY *v.* KATZ ET AL. Sup. Ct. S. D. Certiorari denied. Reported below: 793 N. W. 2d 207.

No. 10–8981. BREWER *v.* ADAMS, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 412 Fed. Appx. 30.

No. 10–8991. FITZGERALD *v.* KELLY, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 394 Fed. Appx. 1.

No. 10–8997. HANSEN *v.* ALLENDORF ET AL. Ct. App. Minn. Certiorari denied.

No. 10–9004. FLETCHER *v.* GAETZ, WARDEN. Sup. Ct. Ill. Certiorari denied.

No. 10–9007. GRAY *v.* MCDONALD, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 10–9013. GALLISHAW *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied.

No. 10–9016. MANZUR *v.* WILLIAMS, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 10–9034. HINTON *v.* CITY OF NASHUA, NEW HAMPSHIRE, ET AL. Sup. Ct. N. H. Certiorari denied.

No. 10–9036. MCDONALD *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 399 Ill. App. 3d 1221, 990 N. E. 2d 930.

No. 10–9037. DARBY *v.* NORTH DAKOTA. Sup. Ct. N. D. Certiorari denied. Reported below: 794 N. W. 2d 898.

No. 10–9040. RAMEY *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

No. 10–9054. CONRAD *v.* NOOTH, SUPERINTENDENT, SNAKE RIVER CORRECTIONAL INSTITUTE. C. A. 9th Cir. Certiorari denied.

No. 10–9059. KACZMAREK *v.* REDNOUR, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 627 F. 3d 586.

No. 10–9061. LEE *v.* FEDERAL EMERGENCY MANAGEMENT AGENCY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 406 Fed. Appx. 688.

No. 10–9088. BAKER *v.* HARDY, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 10–9092. BERRY *v.* LEE, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 391 Fed. Appx. 87.

No. 10–9100. MEADOUX *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 325 S. W. 3d 189.

No. 10–9108. SERRANO, AKA MEDINA *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 401 Ill. App. 3d 1143, 989 N. E. 2d 1217.

No. 10–9110. RENNEKE *v.* FLORENCE UTILITY COMMISSION ET AL. Ct. App. Wis. Certiorari denied. Reported below: 330 Wis. 2d 833, 794 N. W. 2d 927.

No. 10–9123. COX ET AL. *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 187 Cal. App. 4th 337, 113 Cal. Rptr. 3d 759.

No. 10–9128. WILLIAMS *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 364 N. C. 601, 705 S. E. 2d 336.

No. 10–9130. NELSON *v.* ROBERTS, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 10–9139. WHITE *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 402 Ill. App. 3d 1206, 1 N. E. 3d 128.

No. 10–9167. PARKER *v.* RICCI, ADMINISTRATOR, NEW JERSEY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 10–9170. STYLES *v.* PALAKOVICH, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT CAMP HILL, ET AL. C. A. 3d Cir. Certiorari denied.

No. 10–9208. BROWN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 398 Fed. Appx. 915.

No. 10–9220. SIMMONS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 400 Fed. Appx. 848.

No. 10–9221. STRADFORD, AKA SELLERS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 394 Fed. Appx. 923.

No. 10–9223. MILLER *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied.

No. 10–9225. BUMSTEAD *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 10–9227. JONES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 406 Fed. Appx. 878.

No. 10–9231. CADMUS *v.* VARANO, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT COAL TOWNSHIP. C. A. 3d Cir. Certiorari denied.

No. 10–9237. VERDIN-GARCIA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 397 Fed. Appx. 503.

No. 10–9238. VILLANUEVA-OCHOA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 408 Fed. Appx. 263.

No. 10–9239. TAYLOR *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 624 F. 3d 626.

No. 10–9240. YBARRA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 397 Fed. Appx. 936.

No. 10–9243. ZEYON *v.* PITKINS, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT LAUREL HIGHLANDS. C. A. 3d Cir. Certiorari denied.

No. 10–9246. AYALA ARRIAZA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 401 Fed. Appx. 810.

No. 10–9248. PEREZ-CRUZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 404 Fed. Appx. 255.

No. 10–9249. MILTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 398 Fed. Appx. 995.

No. 10–9256. RIVERA-DELGADO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 409 Fed. Appx. 228.

No. 10–9257. FERNANDEZ-HERNANDEZ *v.* UNITED STATES PAROLE COMMISSION. C. A. 5th Cir. Certiorari denied. Reported below: 401 Fed. Appx. 924.

No. 10–9258. GRAY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 392 Fed. Appx. 148.

No. 10–9259. FERGUSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 401 Fed. Appx. 992.

No. 10–9262. GARCIA-BAHENA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 402 Fed. Appx. 926.

No. 10–9263. GUERRERO-MONTELONGO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 402 Fed. Appx. 912.

No. 10–9267. FORD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 402 Fed. Appx. 946.

No. 10–9269. GREEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 402 Fed. Appx. 911.

No. 10–9271. GOMES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 621 F. 3d 1343.

No. 10–9273. HISE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 400 Fed. Appx. 989.

No. 10–9275. HERNANDEZ-MENDEZ *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 626 F. 3d 203.

No. 10–9278. JADLOWE *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 628 F. 3d 1.

No. 10–9282. ESQUIVEL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 10–9283. COLE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 10–9290. SMITH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 10–9295. MUNOZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 409 Fed. Appx. 117.

No. 10–9296. ORTIZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 402 Fed. Appx. 613.

No. 10–9300. DEONARINESINGH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 411 Fed. Appx. 245.

No. 10–9302. ZAVALA *v.* UNITED STATES; and

No. 10–9363. ZAVALA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 10–9304. YUMMI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 408 Fed. Appx. 537.

No. 10–9309. GILYARD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 392 Fed. Appx. 235.

No. 10–9310. IODICE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 10–9311. FULLER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 10–9316. HOFFMAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 10–9318. BYRD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 400 Fed. Appx. 718.

No. 10–9321. ANWARI, AKA MUNIR *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 393 Fed. Appx. 54.

No. 10–9322. GAVIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 394 Fed. Appx. 643.

No. 10–9327. CARGILL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 398 Fed. Appx. 933.

No. 10–9328. DILLEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 10–9329. CASPER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 10–9331. NASH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 627 F. 3d 693.

No. 10–9332. MCKANRY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 628 F. 3d 1010.

No. 10–9344. STULER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 396 Fed. Appx. 798.

No. 10–9347. KELLY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 403 Fed. Appx. 722.

No. 10–9348. KELLAM *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 403 Fed. Appx. 815.

No. 10–9349. LEVINE *v.* GUTIERREZ, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 389 Fed. Appx. 594.

No. 10–9353. NEWHOFF *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 627 F. 3d 1163.

No. 10–9354. LECHUGA PEREZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 404 Fed. Appx. 391.

No. 10–9355. MONTGOMERY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 403 Fed. Appx. 674.

No. 10–9357. COLON-PEREZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 10–9362. SANCHEZ-ESTRADA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 394 Fed. Appx. 428.

No. 10–9367. NANCE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 392 Fed. Appx. 589.

No. 10–9372. MARTINEZ-BAUTISTA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 404 Fed. Appx. 738.

No. 10–9375. HEYWARD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 10–9380. WILLIAMS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 403 Fed. Appx. 707.

No. 10–9383. BEIGALI *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 405 Fed. Appx. 7.

No. 10–9387. FOREY-QUINTERO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 626 F. 3d 1323.

No. 10–9388. GANT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 627 F. 3d 677.

No. 10–9394. RODRIGUEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 627 F. 3d 1372.

No. 10–9395. HOLMES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 409 Fed. Appx. 545.

No. 10–9396. GREER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 631 F. 3d 608.

No. 10–9397. SETTLES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 408 Fed. Appx. 663.

No. 10–9403. HILL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 10–9414. ALSTON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 626 F. 3d 397.

No. 10–9423. NORMAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 398 Fed. Appx. 934.

No. 10–9424. BENNETT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 10–702. MUNOZ *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 605 F. 3d 359.

No. 10–1099. O'DONNELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 608 F. 3d 546.

No. 10–7719. ORTIZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 621 F. 3d 82.

No. 10–7814. AL-BIHANI *v.* OBAMA, PRESIDENT OF THE UNITED STATES, ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 590 F. 3d 866.

No. 10–7824. LONIELLO ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 610 F. 3d 488.

No. 10–8731. LYLES *v.* LEMMON ET AL. C. A. 5th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 405 Fed. Appx. 923.

No. 10–9234. JONES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consid-

eration or decision of this petition. Reported below: 408 Fed. Appx. 416.

No. 10–9377. TAYLOR *v.* WILSON, WARDEN. C. A. 6th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

No. 10–9386. CAPOCCIA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 402 Fed. Appx. 639.

No. 10–9400. ANDERSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 404 Fed. Appx. 814.

No. 10–9402. GARCIA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

Rehearing Denied

No. 10–333. SWARTHOUT, WARDEN *v.* COOKE; and CATE, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION *v.* CLAY, 562 U. S. 216;

No. 10–6179. PAPPAS ET AL. *v.* UNITED STATES, 562 U. S. 1182;

No. 10–6283. ADAMS *v.* HIGH PURITY SYSTEMS, INC., ET AL., 562 U. S. 1223;

No. 10–6953. HACKNEY *v.* LAFLER, WARDEN, 562 U. S. 1142;

No. 10–7153. HARRIS *v.* VIRGINIA, 562 U. S. 1114;

No. 10–7356. WINDHAM *v.* CALIFORNIA DEPARTMENT OF CORRECTIONS ET AL., 562 U. S. 1152;

No. 10–7359. HANDLEY *v.* CHASE BANK USA N. A. ET AL., 562 U. S. 1225;

No. 10–7492. JEFFERSON *v.* MILLER BROTHERS FORD, INC., ET AL., 562 U. S. 1185;

No. 10–7946. WOLTZ *v.* BAILEY ET AL., 562 U. S. 1230;

No. 10–7969. KEMPPAINEN *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 562 U. S. 1230;

No. 10–8413. DEMBRY *v.* UNITED STATES, 562 U. S. 1244; and

No. 10–8704. IN RE RICHARD, 562 U. S. 1215. Petitions for rehearing denied.

No. 10–6910. FARROW *v.* JOHNS, WARDEN, 562 U. S. 1036. Motion for leave to file petition for rehearing denied.

APRIL 5, 2011

Miscellaneous Order

No. 10–8317 (10A971). FOSTER *v.* TEXAS, 562 U. S. 1194. Motion for leave to file petition for rehearing granted. Respondent is requested to file a response to the petition for rehearing within 30 days. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, granted pending disposition of the petition for rehearing. Should the petition for rehearing be denied, this stay shall terminate automatically. In the event the petition for rehearing is granted, the stay shall terminate upon the issuance of the mandate of this Court. JUSTICE SCALIA would deny the motion for leave to file petition for rehearing and the application for stay of execution.

APRIL 7, 2011

Dismissal Under Rule 46

No. 10–969. LEE'S SUMMIT HONDA *v.* RUHL, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED. Sup. Ct. Mo. Certiorari dismissed under this Court's Rule 46. Reported below: 322 S. W. 3d 136.

APRIL 12, 2011

Dismissal Under Rule 46

No. 10–746. BIN MOHAMMED ET AL. *v.* OBAMA, PRESIDENT OF THE UNITED STATES, ET AL. C. A. D. C. Cir. Certiorari dismissed under this Court's Rule 46.

APRIL 13, 2011

Dismissal Under Rule 46

No. 10–8159. HANSON *v.* ILLINOIS. Sup. Ct. Ill. Certiorari dismissed under this Court's Rule 46. Reported below: 238 Ill. 2d 74, 939 N. E. 2d 238.

APRIL 15, 2011

Miscellaneous Orders

No. 09–1403. ERICA P. JOHN FUND, INC., FKA ARCHDIOCESE OF MILWAUKEE SUPPORTING FUND, INC. *v.* HALLIBURTON CO.

ET AL. C. A. 5th Cir. [Certiorari granted, 562 U. S. 1127.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 10–568. NEVADA COMMISSION ON ETHICS *v.* CARRIGAN. Sup. Ct. Nev. [Certiorari granted, 562 U. S. 1127.] Motion of Nevada Legislature for leave to participate in oral argument as *amicus curiae* and for divided argument denied.

No. 10–779. SORRELL, ATTORNEY GENERAL OF VERMONT, ET AL. *v.* IMS HEALTH INC. ET AL. C. A. 2d Cir. [Certiorari granted, 562 U. S. 1127.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

APRIL 18, 2011

Certiorari Granted—Vacated and Remanded

No. 09–1314. RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS *v.* JONES. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Cullen* v. *Pinholster*, *ante*, p. 170. Reported below: 583 F. 3d 626.

No. 10–305. RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS *v.* SCHAD. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Cullen* v. *Pinholster*, *ante*, p. 170. Reported below: 606 F. 3d 1022.

Certiorari Granted—Remanded

No. 09–988. ARIZONA SCHOOL CHOICE TRUST ET AL. *v.* WINN ET AL. C. A. 9th Cir. The Court reversed the judgment below in *Arizona Christian School Tuition Organization* v. *Winn*, *ante*, p. 125. Therefore, certiorari granted, and case remanded for further proceedings. Reported below: 562 F. 3d 1002.

Certiorari Dismissed

No. 10–9020. OCASIO *v.* MCDANIEL, WARDEN, 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. 10–9028. WILLS *v.* TILTON ET AL. Ct. App. Cal., 5th 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)*.

No. 10–9370. LEWIS *v.* WASHINGTON. Ct. App. Wash. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 10–9457. BROWN *v.* UNITED STATES 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. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) *(per curiam)*. JUSTICE KAGAN took no part in the consideration or decision of this motion and this petition. Reported below: 406 Fed. Appx. 820.

No. 10–9528. SALDANA *v.* UNITED STATES. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. JUSTICE KAGAN took no part in the consideration or decision of this motion and this petition.

Miscellaneous Orders

No. 10M94. DULLARD *v.* COLONIAL HEIGHTS CONDOMINIUM ASSN. ET AL.;

No. 10M95. MCCULLOUGH *v.* UNITED STATES;

No. 10M96. CONNER *v.* HART ET AL.;

No. 10M97. BURNS ET UX. *v.* BANK OF AMERICA ET AL.;

No. 10M100. PRESNELL *v.* RAY ET AL.;

No. 10M101. MEHTA ET AL. *v.* CITY OF JERSEY CITY, NEW JERSEY, ET AL.; and

No. 10M103. CREWS *v.* UNITED STATES. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 10M98. BURNS *v.* COMMISSIONER OF REVENUE OF MINNESOTA; and

No. 10M99. IN RE BURNS ET UX. Motions for leave to proceed *in forma pauperis* with the declaration of indigency filed under seal denied.

No. 10–886. COMPTON UNIFIED SCHOOL DISTRICT *v.* ADDISON ET AL. C. A. 9th Cir. The Acting Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 10–8576. HOWARD *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO ET AL. C. A. D. C. Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [562 U. S. 1284] denied. JUSTICE KAGAN took no part in the consideration or decision of this motion.

No. 10–8972. CHERRY *v.* CHERRY. Sup. Ct. Va.; and

No. 10–9539. PRITCHARD *v.* HAYDEN. C. A. 7th Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until May 9, 2011, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 10–9436. WORMAN *v.* UNITED STATES. C. A. 8th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until May 9, 2011, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33.1 of the Rules of this Court. JUSTICE KAGAN took no part in the consideration or decision of this motion.

No. 10–1169. IN RE SCHAFLER;
No. 10–9527. IN RE ROBINSON;
No. 10–9534. IN RE ANDREWS;
No. 10–9535. IN RE ANDREWS;
No. 10–9571. IN RE BAKER;
No. 10–9580. IN RE HOLIDAY;
No. 10–9663. IN RE SUDBERRY;
No. 10–9717. IN RE LOI NGOC NGHIEM; and
No. 10–9721. IN RE DOYLE. Petitions for writs of habeas corpus denied.

No. 10–8819. IN RE REMMERT;

No. 10–8829. In re Ismail;
No. 10–8887. In re Miears;
No. 10–9010. In re Hamilton; and
No. 10–9654. In re Muja. Petitions for writs of mandamus denied.

No. 10–8837. In re Goodman. Petition for writ of mandamus and/or prohibition denied.

Certiorari Granted

No. 10–694. Judulang *v.* Holder, Attorney General. C. A. 9th Cir. Certiorari granted. Reported below: 249 Fed. Appx. 499.

Certiorari Denied

No. 09–1121. Kentucky Baptist Homes for Children, Inc., et al. *v.* Pedreira et al.; and
No. 09–1295. Pedreira et al. *v.* Kentucky Baptist Homes for Children, Inc., et al. C. A. 6th Cir. Certiorari denied. Reported below: 579 F. 3d 722.

No. 10–384. Weiss *v.* Yates, Warden. C. A. 11th Cir. Certiorari denied. Reported below: 375 Fed. Appx. 915.

No. 10–557. Abdel-Latif *v.* Holder, Attorney General. C. A. 5th Cir. Certiorari denied. Reported below: 390 Fed. Appx. 322.

No. 10–629. Youn Mun Hee *v.* Holder, Attorney General. C. A. 11th Cir. Certiorari denied.

No. 10–646. Hein et al. *v.* Sullivan, Warden, et al. C. A. 9th Cir. Certiorari denied. Reported below: 601 F. 3d 897.

No. 10–771. Valencia-Riascos *v.* Holder, Attorney General. C. A. 9th Cir. Certiorari denied. Reported below: 383 Fed. Appx. 662.

No. 10–783. Rangel-Perez *v.* Holder, Attorney General. C. A. 11th Cir. Certiorari denied.

No. 10–801. Valle, Individually and as Representative of the Estate of Esparza, et al. *v.* City of Houston, Texas. C. A. 5th Cir. Certiorari denied. Reported below: 613 F. 3d 536.

No. 10–857. ORANGE COUNTY, CALIFORNIA, ET AL. *v.* FOGARTY-HARDWICK. Ct. App. Cal., 4th App. Dist., Div. 3. Certiorari denied.

No. 10–869. HINKSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 585 F. 3d 1247.

No. 10–881. RAAB ET AL. *v.* BOROUGH OF AVALON, NEW JERSEY, ET AL. Super. Ct. N. J., App. Div. Certiorari denied.

No. 10–884. SCOTT *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 322 S. W. 3d 662.

No. 10–888. CASCIANI *v.* NESBITT ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 392 Fed. Appx. 887.

No. 10–889. BERTALAN ET AL. *v.* RANCHO SANTIAGO COMMUNITY COLLEGE DISTRICT ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 623 F. 3d 1011.

No. 10–890. MIDLAND CENTRAL APPRAISAL DISTRICT *v.* BP AMERICA PRODUCTION CO. ET AL. Ct. App. Tex., 11th Dist. Certiorari denied. Reported below: 282 S. W. 3d 215.

No. 10–896. HARRISON CENTRAL APPRAISAL DISTRICT *v.* PEOPLES GAS, LIGHT & COKE CO. Ct. App. Tex., 6th Dist. Certiorari denied. Reported below: 270 S. W. 3d 208.

No. 10–902. MCGILL, DBA CREATION 7TH DAY ADVENTIST CHURCH *v.* GENERAL CONFERENCE CORPORATION OF SEVENTH-DAY ADVENTISTS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 617 F. 3d 402.

No. 10–988. ASTER *v.* WARD ET AL. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 10–994. BAILEY *v.* SMITH ET AL. C. A. 3d Cir. Certiorari denied.

No. 10–1005. PRINE *v.* CHAILLAND INC. ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 402 Fed. Appx. 469.

No. 10–1008. LAL *v.* GOUERT. Super. Ct. Pa. Certiorari denied. Reported below: 986 A. 2d 1290.

No. 10–1011. WINNEMUCCA COLONY COUNCIL *v.* WASSON ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 400 Fed. Appx. 159.

No. 10–1013. Cormier *v.* Horkan, Judge, Superior Court of Georgia, Southern Judicial Circuit, et al. C. A. 11th Cir. Certiorari denied. Reported below: 397 Fed. Appx. 550.

No. 10–1021. Benlolo et al. *v.* French National Board of Physicians et al. C. A. 9th Cir. Certiorari denied.

No. 10–1023. Tabb *v.* Bordier. Cir. Ct. Jefferson County, W. Va. Certiorari denied.

No. 10–1028. James T. Panagos, LLC *v.* Houska, Personal Representative of the Estate of Houska, Deceased. Sup. Ct. Mo. Certiorari denied. Reported below: 323 S. W. 3d 29.

No. 10–1033. Jarvis et al. *v.* Lowndes County Sheriff's Department et al. C. A. 11th Cir. Certiorari denied.

No. 10–1035. Loye et al. *v.* Dakota County, Minnesota. C. A. 8th Cir. Certiorari denied. Reported below: 625 F. 3d 494.

No. 10–1046. Bickerstaff *v.* Illinois. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 403 Ill. App. 3d 347, 941 N. E. 2d 896.

No. 10–1048. Zhang *v.* Holder, Attorney General. C. A. 2d Cir. Certiorari denied.

No. 10–1067. Smith *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 399 Ill. App. 3d 1223, 990 N. E. 2d 931.

No. 10–1073. Cydrus *v.* Ohio Public Employees Retirement System et al. Sup. Ct. Ohio. Certiorari denied. Reported below: 127 Ohio St. 3d 257, 938 N. E. 2d 1028.

No. 10–1074. Kimble *v.* Donahoe, Postmaster General. C. A. 7th Cir. Certiorari denied. Reported below: 390 Fed. Appx. 601.

No. 10–1082. Hill *v.* Muwwakkil. Sup. Ct. Va. Certiorari denied.

No. 10–1097. TECO Barge Line, Inc., nka U. S. United Barge Line, LLC *v.* Wilson, Tennessee Comptroller of the Treasury, et al. Ct. App. Tenn. Certiorari denied.

No. 10–1098. THREATT *v.* DONOVAN, SECRETARY OF HOUSING AND URBAN DEVELOPMENT. C. A. 7th Cir. Certiorari denied. Reported below: 380 Fed. Appx. 544.

No. 10–1105. KEEFE ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 407 Fed. Appx. 420.

No. 10–1109. DEULEY ET AL. *v.* DYNCORP INTERNATIONAL, INC., ET AL. Sup. Ct. Del. Certiorari denied. Reported below: 8 A. 3d 1156.

No. 10–1114. GLOVER *v.* MCCAUGHTRY, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 10–1120. MILES *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 399 Fed. Appx. 231.

No. 10–1130. RUIZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 10–1145. BANISTER *v.* CALIFORNIA BOARD OF ACCOUNTANCY. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 10–6987. HOLMES *v.* EAST COOPER HOSPITAL, INC., ET AL. Sup. Ct. S. C. Certiorari denied.

No. 10–7240. BILLIAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 383 Fed. Appx. 538.

No. 10–7260. VENCES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 378 Fed. Appx. 397.

No. 10–7628. ALLEN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 618 F. 3d 404.

No. 10–7664. STANLEY *v.* VINING ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 602 F. 3d 767.

No. 10–7971. TERRELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 593 F. 3d 1084.

No. 10–7974. AREVALOS-BARRIOS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 10–8014. DEEGAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 605 F. 3d 625.

No. 10–8034. SILVA-GAYTAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 395 Fed. Appx. 96.

No. 10–8039. OLVERA-CAMPOS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 396 Fed. Appx. 406.

No. 10–8045. BENITEZ *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 189 Md. App. 718.

No. 10–8094. HENDERSON *v.* DUMPHY ET AL. C. A. 11th Cir. Certiorari denied.

No. 10–8102. GUEITS *v.* KIRKPATRICK, SUPERINTENDENT, WENDE CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 612 F. 3d 118.

No. 10–8263. HESTER *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. Reported below: 324 S. W. 3d 1.

No. 10–8318. LETNER *v.* CALIFORNIA; and
No. 10–8427. TOBIN *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 50 Cal. 4th 99, 235 P. 3d 62.

No. 10–8335. TAYLOR *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 397 Fed. Appx. 104.

No. 10–8370. ROLLINS *v.* WETZEL, ACTING SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 386 Fed. Appx. 267.

No. 10–8403. BARNETT *v.* SUPERIOR COURT OF CALIFORNIA, BUTTE COUNTY, ET AL. Sup. Ct. Cal. Certiorari denied. Reported below: 50 Cal. 4th 890, 237 P. 3d 980.

No. 10–8439. PITCHFORD *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 45 So. 3d 216.

No. 10–8465. WILLIAMS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 397 Fed. Appx. 256.

No. 10–8516. SEISMAN *v.* CONSUMER PROTECTION DIVISION OF THE OFFICE OF THE ATTORNEY GENERAL OF MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 193 Md. App. 759 and 763.

No. 10–8530. RUDY B. *v.* NEW MEXICO. Sup. Ct. N. M. Certiorari denied. Reported below: 149 N. M. 22, 243 P. 3d 726.

No. 10–8546. HERNANDEZ *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 398 Fed. Appx. 81.

No. 10–8594. SELVY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 619 F. 3d 945.

No. 10–8808. HUNG LE VO *v.* KIRKLAND, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 10–8811. RANA *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 304 Ga. App. 750, 697 S. E. 2d 867.

No. 10–8822. JOHNSON *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 406 Fed. Appx. 882.

No. 10–8845. MCGIRTH *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 48 So. 3d 777.

No. 10–8852. LINK *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 395 Fed. Appx. 383.

No. 10–8853. JONES *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 126 Nev. 728.

No. 10–8857. PEREZ-MENDEZ *v.* FRANKE, SUPERINTENDENT, TWO RIVERS CORRECTIONAL INSTITUTION. C. A. 9th Cir. Certiorari denied.

No. 10–8862. JACKSON *v.* SUPERIOR COURT OF CALIFORNIA, LOS ANGELES COUNTY, ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 10–8867. WIDNER *v.* AGUILAR ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 398 Fed. Appx. 976.

No. 10–8870. KETCHUM *v.* PUEBLO POLICE DEPARTMENT ET AL. C. A. 10th Cir. Certiorari denied.

No. 10–8875. SAVELL *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied.

No. 10–8879. LANE *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 399 Ill. App. 3d 1221, 990 N. E. 2d 930.

No. 10–8880. REDMOND *v.* SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY. C. A. 3d Cir. Certiorari denied. Reported below: 392 Fed. Appx. 9.

No. 10–8886. PERRY *v.* BUSS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 10–8891. HARPER *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 10–8893. GREEN *v.* PALMER, WARDEN. Sup. Ct. Nev. Certiorari denied. Reported below: 126 Nev. 715.

No. 10–8896. HALLEY *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 10–8902. BROWN *v.* BODISON, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 420 Fed. Appx. 225.

No. 10–8904. GATTIS *v.* SNYDER, WARDEN. C. A. 3d Cir. Certiorari denied.

No. 10–8909. FLOR *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 606 Pa. 384, 998 A. 2d 606.

No. 10–8914. JONES *v.* CATE, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION. C. A. 9th Cir. Certiorari denied.

No. 10–8917. QUINONEZ *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 10–8919. MCCOO *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 154 Wash. App. 1041.

No. 10–8922. NIFAS *v.* WETZEL, ACTING SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 374 Fed. Appx. 241.

No. 10–8923. McGuire *v.* Ohio et al. C. A. 6th Cir. Certiorari denied. Reported below: 619 F. 3d 623.

No. 10–8925. Jones *v.* Walker, Warden. C. A. 9th Cir. Certiorari denied.

No. 10–8927. Calderon *v.* Florida et al. C. A. 5th Cir. Certiorari denied. Reported below: 405 Fed. Appx. 897.

No. 10–8931. Price *v.* Pierce, Warden. C. A. 7th Cir. Certiorari denied. Reported below: 617 F. 3d 947.

No. 10–8932. Meador *v.* California Correctional Institution et al. C. A. 9th Cir. Certiorari denied.

No. 10–8933. Decker-Wegener *v.* Wegener et al. Sup. Ct. Mo. Certiorari denied.

No. 10–8940. Parker *v.* Lee, Superintendent, Green Haven Correctional Facility. C. A. 2d Cir. Certiorari denied.

No. 10–8944. Kolosha *v.* Oklahoma. Ct. Crim. App. Okla. Certiorari denied.

No. 10–8945. Hall *v.* Albrecht. C. A. 1st Cir. Certiorari denied.

No. 10–8946. Holmes *v.* Chandler, Warden. C. A. 7th Cir. Certiorari denied.

No. 10–8949. Wolde-Giorgis *v.* Ariss. Ct. App. Ariz. Certiorari denied.

No. 10–8955. Hall, aka Redditt *v.* Fairfax County Adult Detention Center et al. Sup. Ct. Va. Certiorari denied.

No. 10–8960. Lebbos *v.* Schuette. C. A. 9th Cir. Certiorari denied.

No. 10–8963. Lewis *v.* New Hampshire Judicial Branch et al. Sup. Ct. N. H. Certiorari denied.

No. 10–8965. Johnson *v.* District Attorney of Lawrence County, Pennsylvania, et al. Certiorari denied.

No. 10–8968. Taylor *v.* Arkansas. Sup. Ct. Ark. Certiorari denied. Reported below: 2010 Ark. 372, 372 S. W. 3d 769.

No. 10–8970. WATSON *v.* PENNSYLVANIA DEPARTMENT OF CORRECTIONS ET AL. Commw. Ct. Pa. Certiorari denied. Reported below: 990 A. 2d 164.

No. 10–8975. MILLIGAN *v.* LAWLER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 10–8977. MORALES *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 10–8982. ADDISON *v.* NEW HAMPSHIRE. Sup. Ct. N. H. Certiorari denied. Reported below: 161 N. H. 300, 13 A. 3d 214.

No. 10–8986. SATERSTAD *v.* KLUGH ET AL. Super. Ct. Pa. Certiorari denied. Reported below: 988 A. 2d 738.

No. 10–8987. BUNCH *v.* BONDI, ATTORNEY GENERAL OF FLORIDA, ET AL. C. A. 11th Cir. Certiorari denied.

No. 10–8988. FULLER *v.* SMITH. C. A. 4th Cir. Certiorari denied. Reported below: 390 Fed. Appx. 238.

No. 10–8993. FERGUSON *v.* SHERRY, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 10–8994. HANCOCK *v.* WATSON, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 382 Fed. Appx. 320.

No. 10–8999. HAIYAN LIN *v.* CITY OF COLUMBIA, SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied.

No. 10–9000. LEWIS *v.* RICCI, ADMINISTRATOR, NEW JERSEY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 10–9001. JOSEPH *v.* GRIFFIN, SUPERINTENDENT, SOUTHPORT CORRECTIONAL FACILITY, ET AL. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 75 App. Div. 3d 669, 903 N. Y. S. 2d 273.

No. 10–9006. HAMILTON *v.* BERGHUIS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 10–9008. GREGG *v.* MCCALL, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 386 Fed. Appx. 359.

No. 10–9009. GRAY *v.* COOPER, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 10–9012. GARCIA *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 72 App. Div. 3d 986, 898 N. Y. S. 2d 504.

No. 10–9014. KALALO ET AL. *v.* HOLDER, ATTORNEY GENERAL. C. A. 1st Cir. Certiorari denied.

No. 10–9015. LLOYD *v.* NEW HANOVER REGIONAL MEDICAL CENTER. C. A. 4th Cir. Certiorari denied. Reported below: 405 Fed. Appx. 703.

No. 10–9018. MCGUIRE *v.* BUSS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 10–9026. WALKER *v.* CURTIN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 10–9030. FORD *v.* BUSS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 10–9031. FLORES *v.* JACQUEZ, ACTING WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 10–9032. GUYTON *v.* HUNT. Ct. Civ. App. Ala. Certiorari denied. Reported below: 61 So. 3d 1085.

No. 10–9033. HARDEMAN *v.* SANDERS ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 396 Fed. Appx. 551.

No. 10–9038. COOPER *v.* OWENS, COMMISSIONER, GEORGIA DEPARTMENT OF CORRECTIONS. Super. Ct. Fulton County, Ga. Certiorari denied.

No. 10–9043. STUDY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 10–9044. RAMIREZ *v.* AULT, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 10–9048. ROGERS *v.* BUSS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 10–9050. ALEXANDER *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 49 Cal. 4th 846, 235 P. 3d 873.

No. 10–9051. BERTHEY *v.* HALL, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 10–9057. DOUGLAS *v.* WOODS, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied.

No. 10–9062. WINFIELD *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied.

No. 10–9065. JOHNSON *v.* HEDGPETH, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 10–9066. BULL *v.* SMALL, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 10–9067. ADAMS *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 10–9071. COTTMAN *v.* ASTRUE, COMMISSIONER OF SOCIAL SECURITY. C. A. 4th Cir. Certiorari denied. Reported below: 400 Fed. Appx. 769.

No. 10–9072. CARTER *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 126 Nev. 698.

No. 10–9103. JENKINS *v.* BODISON, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 402 Fed. Appx. 744.

No. 10–9105. JOHNSON *v.* FRAKES, SUPERINTENDENT, MONROE CORRECTIONAL COMPLEX. C. A. 9th Cir. Certiorari denied.

No. 10–9115. BOYD *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 401 Ill. App. 3d 1140, 989 N. E. 2d 1216.

No. 10–9121. MCGEE *v.* CONNECTICUT. App. Ct. Conn. Certiorari denied. Reported below: 124 Conn. App. 261, 4 A. 3d 837.

No. 10–9122. DANIEL *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 291 Kan. 490, 242 P. 3d 1186.

No. 10–9127. VALENTE *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO. C. A. 6th Cir. Certiorari denied.

No. 10–9133. JOHNSON *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 396 Ill. App. 3d 1126, 6 N. E. 3d 448.

No. 10–9134. PEREZ *v.* HOLDER, ATTORNEY GENERAL. C. A. 3d Cir. Certiorari denied. Reported below: 391 Fed. Appx. 1000.

No. 10–9136. WILLIAMS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 399 Ill. App. 3d 1224, 990 N. E. 2d 932.

No. 10–9142. ROBINSON *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 399 Ill. App. 3d 1222, 990 N. E. 2d 931.

No. 10–9146. ADKINS *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 239 Ill. 2d 1, 940 N. E. 2d 11.

No. 10–9151. MANNING *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 401 Ill. App. 3d 1142, 989 N. E. 2d 1217.

No. 10–9158. ROUZER *v.* WENEROWICZ, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD, ET AL. C. A. 3d Cir. Certiorari denied.

No. 10–9160. DUPREE *v.* LASTER ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 389 Fed. Appx. 532.

No. 10–9172. RICE *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 401 Ill. App. 3d 1142, 989 N. E. 2d 1217.

No. 10–9177. ROLLINS *v.* MISSOURI. Ct. App. Mo., Western Dist. Certiorari denied. Reported below: 321 S. W. 3d 353.

No. 10–9180. VENKATARAM *v.* CITY OF NEW YORK, NEW YORK. C. A. 2d Cir. Certiorari denied. Reported below: 396 Fed. Appx. 722.

No. 10–9187. ALSPAW *v.* CALIFORNIA. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 10–9218. MATHIS *v.* BELL, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 10–9242. WILLIAMS *v.* BUSS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 10–9255. PYLE *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 10–9274. GABRIEL *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied.

No. 10–9276. HOFFNER *v.* BRADSHAW, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 622 F. 3d 487.

No. 10–9280. BLACK *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 15 N. Y. 3d 625, 942 N. E. 2d 248.

No. 10–9288. RITTNER *v.* HUGGINS ET AL. C. A. 6th Cir. Certiorari denied.

No. 10–9291. SMITH *v.* GLEBE, SUPERINTENDENT, STAFFORD CREEK CORRECTIONS CENTER, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 407 Fed. Appx. 237.

No. 10–9292. KWASNIK *v.* MAINE DEPARTMENT OF HEALTH AND HUMAN SERVICES. Sup. Jud. Ct. Me. Certiorari denied.

No. 10–9306. RIGGINS, AKA MALIK *v.* VAIL, SECRETARY, WASHINGTON DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 403 Fed. Appx. 292.

No. 10–9312. FISCHER *v.* RICHLAND CHILDREN'S ADMINISTRATION. C. A. 9th Cir. Certiorari denied.

No. 10–9317. HUNTER *v.* DENNEY, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 10–9323. GAINES *v.* SOUTH CAROLINA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 395 Fed. Appx. 988.

No. 10–9335. VIEAU *v.* METRISH, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 10–9340. WHEELER *v.* SCHMALENBERGER, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 10–9346. KELLY *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 195 Md. App. 403, 6 A. 3d 396.

No. 10–9350. KING *v.* FISHER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT SMITHFIELD, ET AL. C. A. 3d Cir. Certiorari denied.

No. 10–9356. OVERBY *v.* LAWLER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 10–9359. CERVANTES *v.* VASQUEZ, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 10–9369. LOWERY *v.* CARTLEDGE, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 403 Fed. Appx. 878.

No. 10–9371. KILLION *v.* DAWSON. C. A. 7th Cir. Certiorari denied.

No. 10–9381. BABICK *v.* BERGHUIS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 620 F. 3d 571.

No. 10–9384. SHABAZZ *v.* BUSS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 10–9393. PERRY *v.* MERIT SYSTEMS PROTECTION BOARD. C. A. Fed. Cir. Certiorari denied. Reported below: 397 Fed. Appx. 647.

No. 10–9405. FLOYD *v.* LAWLER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 10–9408. MITTS *v.* BOBBY, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 620 F. 3d 650.

No. 10–9409. BELL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 624 F. 3d 803.

No. 10–9411. LEAF *v.* ASTRUE, COMMISSIONER OF SOCIAL SECURITY, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 413 Fed. Appx. 724.

No. 10–9412. BARR *v.* SABOL, WARDEN. C. A. 1st Cir. Certiorari denied.

No. 10–9417. WILLIAMS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 630 F. 3d 44.

No. 10–9418. WILSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 394 Fed. Appx. 340.

No. 10–9419. VINH HOANG TRAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 405 Fed. Appx. 224.

No. 10–9426. BRAMLETT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 405 Fed. Appx. 363.

No. 10–9430. COOPER *v.* CITY OF DALLAS, TEXAS. C. A. 5th Cir. Certiorari denied. Reported below: 402 Fed. Appx. 891.

No. 10–9432. HALL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 404 Fed. Appx. 742.

No. 10–9433. RIOS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 404 Fed. Appx. 258.

No. 10–9434. BUSSARD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 398 Fed. Appx. 443.

No. 10–9438. FIGUEROA-PEREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 403 Fed. Appx. 899.

No. 10–9440. MILES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 403 Fed. Appx. 952.

No. 10–9441. MURILLO-PEREZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 405 Fed. Appx. 175.

No. 10–9442. ORTIZ-MALDONADO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 403 Fed. Appx. 944.

No. 10–9444. PFEIFERLING *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 399 Fed. Appx. 126.

No. 10–9446. LOPEZ-CRUZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 403 Fed. Appx. 898.

No. 10–9449. HERNANDEZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 627 F. 3d 1331.

No. 10–9450. GIBSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 396 Fed. Appx. 930.

No. 10–9451. FOSTER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 443 Fed. Appx. 179.

No. 10–9453. COPE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 385 Fed. Appx. 531.

No. 10–9455. NGUYEN NGODTU CHU *v.* WOLFENBARGER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 10–9456. BAEZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 10–9458. BROWN *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 621 F. 3d 48.

No. 10–9459. SANTOS MORIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 627 F. 3d 985.

No. 10–9460. NEWMAN *v.* WETZEL, ACTING SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 617 F. 3d 775.

No. 10–9463. LOPERA-OCHOA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 10–9464. BAKER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 10–9466. RAINEY ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 404 Fed. Appx. 46.

No. 10–9468. CANNON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 10–9471. BERGER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 403 Fed. Appx. 778.

No. 10–9472. MOHAMED *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 630 F. 3d 1.

No. 10–9473. BERGER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 10–9477. JOHNSTON *v.* WASHINGTON. Ct. App. Wash. Certiorari denied.

No. 10–9478. LOWRY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 405 Fed. Appx. 740.

No. 10–9479. JONES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 400 Fed. Appx. 462.

No. 10–9483. McIntosh *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 630 F. 3d 699.

No. 10–9484. Pendergrass *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 403 Fed. Appx. 552.

No. 10–9492. Johnson *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 627 F. 3d 578.

No. 10–9494. Contreras *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 406 Fed. Appx. 160.

No. 10–9495. De Marco *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 405 Fed. Appx. 398.

No. 10–9500. Rogers *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 409 Fed. Appx. 607.

No. 10–9503. Anguino-Adriano *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 409 Fed. Appx. 737.

No. 10–9505. Del Cid Morales *v.* United States. C. A. D. C. Cir. Certiorari denied. Reported below: 398 Fed. Appx. 598.

No. 10–9506. Menchaca *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 469 Fed. Appx. 289.

No. 10–9517. Alexander *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 404 Fed. Appx. 457.

No. 10–9519. Burke *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 633 F. 3d 984.

No. 10–9523. Sandle *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 403 Fed. Appx. 946.

No. 10–9530. Martin *v.* United States. C. A. 6th Cir. Certiorari denied.

No. 10–9536. Barber *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 396 Fed. Appx. 49.

No. 10–9540. Peoples *v.* Pennsylvania. Super. Ct. Pa. Certiorari denied. Reported below: 4 A. 3d 185.

No. 10–9546. Edgerton *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 408 Fed. Appx. 733.

No. 10–9548. TAYLOR *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 385 Fed. Appx. 317.

No. 10–9552. THOMAS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 404 Fed. Appx. 958.

No. 10–9553. TITUS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 480 Fed. Appx. 755.

No. 10–9557. WHITFIELD *v.* O'CONNELL ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 402 Fed. Appx. 563.

No. 10–9559. SANTISTEVAN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 412 Fed. Appx. 142.

No. 10–9560. RUVALCABA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 627 F. 3d 218.

No. 10–9561. COLEMAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 416 Fed. Appx. 41.

No. 10–9562. DICAPRIO-CUOZZO *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 408 Fed. Appx. 765.

No. 10–9563. HARPER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 398 Fed. Appx. 550.

No. 10–9565. JUVENILE MALE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 397 Fed. Appx. 869.

No. 10–9566. HANTZIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 625 F. 3d 575.

No. 10–9570. HINES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 628 F. 3d 101.

No. 10–9573. ROBINSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 400 Fed. Appx. 738.

No. 10–9574. RICHITELLI *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 420 Fed. Appx. 861.

No. 10–9575. RODRIGUEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 406 Fed. Appx. 142.

No. 10–9577. GARCIA-BARAONA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 404 Fed. Appx. 892.

No. 10–9581. FLUTE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 10–9584. HODGE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 480 Fed. Appx. 758.

No. 10–9585. GRANADOS-LOPEZ, AKA GRANADOS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 464 Fed. Appx. 217.

No. 10–9588. HILL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 398 Fed. Appx. 919.

No. 10–9593. GARCIA-ESPARZA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 388 Fed. Appx. 407.

No. 10–9595. HORNE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 10–9605. HOUSER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 404 Fed. Appx. 638.

No. 10–9608. ZARATE MENDEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 405 Fed. Appx. 444.

No. 10–9615. LOPEZ-DIAZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 406 Fed. Appx. 448.

No. 10–9618. HERNANDEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 408 Fed. Appx. 313.

No. 10–9619. GONZALEZ-HERNANDEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 404 Fed. Appx. 922.

No. 10–9624. GORDON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 403 Fed. Appx. 384.

No. 10–9626. RODRIGUEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 407 Fed. Appx. 147.

No. 10–9631. SALES-LOPEZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 406 Fed. Appx. 301.

No. 10–9632. SUTTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 406 Fed. Appx. 955.

No. 10–9652. BALDERAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 10–9653. HOOD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 628 F. 3d 669.

No. 10–9656. WILSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 401 Fed. Appx. 760.

No. 10–9657. TUCKER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 402 Fed. Appx. 499.

No. 10–9661. GRAY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 395 Fed. Appx. 896.

No. 10–9669. ARIAS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 403 Fed. Appx. 610.

No. 10–9671. BLEVINS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 10–9672. ADDERLY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 10–9674. CORLEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 406 Fed. Appx. 342.

No. 10–9685. YORK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 405 Fed. Appx. 943.

No. 10–9686. OLUMUYIWA, AKA DOE, AKA HEUKELOM *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 406 Fed. Appx. 243.

No. 10–775. KIYEMBA ET AL. *v.* OBAMA, PRESIDENT OF THE UNITED STATES, ET AL. C. A. D. C. Cir. Motion of petitioners for leave to file a supplemental brief under seal granted. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this motion and this petition. Reported below: 605 F. 3d 1046.

Statement of JUSTICE BREYER, with whom JUSTICE KENNEDY, JUSTICE GINSBURG, and JUSTICE SOTOMAYOR join, respecting the denial of the petition for writ of certiorari.

Petitioners have been held for several years in custody at Guantanamo Bay, Cuba—a detention that the Government agrees was

without lawful cause. Brief in Opposition 2. They seek a judicial order that would require their release from custody *into the United States.* The District Court concluded that the law entitled petitioners to such an order. *In re Guantanamo Bay Detainee Litigation*, 581 F. Supp. 2d 33 (DC 2008). The Court of Appeals held to the contrary. *Kiyemba* v. *Obama*, 555 F. 3d 1022 (CADC 2009). And this Court initially granted certiorari to resolve the important question whether a district court may order the release of an unlawfully held prisoner into the United States *where no other remedy is available. Kiyemba* v. *Obama*, 558 U. S. 969 (2009).

The Court subsequently learned that each of the remaining petitioners had received and rejected at least two offers of resettlement. In light of these changed circumstances, the Court vacated the Court of Appeals' decision and remanded the case to the lower courts to "determine, in the first instance, what further proceedings in that court or in the District Court are necessary and appropriate for the full and prompt disposition of the case in light of the new developments." *Kiyemba* v. *Obama*, 559 U. S. 131, 132 (2010) *(per curiam)*. The Court of Appeals found that no further proceedings were necessary and reinstated its prior opinion as modified. 605 F. 3d 1046 (CADC 2010) *(per curiam)*. Petitioners have asked this Court to review the Court of Appeals' decision.

Judge Rogers, separately concurring in the Court of Appeals' judgment on remand, pointed out that petitioners have "received two offers of resettlement in countries [including Palau, which] the United States determined 'appropriate.'" *Id.*, at 1050, n. 3. She added that petitioners have "neither allege[d] nor proffer[ed]" any evidence that accepting these offers would have threatened them with a risk of "torture" or any "other harm," the need to avoid which might provide reason to believe the offers are not appropriate. *Id.*, at 1050. At the same time, the Government tells us that "if petitioners were to express interest, the United States would again discuss the matter with the government of Palau [and that it] continues to work to find other options for resettlement." Brief in Opposition 13, n. 7.

In my view, these offers, the lack of any meaningful challenge as to their appropriateness, and the Government's uncontested commitment to continue to work to resettle petitioners transform petitioners' claim. Under present circumstances, I see no

Government-imposed obstacle to petitioners' timely release and appropriate resettlement. Accordingly, I join in the Court's denial of certiorari. Should circumstances materially change, however, petitioners may of course raise their original issue (or related issues) again in the lower courts and in this Court.

No. 10–1015. WILLIAMS ET AL. *v.* RENCHENSKI. C. A. 3d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 622 F. 3d 315.

No. 10–1051. CHIPOTLE MEXICAN GRILL, INC. *v.* ANTONINETTI. C. A. 9th Cir. Certiorari denied. JUSTICE SCALIA took no part in the consideration or decision of this petition. Reported below: 643 F. 3d 1165.

No. 10–1131. SMITH *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 398 Fed. Appx. 423.

No. 10–1133. REDZIC *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 627 F. 3d 683.

No. 10–7925. SADIQ K. *v.* MAINE DEPARTMENT OF HEALTH AND HUMAN SERVICES. Sup. Jud. Ct. Me. Motion of respondent for leave to file a brief in opposition under seal granted. Certiorari denied. Reported below: 2 A. 3d 265.

No. 10–9454. DANIELS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 404 Fed. Appx. 718.

No. 10–9482. JENNINGS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

No. 10–9594. HAQUE *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO. C. A. 6th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

No. 10–9596. FEUER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consid-

eration or decision of this petition. Reported below: 403 Fed. Appx. 538.

No. 10–9597. CALDWELL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

No. 10–9622. AKINS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 406 Fed. Appx. 214.

No. 10–9666. RIGGS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 400 Fed. Appx. 408.

Rehearing Denied

No. 09–10664. RIGGINS *v.* TEXAS, 562 U. S. 848;

No. 10–817. PARISH *v.* VIRGINIA, 562 U. S. 1220;

No. 10–6652. HAYDEN ET UX. *v.* D'AMICO ET AL., 562 U. S. 1223;

No. 10–7173. DEERE *v.* NEVADA, 562 U. S. 1147;

No. 10–7274. WIDEMAN *v.* COLORADO ET AL., 562 U. S. 1224;

No. 10–7570. FORTE *v.* BARBER ET AL., 562 U. S. 1187;

No. 10–7647. CLAYTON *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL., 562 U. S. 1188;

No. 10–7688. KEITH *v.* WASHINGTON, 562 U. S. 1204;

No. 10–7876. NORRIS *v.* SINCLAIR, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY, 562 U. S. 1228;

No. 10–7927. BROWN *v.* GAETZ, WARDEN, 562 U. S. 1205;

No. 10–8024. MANKO *v.* MANNOR ET AL., 562 U. S. 1232;

No. 10–8026. SMITH *v.* SCHOOL BOARD OF BREVARD COUNTY ET AL., 562 U. S. 1232;

No. 10–8066. CASTRO *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 562 U. S. 1233;

No. 10–8130. DAVIS *v.* UNITED STATES, 562 U. S. 1236;

No. 10–8269. DAVENPORT *v.* FRAZIER, WARDEN, 562 U. S. 1259;

No. 10–8361. ASKEW *v.* UNITED STATES, 562 U. S. 1243;

No. 10–8397. IN RE AL-ZAGHARI, 562 U. S. 1215;

No. 10–8412. IN RE SMITHBACK, 562 U. S. 1215;

No. 10–8443. TOLONEN *v.* PUGH, WARDEN, 562 U. S. 1260;

No. 10–8561. BANKS *v.* BROWN, DIRECTOR, DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS, 562 U. S. 1261;

No. 10–8628. PERRY *v.* SANDERS, WARDEN, ET AL., 562 U. S. 1261;

No. 10–8762. TENERELLI *v.* UNITED STATES, 562 U. S. 1264; and

No. 10–8767. KING *v.* UNITED STATES, 562 U. S. 1264. Petitions for rehearing denied.

No. 10–681. UNITED STATES *v.* DEWAR ET AL., 562 U. S. 1254. Petition for rehearing denied. JUSTICE SOTOMAYOR and JUSTICE KAGAN took no part in the consideration or decision of this petition.

No. 10–502. DIXON *v.* DEUTSCHE BANK NATIONAL TRUST CO. ET AL., 562 U. S. 1136; and

No. 10–5913. JOHNSON *v.* UNITED STATES, 562 U. S. 941. Motions for leave to file petitions for rehearing denied.

APRIL 20, 2011

Miscellaneous Order

No. 10A989. HAMILTON COUNTY BOARD OF ELECTIONS ET AL. *v.* HUNTER ET AL. Application to recall and stay the mandate of the United States Court of Appeals for the Sixth Circuit, case Nos. 10–4481, 11–3059, and 11–3060, presented to JUSTICE KAGAN, and by her referred to the Court, denied

APRIL 25, 2011

Certiorari Dismissed

No. 10–9073. CANNON *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist., Div. 2. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 10–9138. WARD *v.* CORTEZ MASTO, ATTORNEY GENERAL OF NEVADA, 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. 10–9169. HON CHUNG LAU *v.* HARRINGTON, WARDEN, 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. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) *(per curiam)*.

No. 10–9250. HON CHUNG LAU *v.* DEPARTMENT OF HOMELAND SECURITY 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. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) *(per curiam)*.

Miscellaneous Orders

No. D–2504. IN RE DISBARMENT OF KROUNER, 562 U. S. 1213. Motion for reconsideration of disbarment denied.

No. 10M104. CHAN *v.* CALIFORNIA; and

No. 10M105. CRONE *v.* WHITESIDE ET AL. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 10–9095. WRIGHT *v.* CRAIG ET AL. C. A. 9th Cir.;

No. 10–9176. BURDETT *v.* REYNOSO ET AL. C. A. 9th Cir.; and

No. 10–9334. ROSS *v.* FEDERAL DEPOSIT INSURANCE CORPORATION, RECEIVER OF WASHINGTON MUTUAL BANK. C. A. 4th Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until May 16, 2011, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 10–9870. IN RE JASMINE. Petition for writ of habeas corpus denied.

No. 10–9786. IN RE SPEARS; and

No. 10–9847. IN RE DANSER. Motions of petitioners for leave to proceed *in forma pauperis* denied, and petitions for writs of habeas corpus dismissed. See this Court's Rule 39.8. JUSTICE KAGAN took no part in the consideration or decision of these motions and these petitions.

No. 10–1092. In re Scheller;
No. 10–9093. In re May;
No. 10–9106. In re Lerma; and
No. 10–9141. In re Chatman. Petitions for writs of mandamus denied.

Certiorari Denied

No. 10–658. Lopez-Dubon *v.* Holder, Attorney General. C. A. 5th Cir. Certiorari denied. Reported below: 609 F. 3d 642.

No. 10–741. Richardson *v.* Dodds. C. A. 10th Cir. Certiorari denied. Reported below: 614 F. 3d 1185.

No. 10–754. Native Wholesale Supply *v.* Oklahoma ex rel. Edmondson, Attorney General of Oklahoma. Sup. Ct. Okla. Certiorari denied. Reported below: 237 P. 3d 199.

No. 10–804. Jones *v.* Keller, Secretary, North Carolina Department of Correction, et al. (Reported below: 364 N. C. 249, 698 S. E. 2d 49); and Jones *v.* North Carolina Department of Correction et al. (364 N. C. 319, 697 S. E. 2d 327). Sup. Ct. N. C. Certiorari denied.

No. 10–918. Henderson *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 613 F. 3d 1177.

No. 10–928. Nathel et al. *v.* Commissioner of Internal Revenue. C. A. 2d Cir. Certiorari denied. Reported below: 615 F. 3d 83.

No. 10–941. Mason *v.* Thomas, Interim Commissioner, Alabama Department of Corrections. C. A. 11th Cir. Certiorari denied. Reported below: 605 F. 3d 1114.

No. 10–1043. Hernandez *v.* Terrones et al. C. A. 5th Cir. Certiorari denied. Reported below: 397 Fed. Appx. 954.

No. 10–1050. Whitley *v.* Allegheny County, Pennsylvania, et al. C. A. 3d Cir. Certiorari denied. Reported below: 402 Fed. Appx. 713.

No. 10–1063. Steward *v.* Town of Paradise, California. C. A. 9th Cir. Certiorari denied. Reported below: 405 Fed. Appx. 184.

No. 10–1072. ATP Oil & Gas Corp. *v.* Department of the Interior et al. C. A. 5th Cir. Certiorari denied. Reported below: 396 Fed. Appx. 93.

No. 10–1077. Schultz et ux. *v.* University of Cincinnati College of Medicine et al. Ct. App. Ohio, Morgan County. Certiorari denied. Reported below: 2010-Ohio-2071.

No. 10–1079. Phelps *v.* Orange County Assessment Appeals Board No. 1 et al. Ct. App. Cal., 4th App. Dist., Div. 3. Certiorari denied. Reported below: 187 Cal. App. 4th 653, 114 Cal. Rptr. 3d 463.

No. 10–1085. Kepas *v.* eBay Inc. C. A. 10th Cir. Certiorari denied. Reported below: 412 Fed. Appx. 40.

No. 10–1108. Tseng *v.* Florida A&M University et al. C. A. 11th Cir. Certiorari denied. Reported below: 380 Fed. Appx. 908.

No. 10–1111. Fusi *v.* O'Brien, Superintendent, Old Colony Correctional Center. C. A. 1st Cir. Certiorari denied. Reported below: 621 F. 3d 1.

No. 10–1128. Androme Leather Corp. *v.* City of Gloversville, New York, et al. C. A. 2d Cir. Certiorari denied. Reported below: 402 Fed. Appx. 663.

No. 10–1138. Joseph *v.* State Bar of California. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 10–1146. Denk *v.* Shulman et al. C. A. 7th Cir. Certiorari denied. Reported below: 405 Fed. Appx. 65.

No. 10–1164. Heath *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 624 F. 3d 884.

No. 10–1165. Hanna *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 630 F. 3d 505.

No. 10–1167. Bazuaye, aka Duzuaye *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 399 Fed. Appx. 822.

No. 10–1172. Cellco Partnership, dba Verizon Wireless, et al. *v.* Morris et al. C. A. 7th Cir. Certiorari denied. Reported below: 630 F. 3d 622.

No. 10–5693. RIVA ET AL. *v.* HEFFERNAN, MASSACHUSETTS SECRETARY OF PUBLIC SAFETY. App. Ct. Mass. Certiorari denied. Reported below: 76 Mass. App. 1104, 918 N. E. 2d 882.

No. 10–8077. PINCHON *v.* MYERS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 615 F. 3d 631.

No. 10–8228. TUCKER ET AL. *v.* CITY OF LOS ANGELES, CALIFORNIA. C. A. 9th Cir. Certiorari denied. Reported below: 399 Fed. Appx. 202.

No. 10–8514. SMITH *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 400 Fed. Appx. 96.

No. 10–8538. SPARKS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 10–8625. VELA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 624 F. 3d 1148.

No. 10–9058. ELLISON *v.* DART, SHERIFF, COOK COUNTY, ILLINOIS, ET AL. C. A. 7th Cir. Certiorari denied.

No. 10–9083. THORNTON *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 10–9084. C. S. *v.* SACRAMENTO COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES. Ct. App. Cal., 3d App. Dist. Certiorari denied. Reported below: 188 Cal. App. 4th 103, 114 Cal. Rptr. 3d 898.

No. 10–9087. JONES-EL *v.* POLLARD, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 10–9089. ARMSTRONG *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 10–9094. WOODBURY *v.* CITY OF TAMPA, FLORIDA, POLICE DEPARTMENT, ET AL. C. A. 11th Cir. Certiorari denied.

No. 10–9096. TAYLOR *v.* ORTIZ ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 410 Fed. Appx. 76.

No. 10–9101. KONTOS *v.* THANCO PRODUCTS & IMPORTS, INC. C. A. 5th Cir. Certiorari denied. Reported below: 401 Fed. Appx. 971.

No. 10–9104. LOVEJOY *v.* WENEROWICZ, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD, ET AL. C. A. 3d Cir. Certiorari denied.

No. 10–9111. SUMRELL *v.* MISSISSIPPI. C. A. 5th Cir. Certiorari denied. Reported below: 403 Fed. Appx. 959.

No. 10–9114. BIXBY *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 388 S. C. 528, 698 S. E. 2d 572.

No. 10–9116. BARNES *v.* DEDMONDT ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 395 Fed. Appx. 928.

No. 10–9117. HUNT *v.* SMITH ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 383 Fed. Appx. 577.

No. 10–9118. MULLINS *v.* DONAT ET AL. C. A. 9th Cir. Certiorari denied.

No. 10–9119. MONTGOMERY *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 404 Ill. App. 3d 1170, 996 N. E. 2d 773.

No. 10–9125. WINKLER *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 388 S. C. 574, 698 S. E. 2d 596.

No. 10–9126. VILLANUEVA *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 401 Ill. App. 3d 1143, 989 N. E. 2d 1218.

No. 10–9129. NIXON *v.* GMAC MORTGAGE CORP. C. A. 5th Cir. Certiorari denied. Reported below: 408 Fed. Appx. 833.

No. 10–9132. YORK *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 10–9143. REDMAN *v.* WEST VIRGINIA. Cir. Ct. Berkeley County, W. Va. Certiorari denied.

No. 10–9144. BURNSIDE *v.* PRUDDEN, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied.

No. 10–9148. LYNCH *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 50 Cal. 4th 693, 237 P. 3d 416.

No. 10–9149. CRUZ LOPEZ *v.* CALIFORNIA. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 10–9150. MARTIN *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 10–9153. SIMON *v.* CITY OF ATLANTA, GEORGIA, ET AL. Ct. App. Ga. Certiorari denied. Reported below: 304 Ga. App. XXII.

No. 10–9154. PRADO *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 10–9155. PETTIGREW *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 10–9157. AINOOSON *v.* MASSACHUSETTS. App. Ct. Mass. Certiorari denied. Reported below: 77 Mass. App. 1121, 933 N. E. 2d 182.

No. 10–9159. STRATTON *v.* TEXAS (four judgments). Ct. Crim. App. Tex. Certiorari denied.

No. 10–9161. DABBS *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 239 Ill. 2d 277, 940 N. E. 2d 1088.

No. 10–9165. ROSS *v.* BUSS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 10–9168. LACY *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 2010 Ark. 388, 377 S. W. 3d 227.

No. 10–9181. WELCH *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 43 So. 3d 708.

No. 10–9182. WILKINS *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 10–9183. WHITLOCK *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 47 So. 3d 668.

No. 10–9191. MOJARRO *v.* CATE, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION. C. A. 9th Cir. Certiorari denied.

No. 10–9211. Lowe *v.* Cate, Secretary, California Department of Corrections and Rehabilitation. C. A. 9th Cir. Certiorari denied. Reported below: 390 Fed. Appx. 709.

No. 10–9214. King *v.* UT Medical Group, Inc., et al. C. A. 6th Cir. Certiorari denied.

No. 10–9226. Bradley *v.* Kravosha, Former Chief Justice, Supreme Court of Nebraska, et al. C. A. 8th Cir. Certiorari denied.

No. 10–9245. Searles *v.* Pompilio et al. C. A. 2d Cir. Certiorari denied.

No. 10–9265. Hodges *v.* Gonzalez, Warden. C. A. 9th Cir. Certiorari denied. Reported below: 393 Fed. Appx. 445.

No. 10–9272. Tijani *v.* Holder, Attorney General. C. A. 9th Cir. Certiorari denied. Reported below: 628 F. 3d 1071.

No. 10–9324. Glodjo *v.* Webb, Warden. C. A. 6th Cir. Certiorari denied. Reported below: 382 Fed. Appx. 429.

No. 10–9325. Gilley *v.* Florida. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 41 So. 3d 913.

No. 10–9326. Fields *v.* South Carolina. Ct. Common Pleas of Charleston County, S. C. Certiorari denied.

No. 10–9342. Mata *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 10–9467. Radcliff *v.* Hall Housing Investments, Inc. C. A. 11th Cir. Certiorari denied.

No. 10–9502. Bibey *v.* Franke, Superintendent, Two Rivers Correctional Institution. C. A. 9th Cir. Certiorari denied.

No. 10–9508. Breedlove *v.* Costner et al. C. A. 10th Cir. Certiorari denied. Reported below: 405 Fed. Appx. 338.

No. 10–9520. Dyer *v.* Nebraska. Ct. App. Neb. Certiorari denied.

No. 10–9522. Patterson *v.* Houston, Director, Nebraska Department of Correctional Services. C. A. 8th Cir. Certiorari denied.

No. 10–9550. Orozco *v.* Kramer, Executive Director, Coalinga State Hospital. C. A. 9th Cir. Certiorari denied.

No. 10–9569. Hill *v.* Ohio. C. A. 6th Cir. Certiorari denied.

No. 10–9589. Greene *v.* Sinclair, Superintendent, Washington State Penitentiary. C. A. 9th Cir. Certiorari denied. Reported below: 386 Fed. Appx. 602.

No. 10–9613. Jones *v.* Harry, Warden. C. A. 6th Cir. Certiorari denied. Reported below: 405 Fed. Appx. 23.

No. 10–9634. Overby *v.* Pennsylvania. Super. Ct. Pa. Certiorari denied. Reported below: 991 A. 2d 360.

No. 10–9643. Cleveland *v.* Whitehead, Warden. C. A. 4th Cir. Certiorari denied. Reported below: 404 Fed. Appx. 815.

No. 10–9668. Aljabari *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 625 F. 3d 940.

No. 10–9673. Joseph *v.* United States. C. A. 4th Cir. Certiorari denied.

No. 10–9677. Cohran *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 393 Fed. Appx. 596.

No. 10–9678. Dickson *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 403 Fed. Appx. 931.

No. 10–9679. Loma-Torres *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 406 Fed. Appx. 223.

No. 10–9684. Heckathorne *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 10–9688. Norwood *v.* United States. C. A. 5th Cir. Certiorari denied.

No. 10–9689. Rodriguez *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 628 F. 3d 1258.

No. 10–9691. Daranda *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 405 Fed. Appx. 834.

No. 10–9694. Johnson *v.* United States. Ct. App. D. C. Certiorari denied. Reported below: 991 A. 2d 33.

No. 10–9695. LONGEE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 407 Fed. Appx. 122.

No. 10–9698. VILLAR *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 411 Fed. Appx. 342.

No. 10–9699. RIVERA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 413 Fed. Appx. 470.

No. 10–9700. REYES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 10–9708. FISHER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 401 Fed. Appx. 979.

No. 10–9709. INIRIO-CASTRO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 10–9711. GREEN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 398 Fed. Appx. 834.

No. 10–9724. JONES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 408 Fed. Appx. 589.

No. 10–9725. LEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 407 Fed. Appx. 132.

No. 10–9726. BARAJAS-GARCIA, AKA SOTO-MARTINEZ *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 405 Fed. Appx. 769.

No. 10–9730. AVITIA GAMBOA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 415 Fed. Appx. 456.

No. 10–9731. GALLOSO-HURTADO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 406 Fed. Appx. 861.

No. 10–9735. HAMILTON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 9 A. 3d 805.

No. 10–9736. GLENN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 377 Fed. Appx. 333.

No. 10–9738. FRANKS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 397 Fed. Appx. 95.

No. 10–9739. HARDY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 393 Fed. Appx. 205.

No. 10–9740. GRACIANI-GONZALES *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 10–9741. FLORES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 398 Fed. Appx. 92.

No. 10–9743. DAVIS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 406 Fed. Appx. 37.

No. 10–9745. MOREL *v.* O'BRIEN, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 393 Fed. Appx. 108.

No. 10–9747. BUTLER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 406 Fed. Appx. 756.

No. 10–9752. ZISKA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 407 Fed. Appx. 195.

No. 10–9757. PENA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 10–9759. BERRY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 10–9761. SCARMAZZO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 628 F. 3d 1183.

No. 10–9762. STANLEY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 405 Fed. Appx. 662.

No. 10–9763. ROMERO-CORONADO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 406 Fed. Appx. 875.

No. 10–9764. SUTTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 406 Fed. Appx. 955.

No. 10–9768. PENA-VELASQUEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 10–9769. MCCARTHY *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 10–9771. BRIGHTMAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 10–9772. BETHLEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 405 Fed. Appx. 908.

No. 10–9775. YELEY-DAVIS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 632 F. 3d 673.

No. 10–9778. CARTWRIGHT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 630 F. 3d 610.

No. 10–9779. JONES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 408 Fed. Appx. 600.

No. 10–9781. MORALES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 407 Fed. Appx. 528.

No. 10–9782. GADSDEN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 412 Fed. Appx. 523.

No. 10–9794. NIXON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 414 Fed. Appx. 521.

No. 09–109. CARDINAL *v.* METRISH, WARDEN. C. A. 6th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 564 F. 3d 794.

No. 09–821. SISNEY *v.* REISCH ET AL. C. A. 8th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 581 F. 3d 639.

No. 10–131. INDIANA FAMILY AND SOCIAL SERVICES ADMINISTRATION ET AL. *v.* INDIANA PROTECTION AND ADVOCACY SERVICES. C. A. 7th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 603 F. 3d 365.

No. 10–822. COLLEGE STANDARD MAGAZINE ET AL. *v.* STUDENT ASSOCIATION OF THE STATE UNIVERSITY OF NEW YORK AT ALBANY. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 610 F. 3d 33.

No. 10–944. HOLSTER *v.* GATCO, INC., DBA FOLIO ASSOCIATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 618 F. 3d 214.

No. 10–1014. VIRGINIA EX REL. CUCCINELLI, ATTORNEY GENERAL OF VIRGINIA *v.* SEBELIUS, SECRETARY OF HEALTH AND

HUMAN SERVICES. C. A. 4th Cir. Certiorari before judgment denied.

No. 10–9690. SILVA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

No. 10–9754. 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: 381 Fed. Appx. 73.

No. 10–9767. HOFFENBERG *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR and JUSTICE KAGAN took no part in the consideration or decision of this petition.

No. 10–9784. SESSOMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 398 Fed. Appx. 910.

Rehearing Denied

No. 10–901. SEGER-THOMSCHITZ *v.* MUSEUM OF FINE ARTS, BOSTON, 562 U. S. 1271;

No. 10–5746. FRANKLIN *v.* TENNESSEE, 562 U. S. 1272;

No. 10–6059. RILEY *v.* UNION PARISH SCHOOL BOARD ET AL., 562 U. S. 1222;

No. 10–7397. SCURLOCK-FERGUSON *v.* CITY OF DURHAM, NORTH CAROLINA, 562 U. S. 1273;

No. 10–7871. PARTOVI *v.* HOLDER, ATTORNEY GENERAL, ET AL., 562 U. S. 1228;

No. 10–8027. TOWNSEND *v.* CALDERONE ET AL., 562 U. S. 1232;

No. 10–8182. MCGLONE *v.* AUSTIN, 562 U. S. 1274;

No. 10–8197. MATTOX *v.* BUSS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL., 562 U. S. 1238;

No. 10–8352. SOUCY *v.* BARNHART, WARDEN, 562 U. S. 1243;

No. 10–8406. HODGE ET UX. *v.* CALVERT COUNTY, MARYLAND, ET AL., 562 U. S. 1244;

No. 10–8416. DOUGLAS *v.* HOBBS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION, 562 U. S. 1245;

No. 10–8452. RAFI *v.* SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES, 562 U. S. 1260;

No. 10–8536. Ellis *v.* Eighth Judicial District Court of Nevada, Clark County, et al., 562 U. S. 1294;

No. 10–8582. Barrino *v.* Department of the Treasury et al., 562 U. S. 1294;

No. 10–8855. Polk *v.* Beeler, Warden, et al., 562 U. S. 1297; and

No. 10–8947. In re Nesbitt, 562 U. S. 1269. Petitions for rehearing denied.

April 26, 2011

Miscellaneous Orders. (For the Court's orders prescribing amendments to the Federal Rules of Appellate Procedure, see *post*, p. 1047; amendments to the Federal Rules of Bankruptcy Procedure, see *post*, p. 1053; amendments to the Federal Rules of Criminal Procedure, see *post*, p. 1065; and amendments to the Federal Rules of Evidence, see *post*, p. 1077.)

May 2, 2011

Certiorari Granted—Vacated and Remanded

No. 09–1521. United States *v.* Eastern Shawnee Tribe of Oklahoma. C. A. Fed. Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States* v. *Tohono O'odham Nation*, *ante*, p. 307. Justice Kagan took no part in the consideration or decision of this petition. Reported below: 582 F. 3d 1306.

No. 10–315. Sonic Automotive, Inc., dba Century BMW *v.* Watts et al. Sup. Ct. S. C. Reported below: 387 S. C. 525, 693 S. E. 2d 394;

No. 10–398. Cellco Partnership, dba Verizon Wireless *v.* Litman et al. C. A. 3d Cir. Reported below: 381 Fed. Appx. 140;

No. 10–551. Litman et al. *v.* Cellco Partnership, dba Verizon Wireless. C. A. 3d Cir. Reported below: 381 Fed. Appx. 140; and

No. 10–1027. Missouri Title Loans, Inc. *v.* Brewer. Sup. Ct. Mo. Reported below: 323 S. W. 3d 18. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *AT&T Mobility LLC* v. *Concepcion*, *ante*, p. 333.

Certiorari Granted—Reversed. (See No. 10–1000, *ante*, p. 395.)

Certiorari Dismissed

No. 10–9228. MOORE *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. 10–9807. BAZEMORE *v.* UNITED STATES. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) *(per curiam)*. JUSTICE KAGAN took no part in the consideration or decision of this motion and this petition.

Miscellaneous Orders

No. 10A887. WELLS *v.* UNITED STATES. Application for certificate of appealability, addressed to JUSTICE THOMAS and referred to the Court, denied.

No. 10M106. MOORE *v.* TERRELL, WARDEN; and
No. 10M107. ANDERSEN *v.* YOUNG & RUBICAM. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 09–1233. BROWN, GOVERNOR OF CALIFORNIA *v.* PLATA ET AL. D. C. E. D. & D. C. N. D. Cal. [Probable jurisdiction postponed *sub nom. Schwarzenegger* v. *Plata*, 560 U. S. 964.] Motion of appellants for leave to file a supplemental brief after argument granted. Motion of appellees for leave to file a supplemental brief after argument granted.

No. 10–209. LAFLER *v.* COOPER. C. A. 6th Cir. [Certiorari granted, 562 U. S. 1127.] Motion of petitioner to dispense with printing the joint appendix granted.

No. 10–5443. FOWLER *v.* UNITED STATES. C. A. 11th Cir. [Certiorari granted, 562 U. S. 1043.] Motion of petitioner for ap-

pointment of counsel granted. Stephen M. Crawford, Esq., of Tampa, Fla., is appointed to serve as counsel for petitioner in this case.

No. 10–8020. SPATARO *v.* UNITED STATES. C. A. 2d Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [562 U. S. 1176] denied.

No. 10–8444. THROCKMORTON *v.* UNITED STATES. C. A. 3d Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [562 U. S. 1214] denied.

No. 10–8833. GILLARD *v.* NORTHWESTERN UNIVERSITY. C. A. 7th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [562 U. S. 1284] denied.

No. 10–9209. PURVIS *v.* OEST ET AL. C. A. 7th Cir.;

No. 10–9470. BARRY *v.* HOLDER, ATTORNEY GENERAL. C. A. 4th Cir.; and

No. 10–9617. LUKASIEWICZ-KRUK *v.* GREENPOINT YMCA ET AL. C. A. 2d Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until May 23, 2011, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 10–1057. IN RE ARMSTRONG. Petition for writ of mandamus denied.

Certiorari Granted

No. 10–699. ZIVOTOFSKY, BY HIS PARENTS AND GUARDIANS ZIVOTOFSKY ET UX. *v.* CLINTON, SECRETARY OF STATE. C. A. D. C. Cir. Certiorari granted. In addition to the question presented by the petition, the parties are directed to brief and argue the following question: "Whether § 214 of the Foreign Relations Authorization Act, Fiscal Year 2003, impermissibly infringes the President's power to recognize foreign sovereigns." Reported below: 571 F. 3d 1227.

No. 10–948. COMPUCREDIT CORP. ET AL. *v.* GREENWOOD ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 615 F. 3d 1204.

Certiorari Denied

No. 10–425. Bauer et al. *v.* Shepard et al. C. A. 7th Cir. Certiorari denied. Reported below: 620 F. 3d 704.

No. 10–836. Tien *v.* Ming Tien et al. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 44 So. 3d 595.

No. 10–865. Wynne *v.* Renico, Warden. C. A. 6th Cir. Certiorari denied. Reported below: 606 F. 3d 867.

No. 10–962. Alaska Airlines, Inc. *v.* Eid et al. C. A. 9th Cir. Certiorari denied. Reported below: 621 F. 3d 858.

No. 10–963. Progressive Casualty Insurance Co. *v.* Estate of Palomera-Ruiz, Deceased, et al. Ct. App. Ariz. Certiorari denied. Reported below: 224 Ariz. 380, 231 P. 3d 384.

No. 10–965. City of Loveland, Ohio *v.* Board of Commissioners of Hamilton County, Ohio, et al. C. A. 6th Cir. Certiorari denied. Reported below: 621 F. 3d 465.

No. 10–975. Bonds *v.* 143 Nenue Holdings, LLC, et al. Int. Ct. App. Haw. Certiorari denied. Reported below: 123 Haw. 292, 231 P. 3d 1009.

No. 10–979. Florida Department of Agriculture and Consumer Services et al. *v.* Bogorff et al. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 35 So. 3d 84.

No. 10–1034. Catholic League for Religious and Civil Rights et al. *v.* City and County of San Francisco, California, et al. C. A. 9th Cir. Certiorari denied. Reported below: 624 F. 3d 1043.

No. 10–1053. Picon *v.* Benson et al. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 185 Cal. App. 4th 1179, 111 Cal. Rptr. 3d 27.

No. 10–1054. City of Cincinnati, Ohio, et al. *v.* Miller et al. C. A. 6th Cir. Certiorari denied. Reported below: 622 F. 3d 524.

No. 10–1056. Doe, Father of Minor Daughter H. S., et al. *v.* Silsbee Independent School District et al. C. A. 5th Cir. Certiorari denied. Reported below: 402 Fed. Appx. 852.

No. 10–1065. O. K. Industries, Inc., et al. *v.* Been et al. C. A. 10th Cir. Certiorari denied. Reported below: 398 Fed. Appx. 382.

No. 10–1069. McDonald *v.* Overnite Express, Inc., et al. C. A. 8th Cir. Certiorari denied.

No. 10–1086. Liberty Apparel Co., Inc., et al. *v.* Ling Nan Zheng et al. C. A. 2d Cir. Certiorari denied. Reported below: 617 F. 3d 182 and 389 Fed. Appx. 63.

No. 10–1101. Lockwood *v.* Astrue, Commissioner of Social Security. C. A. 9th Cir. Certiorari denied. Reported below: 616 F. 3d 1068.

No. 10–1103. Rosales et al. *v.* United States. C. A. Fed. Cir. Certiorari denied.

No. 10–1112. Ismail *v.* Holder, Attorney General. C. A. 11th Cir. Certiorari denied.

No. 10–1116. Burleigh *v.* Monterey County, California, et al. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 10–1118. Lewis *v.* Holder, Attorney General. C. A. 4th Cir. Certiorari denied. Reported below: 388 Fed. Appx. 248.

No. 10–1127. Rodney *v.* Holder, Attorney General. C. A. 3d Cir. Certiorari denied. Reported below: 393 Fed. Appx. 859.

No. 10–1142. Selig *v.* Roeshman. Super. Ct. Pa. Certiorari denied.

No. 10–1159. Garcia-Lawson *v.* Lawson. C. A. 11th Cir. Certiorari denied. Reported below: 398 Fed. Appx. 572.

No. 10–1180. Kral et al. *v.* City of Chicago, Illinois. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 402 Ill. App. 3d 1181, 1 N. E. 3d 116.

No. 10–1188. Adair et al. *v.* Commissioner of Internal Revenue. C. A. 9th Cir. Certiorari denied. Reported below: 621 F. 3d 890.

No. 10–1190. Cintron *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 401 Fed. Appx. 495.

No. 10–1205. ARIAS, AKA MIRANDA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 404 Fed. Appx. 554.

No. 10–1216. MONAHAN *v.* ROMNEY ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 625 F. 3d 42.

No. 10–8178. PETHTEL *v.* BALLARD, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 617 F. 3d 299.

No. 10–8276. VIGIL *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 628 F. 3d 93.

No. 10–8676. BRADY *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 50 Cal. 4th 547, 236 P. 3d 312.

No. 10–9162. C. M. *v.* WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES ET AL. Cir. Ct. Kanawha County, W. Va. Certiorari denied.

No. 10–9185. ROSAS *v.* LEE, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 10–9186. BROOKS *v.* TENNESSEE. C. A. 6th Cir. Certiorari denied. Reported below: 626 F. 3d 878.

No. 10–9188. CALHOUN-EL *v.* MAYNARD, SECRETARY, MARYLAND DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONAL SERVICES, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 403 Fed. Appx. 846.

No. 10–9196. SHIVERS *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 10–9198. PHONGBOUPHA *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 10–9202. ALLEN *v.* BUSS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 611 F. 3d 740.

No. 10–9205. EVANS *v.* TIFFIN. Ct. App. Tex., 13th Dist. Certiorari denied.

No. 10–9210. MOSHER *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 10–9213. LeClaire *v.* Pallito, Commissioner, Vermont Department of Corrections. C. A. 2d Cir. Certiorari denied.

No. 10–9215. Matsuda *v.* Hawaii et al. C. A. 9th Cir. Certiorari denied.

No. 10–9217. Norwood *v.* O'Hare, Warden, et al. C. A. 5th Cir. Certiorari denied. Reported below: 404 Fed. Appx. 923.

No. 10–9219. Span *v.* Buss, Secretary, Florida Department of Corrections, et al. C. A. 11th Cir. Certiorari denied. Reported below: 401 Fed. Appx. 451.

No. 10–9230. Coleman *v.* Bonville & Howard et al. C. A. 1st Cir. Certiorari denied.

No. 10–9232. Eicher *v.* Diodati. Ct. App. Ariz. Certiorari denied.

No. 10–9235. Smith *v.* Buss, Secretary, Florida Department of Corrections. C. A. 11th Cir. Certiorari denied.

No. 10–9241. Vining *v.* Buss, Secretary, Florida Department of Corrections. C. A. 11th Cir. Certiorari denied. Reported below: 610 F. 3d 568.

No. 10–9247. Broom *v.* Bobby, Warden. Sup. Ct. Ohio. Certiorari denied. Reported below: 127 Ohio St. 3d 1450, 937 N. E. 2d 1039.

No. 10–9252. Tafari *v.* Weinstock et al. C. A. 2d Cir. Certiorari denied.

No. 10–9264. Houck *v.* Lockett, Superintendent, State Correctional Institution at Pittsburgh, et al. C. A. 3d Cir. Certiorari denied. Reported below: 625 F. 3d 88.

No. 10–9266. Huntley *v.* Franke, Superintendent, Two Rivers Correctional Institution. C. A. 9th Cir. Certiorari denied.

No. 10–9268. Harris *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 402 Ill. App. 3d 1186, 1 N. E. 3d 119.

No. 10–9270. HARMON *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist., Div. 1. Certiorari denied.

No. 10–9277. HAMMER *v.* FOREST HIGHLANDS COMMUNITY ASSN. Sup. Ct. Pa. Certiorari denied.

No. 10–9279. LIFRIERI *v.* LAVALLEY, SUPERINTENDENT, GREAT MEADOW CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 10–9281. BAILEY *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist., Div. 2. Certiorari denied.

No. 10–9284. CHANDLER *v.* STINE, SUPERINTENDENT, NEW CASTLE CORRECTIONAL FACILITY. C. A. 7th Cir. Certiorari denied.

No. 10–9285. DAWSON *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 403 Ill. App. 3d 499, 934 N. E. 2d 598.

No. 10–9287. SAMUEL *v.* BROWN ET AL. C. A. 2d Cir. Certiorari denied.

No. 10–9289. RITTER *v.* RITTER ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 396 Fed. Appx. 30.

No. 10–9293. LANE *v.* VALONE ET AL. C. A. 6th Cir. Certiorari denied.

No. 10–9294. JOHNSON *v.* HEDGPETH, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 10–9297. AMIGON *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 239 Ill. 2d 71, 940 N. E. 2d 63.

No. 10–9298. BROOKS *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 10–9305. BINH LY *v.* MCKUNE, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 394 Fed. Appx. 502.

No. 10–9307. RIDENOUR *v.* COLLINS, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied.

No. 10–9315. GILBERT-MITCHELL *v.* PATTERSON ET AL. C. A. 7th Cir. Certiorari denied.

No. 10–9339. WATERS *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 10–9376. TISDALE *v.* SOUTH CAROLINA. C. A. 4th Cir. Certiorari denied. Reported below: 382 Fed. Appx. 259.

No. 10–9378. TIDWELL *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 55 So. 3d 1290.

No. 10–9382. AVILA-CANCHOLA *v.* HOLDER, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied. Reported below: 398 Fed. Appx. 317.

No. 10–9398. SURGICK *v.* MARTINEZ ET AL. C. A. 9th Cir. Certiorari denied.

No. 10–9443. FRANZEN *v.* MCDANIEL, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 405 Fed. Appx. 227.

No. 10–9452. CLARK *v.* WILSON. C. A. 10th Cir. Certiorari denied. Reported below: 625 F. 3d 686.

No. 10–9480. KOWAL *v.* RHODE ISLAND. Sup. Ct. R. I. Certiorari denied. Reported below: 8 A. 3d 1036.

No. 10–9496. CONSTIEN *v.* UNITED STATES ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 628 F. 3d 1207.

No. 10–9498. ABULKHAIR *v.* BUSH ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 413 Fed. Appx. 502.

No. 10–9499. ROBINSON *v.* MARSHALL, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 405 Fed. Appx. 241.

No. 10–9504. ARROZAL *v.* SHINSEKI, SECRETARY OF VETERANS AFFAIRS. C. A. Fed. Cir. Certiorari denied. Reported below: 396 Fed. Appx. 698.

No. 10–9510. MADISON *v.* ARTUS, SUPERINTENDENT, CLINTON CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 10–9518. BELL *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 15 N. Y. 3d 935, 940 N. E. 2d 913.

No. 10–9521. TAPIA *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 2010 Ark. 406.

No. 10–9525. SMITH *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 2010 Ark. 473.

No. 10–9532. ALLEN *v.* NAJI ET AL. C. A. 3d Cir. Certiorari denied.

No. 10–9551. WILKIN *v.* DENNEY, WARDEN. Sup. Ct. Mo. Certiorari denied.

No. 10–9568. LAVALLE *v.* ARTUS, SUPERINTENDENT, CLINTON CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 403 Fed. Appx. 607.

No. 10–9598. EDWIN *v.* WILLIAMS, ACTING WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 406 Fed. Appx. 201.

No. 10–9645. MCGOWAN *v.* MERRILL, WARDEN. C. A. 1st Cir. Certiorari denied.

No. 10–9649. BENSON *v.* MINNESOTA. C. A. 8th Cir. Certiorari denied.

No. 10–9658. TATE *v.* DISTRICT OF COLUMBIA. C. A. D. C. Cir. Certiorari denied. Reported below: 627 F. 3d 904.

No. 10–9676. CHAMBERS *v.* HATHAWAY, JUDGE, COURT OF COMMON PLEAS OF PENNSYLVANIA, WESTMORELAND COUNTY, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 406 Fed. Appx. 571.

No. 10–9701. SANDOVAL *v.* TOLEDO CORRECTIONAL INSTITUTION ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 409 Fed. Appx. 847.

No. 10–9704. LEWIS *v.* TENNIS, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT ROCKVIEW, ET AL. C. A. 3d Cir. Certiorari denied.

No. 10–9713. STEPHENS *v.* THURMER, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 10–9728. BURGESS *v.* HARTFORD LIFE INSURANCE CO. C. A. 2d Cir. Certiorari denied.

No. 10–9756. MILLS *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 329 Wis. 2d 710, 790 N. W. 2d 542.

No. 10–9773. BELL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 10–9790. PETERS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 402 Fed. Appx. 217.

No. 10–9798. COCKERHAM *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 396 Fed. Appx. 66.

No. 10–9800. SESERE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 413 Fed. Appx. 653.

No. 10–9804. FIGUEROA-MONTES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 400 Fed. Appx. 148.

No. 10–9805. ORR *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 622 F. 3d 864.

No. 10–9810. GROTE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 408 Fed. Appx. 90.

No. 10–9814. FERMIN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 10–9816. HAMILTON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 10–9818. GUZMAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 10–9821. GYAMFI *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 408 Fed. Appx. 669.

No. 10–9827. SUAREZ FLORES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 385 Fed. Appx. 881.

No. 10–9828. HAYNES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 398 Fed. Appx. 920.

No. 10–9830. HERVIS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 10–9831. GOMEZ *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 10–9834. RAMIREZ-ACOLTZI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 407 Fed. Appx. 211.

No. 10–9835. PEACOCK *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 403 Fed. Appx. 474.

No. 10–9836. SANDERS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 406 Fed. Appx. 995.

No. 10–9839. GONZALEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 395 Fed. Appx. 122.

No. 10–9840. HINES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 395 Fed. Appx. 316.

No. 10–9841. HAMES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 10–9842. GRIFFITHS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 403 Fed. Appx. 836.

No. 10–9845. CLARK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 10–9848. SMITH *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 10–9850. CRUZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 412 Fed. Appx. 686.

No. 10–9851. ESQUIVEL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 407 Fed. Appx. 781.

No. 10–9854. PATTERSON ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 406 Fed. Appx. 773.

No. 10–9856. ARRELLANO-DEPAZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 407 Fed. Appx. 775.

No. 10–9857. BAILEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 10–9859. BALDWIN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 406 Fed. Appx. 762.

No. 10–9863. VEYTIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 407 Fed. Appx. 248.

No. 10–9864. URENA-GONZALEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 407 Fed. Appx. 853.

No. 10–9875. ARMSTRONG *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 406 Fed. Appx. 722.

No. 10–9878. BELL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 10–9894. BLOUNT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 402 Fed. Appx. 3.

No. 10–405. SIEFERT, JUDGE, CIRCUIT COURT OF WISCONSIN, MILWAUKEE COUNTY, FIRST JUDICIAL ADMINISTRATIVE DISTRICT *v.* ALEXANDER ET AL. C. A. 7th Cir. Motion of Center for Constitutional Jurisprudence for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 608 F. 3d 974.

No. 10–9797. DOUGLAS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition.

No. 10–9832. KOSACK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

No. 10–9844. DUONG-CAM TRAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition.

No. 10–9849. SMITH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 396 Fed. Appx. 924.

No. 10–9882. TURPIN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

Rehearing Denied

No. 10–7797. ANDERSON *v.* CLINE, WARDEN, ET AL., 562 U. S. 1227;

No. 10–7920. LARSON *v.* WILSON, WARDEN, 562 U. S. 1229;

No. 10–8100. FREE *v.* UNITED STATES, 562 U. S. 1235;

No. 10–8281. ALLEN *v.* ILLINOIS, 562 U. S. 1276;

No. 10–8309. STUDY *v.* UNITED STATES ET AL., 562 U. S. 1260;

No. 10–8500. REYNOLDS *v.* WHITEHEAD ET AL., 562 U. S. 1277; No. 10–8828. HOWARD *v.* UNITED STATES, 562 U. S. 1278; and No. 10–9075. OESBY *v.* UNITED STATES, 562 U. S. 1301. Petitions for rehearing denied.

MAY 3, 2011

Certiorari Denied

No. 10–10218 (10A1057). KERR *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. Reported below: 358 S. W. 3d 248.

MAY 10, 2011

Certiorari Denied

No. 10–10390 (10A1084). STEVENS *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 16, 2011

Dismissal Under Rule 46

No. 10–9861. THOMPSON *v.* WETZEL, ACTING SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 3d Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 412 Fed. Appx. 483.

Certiorari Granted—Vacated and Remanded

No. 10–1107. RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS *v.* DETRICH. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Cullen* v. *Pinholster*, *ante*, p. 170. Reported below: 619 F. 3d 1038.

Certiorari Dismissed

No. 10–9712. FREDERICK *v.* GRAHAM. Sup. Ct. Wis. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed

not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) *(per curiam)*.

No. 10–10008. FIORANI *v.* UNITED STATES. 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: 396 Fed. Appx. 924.

Miscellaneous Orders

No. 10A894. CAP SOO HAN *v.* HOLDER, ATTORNEY GENERAL. Application for stay, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. D–2508. IN RE DISBARMENT OF MUNROE. Disbarment entered. [For earlier order herein, see 562 U. S. 810.]

No. D–2510. IN RE DISBARMENT OF SPARGO. Disbarment entered. [For earlier order herein, see 562 U. S. 810.]

No. D–2511. IN RE DISBARMENT OF DEJONG. Disbarment entered. [For earlier order herein, see 562 U. S. 810.]

No. D–2513. IN RE DISBARMENT OF ROMEO. Disbarment entered. [For earlier order herein, see 562 U. S. 810.]

No. D–2514. IN RE DISBARMENT OF BLEECKER. Disbarment entered. [For earlier order herein, see 562 U. S. 810.]

No. D–2515. IN RE DISBARMENT OF CALLEGARY. Disbarment entered. [For earlier order herein, see 562 U. S. 811.]

No. D–2516. IN RE DISBARMENT OF GILLAND. Disbarment entered. [For earlier order herein, see 562 U. S. 811.]

No. D–2517. IN RE DISBARMENT OF PEPYNE. Disbarment entered. [For earlier order herein, see 562 U. S. 811.]

No. D–2518. IN RE DISBARMENT OF FINNERAN. Disbarment entered. [For earlier order herein, see 562 U. S. 811.]

No. D–2519. IN RE DISBARMENT OF NGOBENI. Disbarment entered. [For earlier order herein, see 562 U. S. 811.]

No. D–2520. In re Disbarment of Deutchman. Disbarment entered. [For earlier order herein, see 562 U. S. 811.]

No. 10M108. Grimes *v.* Barber et al.; and
No. 10M109. Driscoll *v.* DeLaRosa. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 10–1042. Freeman et vir *v.* Quicken Loans, Inc. C. A. 5th Cir.;
No. 10–1139. Faculty Senate of Florida International University et al. *v.* Florida. C. A. 11th Cir.; and
No. 10–1144. Republica Bolivariana de Venezuela et al. *v.* DRFP L. L. C., dba Skye Ventures. C. A. 6th Cir. The Acting Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 10–8395. Semler *v.* Crow Wing County Social Services et al. Ct. App. Minn. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [562 U. S. 1283] denied.

No. 10–8580. Shahin *v.* Strosser et al. C. A. 3d Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 902] denied.

No. 10–8795. Simon *v.* Bickell et al. C. A. D. C. Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 901] denied.

No. 10–9485. Murray *v.* Truly. C. A. 6th Cir.; and
No. 10–10055. Lawler et al. *v.* United States. Ct. App. D. C. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until June 6, 2011, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 10–1284. In re Ford;
No. 10–10047. In re Miles; and
No. 10–10126. In re McGhee. Petitions for writs of habeas corpus denied.

No. 10–1200. In re Rosenquist; and
No. 10–9638. In re Routie. Petitions for writs of mandamus denied.

No. 10–8924. IN RE HONKEN; and

No. 10–9916. IN RE WATKINS. Petitions for writs of mandamus denied. JUSTICE KAGAN took no part in the consideration or decision of these petitions.

Certiorari Granted

No. 10–1104. MINNECI ET AL. *v.* POLLARD ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 607 F. 3d 583 and 629 F. 3d 843.

Certiorari Denied

No. 10–742. BNSF RAILWAY CO. *v.* SURFACE TRANSPORTATION BOARD ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 604 F. 3d 602.

No. 10–809. MURDOCH *v.* CASTRO, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 609 F. 3d 983.

No. 10–810. UNITED STATES ET AL. EX REL. O'CONNELL ET AL. *v.* CHAPMAN UNIVERSITY. C. A. 9th Cir. Certiorari denied.

No. 10–864. BILL HARBERT INTERNATIONAL CONSTRUCTION, INC., ET AL. *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 608 F. 3d 871.

No. 10–898. PRINCO CORP. ET AL. *v.* INTERNATIONAL TRADE COMMISSION ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 616 F. 3d 1318.

No. 10–972. ELI LILLY & CO. *v.* SUN PHARMACEUTICAL INDUSTRIES, LTD. C. A. Fed. Cir. Certiorari denied. Reported below: 611 F. 3d 1381.

No. 10–992. GUARDADO-GARCIA *v.* HOLDER, ATTORNEY GENERAL. C. A. 8th Cir. Certiorari denied. Reported below: 615 F. 3d 900.

No. 10–1017. GEORGE ET AL. *v.* LOUISIANA. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 34 So. 3d 941.

No. 10–1076. SHLISHEY THE BEST, INC., TRUSTEE FOR THE TWICE AS NICE 2X22 LAND TRUST *v.* OPTION ONE MORTGAGE

CORP. ET AL. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 49 So. 3d 249.

No. 10–1078. SLATER *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 10–1083. FLINT *v.* CHAUVIN. C. A. 6th Cir. Certiorari denied.

No. 10–1088. HINTON-LYNCH *v.* HORTON. Ct. App. Ga. Certiorari denied. Reported below: 302 Ga. App. 597, 692 S. E. 2d 34.

No. 10–1096. ZAVALIDROGA ET AL. *v.* COTE ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 395 Fed. Appx. 737.

No. 10–1100. DOE, A MINOR, BY HIS PARENTS AND NEXT FRIENDS DOE ET UX., ET AL. *v.* KAMEHAMEHA SCHOOLS/BERNICE PAUAHI BISHOP ESTATE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 596 F. 3d 1036.

No. 10–1110. CRISP *v.* BESSEN, JUDGE, STATE COURT OF GEORGIA, FULTON COUNTY. Ct. App. Ga. Certiorari denied. Reported below: 302 Ga. App. XXIII.

No. 10–1122. TAMRAZ ET UX. *v.* LINCOLN ELECTRIC CO. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 620 F. 3d 665.

No. 10–1123. TUETKEN *v.* TUETKEN. Sup. Ct. Tenn. Certiorari denied. Reported below: 320 S. W. 3d 262.

No. 10–1125. GUGGENHEIM ET AL. *v.* CITY OF GOLETA, CALIFORNIA. C. A. 9th Cir. Certiorari denied. Reported below: 638 F. 3d 1111.

No. 10–1126. SPRINGER *v.* PERRYMAN, JUDGE, CIRCUIT COURT OF ALABAMA, RANDOLPH COUNTY, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 401 Fed. Appx. 457.

No. 10–1134. CHIEN *v.* SKYSTAR BIO PHARMACEUTICAL CO. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 378 Fed. Appx. 109.

No. 10–1135. SCARBOROUGH *v.* DILLARD'S, INC., FKA DILLARD DEPARTMENT STORES, INC. Sup. Ct. N. C. Certiorari denied. Reported below: 363 N. C. 715, 693 S. E. 2d 640.

No. 10–1136. LOPEZ *v.* CANDAELE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 630 F. 3d 775.

No. 10–1140. FINK *v.* RICHMOND ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 405 Fed. Appx. 719.

No. 10–1141. HIXSON, ON BEHALF OF HIXSON, ET AL. *v.* STEINBERG, ACTING DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 401 Fed. Appx. 639.

No. 10–1151. CRV ENTERPRISES, INC., ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 626 F. 3d 1241.

No. 10–1152. WAESCHLE, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED *v.* OAKLAND COUNTY MEDICAL EXAMINER ET AL. Sup. Ct. Mich. Certiorari denied. Reported below: 488 Mich. 1, 793 N. W. 2d 560.

No. 10–1153. TENENBAUM ET UX. *v.* ASHCROFT ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 407 Fed. Appx. 4.

No. 10–1155. HEGHMANN *v.* GEITHNER, SECRETARY OF THE TREASURY, ET AL. C. A. 2d Cir. Certiorari denied.

No. 10–1157. AMERICAN SMALL BUSINESS LEAGUE *v.* SMALL BUSINESS ADMINISTRATION. C. A. 9th Cir. Certiorari denied. Reported below: 623 F. 3d 1052.

No. 10–1161. HOWMEDICA OSTEONICS CORP. *v.* ZIMMER, INC., ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 397 Fed. Appx. 654.

No. 10–1186. NADER ET AL. *v.* BENNETT, SECRETARY OF STATE OF ARIZONA. C. A. 9th Cir. Certiorari denied. Reported below: 407 Fed. Appx. 190.

No. 10–1193. MARTIN-MATERA ET VIR *v.* TENNESSEE DEPARTMENT OF CHILDREN'S SERVICES ET AL. Ct. App. Tenn. Certiorari denied.

No. 10–1198. PURYEAR *v.* BUSS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 10–1213. TRUSTMARK INSURANCE CO. *v.* JOHN HANCOCK LIFE INSURANCE CO. (U. S. A.). C. A. 7th Cir. Certiorari denied. Reported below: 631 F. 3d 869.

No. 10–1215. HOEFFNER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 626 F. 3d 857.

No. 10–1222. GAALLA ET AL. *v.* CITIZENS MEDICAL CENTER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 407 Fed. Appx. 810.

No. 10–1228. FERNANDES *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 300 Conn. 104, 12 A. 3d 925.

No. 10–1234. SCHALLER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 401 Fed. Appx. 419.

No. 10–1237. TIDWELL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 10–1239. SEGREDO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 414 Fed. Appx. 184.

No. 10–1242. SAMMONS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 407 Fed. Appx. 724.

No. 10–1243. CUNNINGHAM *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 393 Fed. Appx. 403.

No. 10–1250. FIGUEROA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 394 Fed. Appx. 315.

No. 10–1251. LEE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 401 Fed. Appx. 336.

No. 10–1253. MATHISON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 10–1268. REESE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 627 F. 3d 792.

No. 10–7867. WINN *v.* BUSS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 10–7883. BARBOSA *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 457 Mass. 773, 933 N. E. 2d 93.

No. 10–7906. BAILEY *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 10–7990. HERNANDEZ *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 10–8003. AVILES *v.* MEDINA, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 389 Fed. Appx. 853.

No. 10–8030. PURCELL *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 10–8060. RODRIGUEZ *v.* COLORADO. Sup. Ct. Colo. Certiorari denied. Reported below: 238 P. 3d 1283.

No. 10–8266. DORSETT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 622 F. 3d 196.

No. 10–8272. HARDISTY *v.* ASTRUE, COMMISSIONER OF SOCIAL SECURITY. C. A. 9th Cir. Certiorari denied. Reported below: 592 F. 3d 1072.

No. 10–8332. ETERE *v.* CITY OF NEW YORK, NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 381 Fed. Appx. 24.

No. 10–8405. HOLMES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 384 Fed. Appx. 219.

No. 10–8418. LIZARDO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 619 F. 3d 273.

No. 10–8527. ADDISON *v.* NEW HAMPSHIRE. Sup. Ct. N. H. Certiorari denied. Reported below: 160 N. H. 792, 8 A. 3d 118.

No. 10–8544. BOYD *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 398 Fed. Appx. 649.

No. 10–8621. WOODS *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 399 Fed. Appx. 884.

No. 10–8630. MAKARENKOV *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 401 Fed. Appx. 442.

No. 10–8666. VASQUEZ *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 389 Fed. Appx. 419.

No. 10–8745. CLIFTON *v.* FLORIDA PAROLE COMMISSION. C. A. 11th Cir. Certiorari denied.

No. 10–8784. FAYIGA *v.* CASSAGNOL ET AL. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 49 So. 3d 252.

No. 10–8844. PERDOMA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 621 F. 3d 745.

No. 10–8916. ESPARZA *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 408 Fed. Appx. 787.

No. 10–8938. REYES *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist., Div. 2. Certiorari denied.

No. 10–9308. GREENE *v.* SOISUVARN ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 10–9313. HANDY *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 10–9314. HENRY *v.* ALABAMA ET AL. C. A. 11th Cir. Certiorari denied.

No. 10–9319. BARNES *v.* IMS MANAGEMENT, LLC, AS AGENT FOR METROPOLITAN GARDENS DEVELOPERS, LLP. Ct. Civ. App. Ala. Certiorari denied. Reported below: 82 So. 3d 19.

No. 10–9330. CIHA *v.* IOWA. Ct. App. Iowa. Certiorari denied. Reported below: 789 N. W. 2d 165.

No. 10–9336. TUCKER *v.* BUSS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 10–9337. WATSON *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 51 So. 3d 467.

No. 10–9338. THORNTON *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 10–9341. QUATTROCCHI *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 17 So. 3d 329.

No. 10–9351. MANSEAU ET UX. *v.* CITY OF MIRAMAR, FLORIDA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 395 Fed. Appx. 642.

No. 10–9361. CUNNINGHAM *v.* PALMER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 10–9364. O'NEAL *v.* BUSS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 10–9365. PAGE *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 49 So. 3d 762.

No. 10–9366. MOORE *v.* LOUISIANA. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 39 So. 3d 850.

No. 10–9368. MAISANO *v.* WEARE ET AL. C. A. 9th Cir. Certiorari denied.

No. 10–9373. MARTIN *v.* VOLUNTEER AUTOMOTIVE. C. A. 6th Cir. Certiorari denied.

No. 10–9374. KENNEDY ET AL. *v.* RELATED MANAGEMENT ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 403 Fed. Appx. 566.

No. 10–9379. WILKINS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 10–9389. VAN ZANT *v.* FLORIDA PAROLE COMMISSION ET AL. C. A. 11th Cir. Certiorari denied.

No. 10–9390. WOOD *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 409 Fed. Appx. 735.

No. 10–9391. HAWKINS *v.* MICHIGAN DEPARTMENT OF CORRECTIONS. Ct. App. Mich. Certiorari denied.

No. 10–9392. MCKNIGHT *v.* TRAMMELL, WARDEN. Ct. Crim. App. Okla. Certiorari denied.

No. 10–9401. GLOVER *v.* BOOKER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 10–9406. ARUANNO *v.* BOOKER ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 397 Fed. Appx. 756.

No. 10–9407. BOCZKOWSKI *v.* JACKSON ET AL. C. A. 3d Cir. Certiorari denied.

No. 10–9410. HERNANDEZ *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 396 Ill. App. 3d 1126, 6 N. E. 3d 448.

No. 10–9415. PEREZ *v.* EVANS, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 405 Fed. Appx. 262.

No. 10–9416. LERAJJAREANRA-O-KEL-LY *v.* OLSEN ET AL. Sup. Ct. Idaho. Certiorari denied.

No. 10–9421. SCINTO *v.* PRESTON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 391 Fed. Appx. 232.

No. 10–9422. SHEEDY *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 10–9425. BYRD *v.* ARIAS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 411 Fed. Appx. 105.

No. 10–9427. ADAMS *v.* JACOBS, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 10–9428. CRISDON *v.* NEW JERSEY DEPARTMENT OF EDUCATION. C. A. 3d Cir. Certiorari denied.

No. 10–9429. CURIEL *v.* WALKER, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 413 Fed. Appx. 974.

No. 10–9435. BROWN *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 288 Ga. 364, 703 S. E. 2d 609.

No. 10–9447. SAUNDERS *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied.

No. 10–9448. HULLUM *v.* MASSACHUSETTS. App. Ct. Mass. Certiorari denied. Reported below: 78 Mass. App. 1107, 936 N. E. 2d 452.

No. 10–9462. JACKSON *v.* HERNDON, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 10–9469. Cooper *v.* Johnson, Director, Virginia Department of Corrections. Sup. Ct. Va. Certiorari denied.

No. 10–9475. Adams *v.* Washington. Ct. App. Wash. Certiorari denied.

No. 10–9476. Bacon *v.* California. Sup. Ct. Cal. Certiorari denied. Reported below: 50 Cal. 4th 1082, 240 P. 3d 204.

No. 10–9481. Lytle *v.* North Carolina. Ct. App. N. C. Certiorari denied. Reported below: 204 N. C. App. 597, 696 S. E. 2d 925.

No. 10–9486. Ponton *v.* American Federation of State, County and Municipal Employees, AFL–CIO, et al. C. A. 3d Cir. Certiorari denied. Reported below: 395 Fed. Appx. 867.

No. 10–9487. Melvin *v.* North Carolina. Sup. Ct. N. C. Certiorari denied. Reported below: 364 N. C. 620, 705 S. E. 2d 366.

No. 10–9488. Tucker *v.* Heath, Superintendent, Sing Sing Correctional Facility. C. A. 2d Cir. Certiorari denied.

No. 10–9490. Weinrich *v.* Roper, Superintendent, Potosi Correctional Center. C. A. 8th Cir. Certiorari denied.

No. 10–9491. James *v.* Thaler, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied.

No. 10–9493. Jackson *v.* Thaler, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied.

No. 10–9497. Allen *v.* Curtin, Warden. C. A. 6th Cir. Certiorari denied.

No. 10–9501. Owens *v.* Jefferson et al. C. A. 4th Cir. Certiorari denied. Reported below: 404 Fed. Appx. 781.

No. 10–9507. Konopko *v.* Westfield Police Department. C. A. 1st Cir. Certiorari denied.

No. 10–9513. Palk *v.* Harrison, Warden. C. A. 9th Cir. Certiorari denied.

No. 10–9524. SALINAS *v.* DILLMAN, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 401 Fed. Appx. 816.

No. 10–9526. RANSOM *v.* CONERLY, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 10–9529. COOPER *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 10–9554. JONES *v.* LEMPKE, SUPERINTENDENT, FIVE POINTS CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 403 Fed. Appx. 617.

No. 10–9564. FLOWERS *v.* MINNESOTA. Sup. Ct. Minn. Certiorari denied. Reported below: 788 N. W. 2d 120.

No. 10–9590. HANNAH *v.* BUSS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 46 So. 3d 1007.

No. 10–9611. GOMEZ *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 226 Ariz. 165, 244 P. 3d 1163.

No. 10–9614. JOHNSON *v.* KNOWLES, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 10–9625. HALL *v.* BERGHUIS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 10–9627. COEN *v.* OREGON. Sup. Ct. Ore. Certiorari denied. Reported below: 349 Ore. 371, 245 P. 3d 101.

No. 10–9640. CHAO *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 126 Nev. 699.

No. 10–9655. MOSLEY *v.* WHITE. C. A. 5th Cir. Certiorari denied. Reported below: 464 Fed. Appx. 206.

No. 10–9660. ZABRISKIE *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 48 So. 3d 69.

No. 10–9667. SCOTT *v.* BUSS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 10–9683. KNIGHT *v.* SECURITIES AND EXCHANGE COMMISSION ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 403 Fed. Appx. 622.

No. 10–9692. DAVIS *v.* BONDI, ATTORNEY GENERAL OF FLORIDA, ET AL. C. A. 11th Cir. Certiorari denied.

No. 10–9702. SHEEHAN *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 10–9714. HOLTON *v.* NOOTH, SUPERINTENDENT, SNAKE RIVER CORRECTIONAL INSTITUTION. C. A. 9th Cir. Certiorari denied.

No. 10–9715. HOWARD *v.* NERO ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 406 Fed. Appx. 715.

No. 10–9718. ENTLER *v.* SUPREME COURT OF WASHINGTON ET AL. C. A. 9th Cir. Certiorari denied.

No. 10–9723. KILLS ON TOP *v.* MAHONEY, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 10–9750. WEAVER *v.* PREMO, SUPERINTENDENT, OREGON STATE PENITENTIARY (two judgments). C. A. 9th Cir. Certiorari denied.

No. 10–9751. WASHINGTON *v.* OLLISON, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 414 Fed. Appx. 959.

No. 10–9753. WILLIAMS *v.* KELLER, SECRETARY, NORTH CAROLINA DEPARTMENT OF CORRECTION. C. A. 4th Cir. Certiorari denied. Reported below: 396 Fed. Appx. 978.

No. 10–9799. KOWALSKEY *v.* DORMIRE, SUPERINTENDENT, JEFFERSON CITY CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 10–9815. H'SHAKA *v.* ROCK, SUPERINTENDENT, UPSTATE CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 10–9824. COOK *v.* BREWER, GOVERNOR OF ARIZONA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 649 F. 3d 915.

No. 10–9838. YUSOV *v.* SHAUGHNESSY ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 396 Fed. Appx. 780.

No. 10–9858. BECKER *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 239 Ill. 2d 215, 940 N. E. 2d 1131.

No. 10–9865. PORCH *v.* LAFLER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 10–9867. MACIAS *v.* JACKSON, SUPERINTENDENT, NASH CORRECTIONAL INSTITUTION. C. A. 4th Cir. Certiorari denied. Reported below: 403 Fed. Appx. 851.

No. 10–9891. VAN HODGES *v.* UNITED STATES; and
No. 10–9939. THOMAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 627 F. 3d 146.

No. 10–9899. GALINDO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 406 Fed. Appx. 322.

No. 10–9901. FRANKLIN *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 630 F. 3d 53.

No. 10–9903. ROMERO-CARCAMO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 399 Fed. Appx. 614.

No. 10–9905. CANSLER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 406 Fed. Appx. 48.

No. 10–9906. ESCOBEDO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 397 Fed. Appx. 205.

No. 10–9907. CAULEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 406 Fed. Appx. 386.

No. 10–9909. POWELL *v.* HATCHER, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 407 Fed. Appx. 226.

No. 10–9910. JANGULA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 407 Fed. Appx. 234.

No. 10–9914. TRIPLETT *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 402 Fed. Appx. 344.

No. 10–9917. ZIERKE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 10–9919. SCHUYLER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 407 Fed. Appx. 649.

No. 10–9921. CONTRERAS-HERNANDEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 628 F. 3d 1169.

No. 10–9925. RUIZ MONTES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 628 F. 3d 1183 and 421 Fed. Appx. 670.

No. 10–9927. LEWIS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 406 Fed. Appx. 306.

No. 10–9932. WHEELER *v.* ROZUM, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT SOMERSET, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 410 Fed. Appx. 453.

No. 10–9934. MCDAVID *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 396 Fed. Appx. 365.

No. 10–9935. PATTERSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 406 Fed. Appx. 924.

No. 10–9942. WILLIAMS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 397 Fed. Appx. 264.

No. 10–9944. CHEN XIANG *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 10–9947. HAMILTON *v.* PREMO, SUPERINTENDENT, OREGON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied.

No. 10–9948. FRANCO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 632 F. 3d 880.

No. 10–9950. MARTINEZ-CARMONA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 415 Fed. Appx. 811.

No. 10–9951. JOHNSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 10–9952. BROWN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 10–9955. KALU *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 10–9960. CORNWELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 418 Fed. Appx. 224.

No. 10–9961. COLEMAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 627 F. 3d 205.

No. 10–9968. JONES *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 407 Fed. Appx. 974.

No. 10–9971. LONE FIGHT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 625 F. 3d 523.

No. 10–9972. LAHENS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 394 Fed. Appx. 646.

No. 10–9974. UMANA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 411 Fed. Appx. 249.

No. 10–9975. WOODWARD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 419 Fed. Appx. 969.

No. 10–9979. WILLIAMS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 410 Fed. Appx. 272.

No. 10–9980. SPIRES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 628 F. 3d 1049.

No. 10–9990. LINDSEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 634 F. 3d 541.

No. 10–9991. LIPSCOMB *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 619 F. 3d 474.

No. 10–9994. WARE *v.* BERGERON, SUPERINTENDENT, OLD COLONY CORRECTIONAL CENTER. C. A. 1st Cir. Certiorari denied.

No. 10–9999. ST. VALLIER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 404 Fed. Appx. 651.

No. 10–10002. STREETS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 401 Fed. Appx. 81.

No. 10–10007. DAVIS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 406 Fed. Appx. 268.

No. 10–10009. BLANCO-NAVAR *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 10–10010. TOWNSEND *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 630 F. 3d 1003.

No. 10–10019. GONZALEZ-DIAZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 630 F. 3d 1239.

No. 10–10021. BURTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 401 Fed. Appx. 874.

No. 10–10023. BAILEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 407 Fed. Appx. 27.

No. 10–10029. PETERSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 411 Fed. Appx. 857.

No. 10–10033. GREER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 415 Fed. Appx. 673.

No. 10–10039. HALL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 403 Fed. Appx. 214.

No. 10–10048. PRICE *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 998 A. 2d 867.

No. 10–10049. BALDWIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 10–10054. HARRINGTON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 415 Fed. Appx. 986.

No. 10–10056. FALCIGLIA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 10–10057. JONES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 10–10067. MONAHAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 405 Fed. Appx. 742.

No. 10–10075. NORTHROP *v.* QUINTANA, WARDEN. C. A. 3d Cir. Certiorari denied. Reported below: 418 Fed. Appx. 73.

No. 10–74. RIVERA AQUINO, SECRETARY, PUERTO RICO DEPARTMENT OF AGRICULTURE, ET AL. *v.* SUIZA DAIRY, INC., ET AL. C. A. 1st Cir. Certiorari denied. JUSTICE KENNEDY took no part in the consideration or decision of this petition. Reported below: 587 F. 3d 464.

No. 10–757. NEWDOW ET AL. *v.* ROBERTS, CHIEF JUSTICE OF THE UNITED STATES, ET AL. C. A. D. C. Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. Reported below: 603 F. 3d 1002.

No. 10–778. MOHAMED ET AL. *v.* JEPPESEN DATAPLAN, INC., ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 614 F. 3d 1070.

No. 10–872. FREEMAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 617 F. 3d 873.

No. 10–1089. KINDER *v.* ALLIED INTERSTATE, INC., ET AL. Ct. App. Cal., 4th App. Dist., Div. 2. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition.

No. 10–1090. MEDIOSTREAM, INC. *v.* ACER AMERICA CORP. ET AL. C. A. Fed. Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. Reported below: 626 F. 3d 1252.

No. 10–9320. BISSON *v.* MARTIN LUTHER KING, JR. HEALTH CLINIC, ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 399 Fed. Appx. 655.

No. 10–9413. AGUADO-GUEL *v.* PEARSON, WARDEN. C. A. 5th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 408 Fed. Appx. 826.

No. 10–9439 (10A933). TEAGUE *v.* NORTH CAROLINA DEPARTMENT OF TRANSPORTATION. C. A. 4th Cir. Application for stay, addressed to JUSTICE ALITO and referred to the Court, denied. Certiorari denied. Reported below: 403 Fed. Appx. 872.

No. 10–9808. BUNKE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 412 Fed. Appx. 760.

No. 10–9976. KNIGHT *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA. C. A. 3d Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 401 Fed. Appx. 633.

No. 10–9983. BROWN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

No. 10–9989. LICHTENBERG *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 631 F. 3d 1021.

No. 10–10050. ARIZA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition.

Rehearing Denied

No. 10–677. FOX *v.* FLORIDA BAR, 562 U. S. 1286;

No. 10–695. LAY *v.* UNITED STATES, 562 U. S. 1264;

No. 10–768. AFTERMATH RECORDS, DBA AFTERMATH ENTERTAINMENT, ET AL. *v.* F. B. T. PRODUCTIONS, LLC, ET AL., 562 U. S. 1286;

No. 10–934. LAKSHMINARASIMHA *v.* UNITED STATES ET AL., 562 U. S. 1288;

No. 10–7842. OLSON *v.* ESTATE OF GAIGNAT, DECEASED, 562 U. S. 1228;

No. 10–8006. STRATTON *v.* TEXAS (three judgments), 562 U. S. 1231;

No. 10–8191. DAY *v.* UNITED STATES, 562 U. S. 1238;

No. 10–8202. BROWN *v.* BRADSHAW, WARDEN, 562 U. S. 1238;

No. 10–8230. LAFFITEAU *v.* MANAGEMENT AND LEGAL AGENTS FOR CAMELOT INN, 562 U. S. 1275;

No. 10–8253. COOPER *v.* HOBBS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION, 562 U. S. 1240;

No. 10–8274. BERRY *v.* CITIBANK F. S. B., 562 U. S. 1275;

No. 10–8333. CHAMBERS *v.* JUSTICE OF THE PEACE COURT, PRECINCT ONE, 562 U. S. 1260;

No. 10–8404. NELSON *v.* JACKSON, WARDEN, 562 U. S. 1260;

No. 10–8407. WEST *v.* UNITED STATES, 562 U. S. 1244;

No. 10–8430. BRAMAGE *v.* HSBC BANK NEVADA, N. A., 562 U. S. 1293;

No. 10–8456. DEYOUNG *v.* SCHOFIELD, WARDEN, 562 U. S. 1293;

No. 10–8485. ALSTON *v.* COURT OF APPEALS OF WISCONSIN, 562 U. S. 1294;

No. 10–8491. ROSENFELD *v.* HACKETT ET AL., *ante*, p. 906;

No. 10–8508. JONES *v.* LARKINS, WARDEN, 562 U. S. 1294;

No. 10–8604. JOHNSON *v.* KELLY, WARDEN, *ante*, p. 907;

No. 10–8679. RAMESES *v.* KERNAN, WARDEN, ET AL., *ante*, p. 909;

No. 10–8687. CIRIA *v.* RUBINO ET AL., 562 U. S. 1295;

No. 10–8791. RICHARD *v.* WENEROWICZ, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD, *ante*, p. 921;

No. 10–8873. SOLOMON *v.* UNITED STATES, 562 U. S. 1279;

No. 10–8889. DORSEY *v.* SHINSEKI, SECRETARY OF VETERANS AFFAIRS, *ante*, p. 922;

No. 10–8921. ELLIS *v.* PALMER, WARDEN, ET AL., *ante*, p. 922;

No. 10–8971. TUVALU *v.* WOODFORD ET AL., 562 U. S. 1299; and

No. 10–9300. DEONARINESINGH *v.* UNITED STATES, *ante*, p. 926. Petitions for rehearing denied.

MAY 17, 2011

Certiorari Denied

No. 10–10460 (10A1117). BEDFORD *v.* BOBBY, WARDEN. C. A. 6th Cir. Application for stay of execution of sentence of death, presented to JUSTICE KAGAN, and by her referred to the Court, denied. Certiorari denied. Reported below: 645 F. 3d 372.

No. 10–10463 (10A1113). GRAY *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 19, 2011

Certiorari Denied

No. 10–10589 (10A1135). WILLIAMS *v.* THOMAS, INTERIM COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Certiorari denied. Reported below: 641 F. 3d 1255.

MAY 23, 2011

Certiorari Granted—Remanded

No. 09–784. AMARA ET AL., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED *v.* CIGNA CORP. ET AL. C. A. 2d Cir. The Court vacated the judgment below in *CIGNA Corp.* v. *Amara*, *ante*, p. 421. Therefore, certiorari granted, and case remanded for further proceedings. JUSTICE SOTOMAYOR

took no part in the consideration or decision of this petition. Reported below: 348 Fed. Appx. 627.

Certiorari Dismissed

No. 10–9603. MONACELLI *v.* FLORIDA DEPARTMENT OF CHILDREN AND FAMILIES ET AL. Dist. Ct. App. Fla., 2d Dist.; and

No. 10–9604. MONACELLI *v.* FLORIDA DEPARTMENT OF CHILDREN AND FAMILIES. Sup. Ct. Fla. Motions of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) *(per curiam)*. Reported below: No. 10–9604, 48 So. 3d 836.

No. 10–9636. SPAIN *v.* BLACK ET AL. Ct. App. Tex., 8th Dist. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) *(per curiam)*. Reported below: 333 S. W. 3d 270.

No. 10–10123. SUKUP *v.* UNITED STATES. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) *(per curiam)*. JUSTICE KAGAN took no part in the consideration or decision of this motion and this petition.

Miscellaneous Orders

No. D–2523. IN RE DISBARMENT OF CHASNOFF. Disbarment entered. [For earlier order herein, see 562 U. S. 812.]

No. D–2525. IN RE DISBARMENT OF BRANDES. Disbarment entered. [For earlier order herein, see 562 U. S. 812.]

No. D–2526. IN RE DISBARMENT OF EHRLICH. Disbarment entered. [For earlier order herein, see 562 U. S. 812.]

No. D–2527. IN RE DISBARMENT OF HEGHMANN. Disbarment entered. [For earlier order herein, see 562 U. S. 812.]

No. D–2528. IN RE DISBARMENT OF UDELL. Disbarment entered. [For earlier order herein, see 562 U. S. 812.]

No. D–2529. IN RE DISBARMENT OF FITZPATRICK. Disbarment entered. [For earlier order herein, see 562 U. S. 812.]

No. D–2530. IN RE DISBARMENT OF HALLOCK. Disbarment entered. [For earlier order herein, see 562 U. S. 813.]

No. D–2531. IN RE DISBARMENT OF DAVIS. Disbarment entered. [For earlier order herein, see 562 U. S. 813.]

No. D–2532. IN RE DISBARMENT OF DEFILIPPO. Disbarment entered. [For earlier order herein, see 562 U. S. 813.]

No. D–2533. IN RE DISBARMENT OF CONDON. Disbarment entered. [For earlier order herein, see 562 U. S. 813.]

No. D–2534. IN RE DISBARMENT OF STEIN. Disbarment entered. [For earlier order herein, see 562 U. S. 813.]

No. D–2535. IN RE DISBARMENT OF TIPLER. Disbarment entered. [For earlier order herein, see 562 U. S. 813.]

No. D–2536. IN RE DISBARMENT OF HATCH. Disbarment entered. [For earlier order herein, see 562 U. S. 813.]

No. D–2537. IN RE DISBARMENT OF MANZINI. Disbarment entered. [For earlier order herein, see 562 U. S. 813.]

No. D–2538. IN RE DISBARMENT OF ZIEGLER. Disbarment entered. [For earlier order herein, see 562 U. S. 814.]

No. 10M110. SEIDEL ET UX. *v.* RESIDENTIAL FUNDING CO. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 10–8774. WARREN *v.* OWENS ET AL. C. A. 5th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 915] denied.

No. 10–9035. MITTS *v.* UNITED STATES. C. A. 6th Cir.; and
No. 10–9637. STANTON *v.* STANTON ET AL. Ct. App. Cal., 4th App. Dist., Div. 1. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until June 13, 2011, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 10–9616. IN RE LAMBRIX;
No. 10–10206. IN RE WARD;
No. 10–10213. IN RE WILLIAMS; and
No. 10–10247. IN RE BAKER. Petitions for writs of habeas corpus denied.

No. 10–9635. IN RE REMMERT. Petition for writ of mandamus denied.

No. 10–9628. IN RE CLAY; and
No. 10–9629. IN RE CLAY. Motions of petitioner for leave to proceed *in forma pauperis* denied, and petitions for writs of mandamus and/or prohibition dismissed. See this Court's Rule 39.8.

Certiorari Granted

No. 10–577. KAWASHIMA ET UX. *v.* HOLDER, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari granted limited to Question 1 presented by the petition. Reported below: 615 F. 3d 1043.

Certiorari Denied

No. 10–765. YOUNG, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED *v.* VERIZON'S BELL ATLANTIC CASH BALANCE PLAN ET AL.; and
No. 10–911. VERIZON'S BELL ATLANTIC CASH BALANCE PLAN ET AL. *v.* YOUNG, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED. C. A. 7th Cir. Certiorari denied. Reported below: 615 F. 3d 808.

No. 10–828. MEAD *v.* CITY OF COTATI, CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 389 Fed. Appx. 637.

No. 10–835. TUCKER *v.* CASON, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 393 Fed. Appx. 334.

No. 10–1009. JOHNSON *v.* BELL, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 605 F. 3d 333.

No. 10–1041. PARTH, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED *v.* POMONA VALLEY HOSPITAL MEDICAL CENTER. C. A. 9th Cir. Certiorari denied. Reported below: 630 F. 3d 794.

No. 10–1143. MONTELLO *v.* ACKERMAN. Ct. App. Ohio, Lake County. Certiorari denied.

No. 10–1148. MCI SALES & SERVICE, INC., FKA HAUSMAN BUS SALES, INC., ET AL. *v.* HINTON, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF HINTON, DECEASED, ET AL. Sup. Ct. Tex. Certiorari denied. Reported below: 329 S. W. 3d 475.

No. 10–1149. JOHNSON ET AL. *v.* HASLAM, GOVERNOR OF TENNESSEE, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 624 F. 3d 742.

No. 10–1154. ROHART *v.* MELSAR RISK MANAGEMENT SERVICES, INC., ET AL. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 48 So. 3d 854.

No. 10–1175. ASHFORD *v.* CITY OF RIVERDALE, GEORGIA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 389 Fed. Appx. 980.

No. 10–1181. TROUTMAN *v.* ESTATE OF TROUTMAN ET AL. Ct. App. Ohio, Montgomery County. Certiorari denied. Reported below: 189 Ohio. App. 3d 19, 937 N. E. 2d 173.

No. 10–1182. SIMMONS *v.* DEUEL ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 402 Fed. Appx. 282.

No. 10–1194. MARICOPA COUNTY, ARIZONA, ET AL. *v.* BRAILLARD ET AL. Ct. App. Ariz. Certiorari denied. Reported below: 224 Ariz. 481, 232 P. 3d 1263.

No. 10–1247. ROBLE *v.* MINNESOTA. Ct. App. Minn. Certiorari denied.

No. 10–1257. KAY ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION. C. A. D. C. Cir. Certiorari denied.

No. 10–1266. LEVY, INDEPENDENT EXECUTOR OF THE ESTATE OF LEVY, DECEASED *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 402 Fed. Appx. 979.

No. 10–1282. HOSSAINI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 407 Fed. Appx. 556.

No. 10–1286. ROGERS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 409 Fed. Appx. 607.

No. 10–1292. DANIEL CHAPTER ONE ET AL. *v.* FEDERAL TRADE COMMISSION. C. A. D. C. Cir. Certiorari denied. Reported below: 405 Fed. Appx. 505.

No. 10–1294. LUKE *v.* UNITED STATES. C. A. Armed Forces. Certiorari denied. Reported below: 69 M. J. 309.

No. 10–1323. UHS OF DELAWARE, INC. *v.* MASTERS, AKA JOHNSON. C. A. 8th Cir. Certiorari denied. Reported below: 631 F. 3d 464.

No. 10–8580. SHAHIN *v.* STROSSER ET AL. C. A. 3d Cir. Certiorari denied.

No. 10–8641. WILKINS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 10–8744. CARNEY *v.* CARNEY. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 46 So. 3d 605.

No. 10–8957. GREENE *v.* ARNONE, COMMISSIONER, CONNECTICUT DEPARTMENT OF CORRECTION. App. Ct. Conn. Certiorari denied. Reported below: 123 Conn. App. 121, 2 A. 3d 29.

No. 10–9069. MONROE *v.* KRIPPEL ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 399 Fed. Appx. 799.

No. 10–9253. EVANS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 10–9352. POST *v.* BRADSHAW, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 621 F. 3d 406.

No. 10–9474. BEATY *v.* ARIZONA. Super. Ct. Ariz., County of Maricopa. Certiorari denied.

No. 10–9533. BROWN *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 402 Ill. App. 3d 1183, 1 N. E. 3d 117.

No. 10–9537. ALEXANDER *v.* GRAMS, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 10–9538. BRADLEY *v.* CHANDLER ET AL. C. A. 8th Cir. Certiorari denied.

No. 10–9542. DANIELS *v.* BALLY'S ATLANTIC CITY ET AL. Super. Ct. N. J., App. Div. Certiorari denied.

No. 10–9547. SMITH *v.* FAIRVIEW RIDGES HOSPITAL. C. A. 8th Cir. Certiorari denied. Reported below: 625 F. 3d 1076.

No. 10–9549. SMITH *v.* WASHINGTON STATE REFORMATORY CORRECTIONAL COMPLEX ET AL. C. A. 11th Cir. Certiorari denied.

No. 10–9556. DREW *v.* MANPOWER OF SOUTHERN NEVADA ET AL. Sup. Ct. Nev. Certiorari denied. Reported below: 126 Nev. 706.

No. 10–9558. WILLIAMS *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 10–9567. BRADLEY *v.* HARRIET ET AL. C. A. 8th Cir. Certiorari denied.

No. 10–9572. HEINONEN *v.* SCOTT. App. Ct. Conn. Certiorari denied. Reported below: 124 Conn. App. 905, 4 A. 3d 355.

No. 10–9576. RAHEEM *v.* HALL, WARDEN. Sup. Ct. Ga. Certiorari denied.

No. 10–9578. SIMON *v.* GEORGIA ET AL. Ct. App. Ga. Certiorari denied.

No. 10–9579. SANFORD *v.* MASON ET AL. C. A. 6th Cir. Certiorari denied.

No. 10–9586. HAMILTON *v.* TEXAS. Ct. App. Tex., 4th Dist. Certiorari denied. Reported below: 300 S. W. 3d 14.

No. 10–9587. FLINN *v.* CORBITT ET AL. C. A. 6th Cir. Certiorari denied.

No. 10–9591. FULTON *v.* LAVALLEY, SUPERINTENDENT, GREAT MEADOW CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 10–9592. GUTIERREZ *v.* TEXAS. Sup. Ct. Tex. Certiorari denied.

No. 10–9602. MONACELLI *v.* FORD MOTOR CO. Sup. Ct. Fla. Certiorari denied. Reported below: 52 So. 3d 662.

No. 10–9606. WIGGINS *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 288 Ga. 169, 702 S. E. 2d 865.

No. 10–9607. WILLIAMS *v.* BAC HOME LOANS SERVICING LP, FKA COUNTRYWIDE HOME LOANS SERVICING LP, ET AL. C. A. 11th Cir. Certiorari denied.

No. 10–9609. WEEMS *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 49 So. 3d 1267.

No. 10–9610. WELLER *v.* MAHONEY, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 10–9612. NELSON *v.* LEWIS ET AL. Ct. App. Mich. Certiorari denied.

No. 10–9623. BLANKENSHIP *v.* SIMON, JUDGE, COUNTY COURT OF FLORIDA, ESCAMBIA COUNTY, ET AL. C. A. 11th Cir. Certiorari denied.

No. 10–9630. MILTON *v.* RICHARDS. C. A. 11th Cir. Certiorari denied.

No. 10–9633. MILLER *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 403 Ill. App. 3d 1104, 993 N. E. 2d 149.

No. 10–9639. SMITHSON *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 990 A. 2d 54.

No. 10–9641. DOWNS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 10–9642. CAVENDER *v.* MUDD ET AL. Ct. App. Ky. Certiorari denied.

No. 10–9648. WASHINGTON *v.* OHIO ET AL. C. A. 6th Cir. Certiorari denied.

No. 10–9687. McIntire *v.* Massachusetts. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 458 Mass. 257, 936 N. E. 2d 424.

No. 10–9710. Goodman *v.* Merit Systems Protection Board. C. A. Fed. Cir. Certiorari denied. Reported below: 397 Fed. Appx. 639.

No. 10–9722. DePace *v.* Massachusetts. Sup. Jud. Ct. Mass. Certiorari denied.

No. 10–9733. Stevenson *v.* Yates, Warden. C. A. 9th Cir. Certiorari denied. Reported below: 407 Fed. Appx. 178.

No. 10–9734. Koynok *v.* Lloyd et al. C. A. 3d Cir. Certiorari denied. Reported below: 405 Fed. Appx. 679.

No. 10–9802. Abidaoud *v.* Holder, Attorney General. C. A. 1st Cir. Certiorari denied.

No. 10–9819. Haywood *v.* Hillman, Chief Magistrate Judge, United States District Court for the Central District of California, et al. C. A. 9th Cir. Certiorari denied. Reported below: 398 Fed. Appx. 296.

No. 10–9843. Centeno *v.* Hardy, Warden. C. A. 7th Cir. Certiorari denied.

No. 10–9866. Engle *v.* Ohio. Ct. App. Ohio, Montgomery County. Certiorari denied. Reported below: 2010-Ohio-2636.

No. 10–9879. Barksdale *v.* Taylor, Acting Director, Illinois Department of Corrections, et al. C. A. 7th Cir. Certiorari denied.

No. 10–9890. Hearns *v.* Artus, Superintendent, Clinton Correctional Facility. C. A. 2d Cir. Certiorari denied.

No. 10–9896. Norwood *v.* Board of Trustees of University of Arkansas at Little Rock. C. A. 8th Cir. Certiorari denied. Reported below: 407 Fed. Appx. 986.

No. 10–9897. Sandoval *v.* Nebraska. Sup. Ct. Neb. Certiorari denied. Reported below: 280 Neb. 309, 788 N. W. 2d 172.

No. 10–9912. Fitzgerald *v.* Walsh, Superintendent, State Correctional Institution at Dallas, et al. C. A. 3d Cir. Certiorari denied.

No. 10–9923. ROGERS *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied.

No. 10–9930. T. G. *v.* NEW JERSEY DIVISION OF YOUTH AND FAMILY SERVICES. Super. Ct. N. J., App. Div. Certiorari denied. Reported below: 414 N. J. Super. 423, 999 A. 2d 471.

No. 10–9936. CHARLTON *v.* PEREZ, SUPERINTENDENT, BEDFORD HILLS CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied.

No. 10–9949. MARTINEZ *v.* RUNNELS, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 408 Fed. Appx. 103.

No. 10–9965. MIRANDA *v.* CHANDLER, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 405 Fed. Appx. 52.

No. 10–9997. WARREN *v.* HOBBS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 10–10000. RICHARDSON *v.* SOUTH CAROLINA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 409 Fed. Appx. 715.

No. 10–10014. PALMER *v.* RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied.

No. 10–10030. DURHAM *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 419 Fed. Appx. 77.

No. 10–10058. HURTADO *v.* HOLDER, ATTORNEY GENERAL, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 401 Fed. Appx. 453.

No. 10–10061. CRIPPEN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 627 F. 3d 1056.

No. 10–10064. DAVIDSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 399 Fed. Appx. 525.

No. 10–10065. REGAN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 627 F. 3d 1348.

No. 10–10073. BARNES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 411 Fed. Appx. 365.

No. 10–10078. LOPEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 10–10081. SELF *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 414 Fed. Appx. 611.

No. 10–10082. ABELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 401 Fed. Appx. 751.

No. 10–10083. BUTLER *v.* JETT, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied.

No. 10–10086. YOUNG *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 408 Fed. Appx. 838.

No. 10–10089. RICHARDSON *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 10–10092. FUENTES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 411 Fed. Appx. 737.

No. 10–10093. PRESBERRY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 407 Fed. Appx. 988.

No. 10–10098. FARRINGTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 401 Fed. Appx. 784.

No. 10–10099. MCCOLLOUGH *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 7 A. 3d 519.

No. 10–10103. BLANCHARD *v.* BENNETT ET AL. C. A. 3d Cir. Certiorari denied.

No. 10–10107. ARCHULETA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 10–10113. REYNOSO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 10–10116. RAHIM *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 10–10118. PALACIOS-HERRERA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 403 Fed. Appx. 825.

No. 10–10128. DAVIS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 413 Fed. Appx. 312.

No. 10–10129. CAMPOS-PADILLA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 398 Fed. Appx. 254.

No. 10–10130. Diaz-Lopez *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 625 F. 3d 1198.

No. 10–10131. De Paz-Flores *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 408 Fed. Appx. 839.

No. 10–10134. Rivers *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 408 Fed. Appx. 661.

No. 10–10136. Schafer et al. *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 625 F. 3d 629.

No. 10–10144. Hambrick *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 630 F. 3d 742.

No. 10–10145. Woods et ux. *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 395 Fed. Appx. 44.

No. 10–10146. Castaneda-Pineda *v.* United States. C. A. 4th Cir. Certiorari denied.

No. 10–10148. Landry *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 631 F. 3d 597.

No. 10–10149. Leyva-Martinez *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 632 F. 3d 568.

No. 10–10154. Tarin *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 408 Fed. Appx. 835.

No. 10–10157. Anderson *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 420 Fed. Appx. 897.

No. 10–10161. Anderson *v.* United States. C. A. 6th Cir. Certiorari denied.

No. 10–10168. Richarte *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 413 Fed. Appx. 769.

No. 10–10169. Wilcox *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 631 F. 3d 740.

No. 10–10171. Carmichael *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 408 Fed. Appx. 769.

No. 10–10174. Moore *v.* United States. C. A. 7th Cir. Certiorari denied.

No. 10–10176. LEE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 414 Fed. Appx. 458.

No. 10–10179. MUELLER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 405 Fed. Appx. 648.

No. 10–10183. WILKINSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 633 F. 3d 938.

No. 10–10184. ZAMORA-VILLELA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 411 Fed. Appx. 114.

No. 10–10185. VARA-DAVILA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 410 Fed. Appx. 395.

No. 10–10188. WESTCOTT *v.* OUTLAW, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 10–10190. PENA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 407 Fed. Appx. 787.

No. 10–10195. CARNEGLIA, AKA CANIG *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 403 Fed. Appx. 581.

No. 10–10196. THOMAS ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 625 F. 3d 410.

No. 10–10198. CARTER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 10–10214. WILLIAMS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 10–751. KHADR ET AL. *v.* OBAMA, PRESIDENT OF THE UNITED STATES, ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE BREYER and JUSTICE SOTOMAYOR would grant the petition for writ of certiorari. JUSTICE KAGAN took no part in the consideration or decision of this petition.

No. 10–854. ROSARIO *v.* GRIFFIN, SUPERINTENDENT, SOUTHPORT CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 601 F. 3d 118.

No. 10–1208. BENGIS ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the

consideration or decision of this petition. Reported below: 631 F. 3d 33.

No. 10–9732. HAQUE *v.* IMMIGRATION AND CUSTOMS ENFORCEMENT ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

No. 10–9737. HAQUE *v.* DEPARTMENT OF HOMELAND SECURITY ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

No. 10–9744. ROSSATY, AKA ROSSATTI MENDEZ *v.* HOLDER, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

Rehearing Denied

No. 10–887. DIXON *v.* EAST COAST MUSIC MALL, 562 U. S. 1287;

No. 10–973. SMITH *v.* FRIEDMAN ET AL., *ante*, p. 918;

No. 10–1071. AHMADI *v.* TEXAS, *ante*, p. 918;

No. 10–8454. BENSON *v.* LUTTRELL ET AL., 562 U. S. 1303;

No. 10–8495. YATES *v.* OHIO, 562 U. S. 1294;

No. 10–8513. JONES *v.* ROTHENBERG, JUDGE, CIRCUIT COURT OF FLORIDA, MIAMI-DADE COUNTY, *ante*, p. 906;

No. 10–8518. JUDD *v.* NEW MEXICO, *ante*, p. 906;

No. 10–8771. WHITE *v.* JONES ET AL., *ante*, p. 920;

No. 10–9199. MYTON *v.* UNITED STATES, *ante*, p. 912; and

No. 10–9479. JONES *v.* UNITED STATES, *ante*, p. 950. Petitions for rehearing denied.

No. 10–7328. MANN *v.* BUSS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, 562 U. S. 1151. Motion for leave to file petition for rehearing denied.

MAY 25, 2011

Miscellaneous Orders

No. 10A1138 (10–10608). BEATY *v.* ARIZONA. Super. Ct. Ariz., County of Maricopa. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied.

No. 10–10338 (10A1137). IN RE BEATY. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

Certiorari Denied

No. 10–10675 (10A1153). BEATY *v.* BREWER, GOVERNOR OF ARIZONA, ET AL. C. A. 9th Cir. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Certiorari denied. Reported below: 649 F. 3d 1071.

MAY 27, 2011

Rehearing Denied

No. 09–11519 (10A1020). BRADFORD *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 562 U. S. 1177. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Motion for leave to file petition for rehearing denied.

MAY 31, 2011

Appeal Dismissed

No. 09–1232. CALIFORNIA STATE REPUBLICAN LEGISLATOR INTERVENORS ET AL. *v.* PLATA ET AL. Appeal from D. C. E. D. & D. C. N. D. Cal. The Court affirmed the judgment below in *Brown* v. *Plata*, *ante*, p. 493. Therefore, appeal dismissed. Reported below: 922 F. Supp. 2d 882.

Certiorari Dismissed

No. 10–9868. HONG MAI *v.* ASTRUE, COMMISSIONER OF SOCIAL SECURITY, ET AL. C. A. 2d Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

Miscellaneous Orders

No. D–2521. IN RE DISCIPLINE OF HARRIS-SMITH. It having been reported that Bridgette Miriam Harris-Smith, of Washington, D. C., has died, the rule to show cause, issued on October 4, 2010 [562 U. S. 811], is discharged.

No. D–2539. In re Disbarment of Stolar. Disbarment entered. [For earlier order herein, see 562 U. S. 814.]

No. D–2540. In re Disbarment of Nager. Disbarment entered. [For earlier order herein, see 562 U. S. 814.]

No. D–2542. In re Disbarment of Bailey. Disbarment entered. [For earlier order herein, see 562 U. S. 814.]

No. D–2543. In re Disbarment of Fox. Disbarment entered. [For earlier order herein, see 562 U. S. 814.]

No. D–2544. In re Disbarment of Lubin. Disbarment entered. [For earlier order herein, see 562 U. S. 814.]

No. D–2545. In re Disbarment of Campbell. Disbarment entered. [For earlier order herein, see 562 U. S. 815.]

No. D–2546. In re Disbarment of Neel. Disbarment entered. [For earlier order herein, see 562 U. S. 815.]

No. D–2548. In re Disbarment of Menyhart. Disbarment entered. [For earlier order herein, see 562 U. S. 815.]

No. D–2549. In re Disbarment of Rayvis. Disbarment entered. [For earlier order herein, see 562 U. S. 815.]

No. D–2551. In re Disbarment of McCartney. Disbarment entered. [For earlier order herein, see 562 U. S. 815.]

No. D–2552. In re Disbarment of Shemin. Disbarment entered. [For earlier order herein, see 562 U. S. 815.]

No. D–2553. In re Disbarment of Gassaway. Disbarment entered. [For earlier order herein, see 562 U. S. 816.]

No. D–2554. In re Disbarment of Lile. Disbarment entered. [For earlier order herein, see 562 U. S. 816.]

No. D–2556. In re Disbarment of Stocker. Disbarment entered. [For earlier order herein, see 562 U. S. 816.]

No. D–2557. In re Disbarment of Grabinski. Disbarment entered. [For earlier order herein, see 562 U. S. 816.]

No. D–2558. In re Disbarment of Brown. Disbarment entered. [For earlier order herein, see 562 U. S. 816.]

No. D–2559. IN RE DISBARMENT OF STANTON. Disbarment entered. [For earlier order herein, see 562 U. S. 816.]

No. D–2561. IN RE DISBARMENT OF CRAWFORD. Disbarment entered. [For earlier order herein, see 562 U. S. 817.]

No. D–2562. IN RE DISBARMENT OF RADOLOVICH. Disbarment entered. [For earlier order herein, see 562 U. S. 817.]

No. 10–680. HOWES, WARDEN *v.* FIELDS. C. A. 6th Cir. [Certiorari granted, 562 U. S. 1199.] Motion of petitioner to dispense with printing the joint appendix granted.

No. 10–694. JUDULANG *v.* HOLDER, ATTORNEY GENERAL. C. A. 9th Cir. [Certiorari granted, *ante*, p. 935.] Motion of petitioner to dispense with printing the joint appendix granted.

No. 10–930. RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS *v.* VALENCIA GONZALES. C. A. 9th Cir. The Acting Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 10–1064. FARINA *v.* NOKIA, INC., ET AL. C. A. 3d Cir. The Acting Solicitor General is invited to file a brief in this case expressing the views of the United States. THE CHIEF JUSTICE and JUSTICE BREYER took no part in the consideration or decision of this petition.

No. 10–9204. CHAVEZ ET AL. *v.* MEDICAL ASSURANCE CO., INC., ET AL. Sup. Ct. Ark.; and

No. 10–9902. SEYDY *v.* HOLDER, ATTORNEY GENERAL. C. A. 6th Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until June 21, 2011, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 10–10327. IN RE POIRIER. Petition for writ of habeas corpus denied.

No. 10–10274. IN RE KIDERLEN. Petition for writ of mandamus denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

Certiorari Granted

No. 10–8974. PERRY *v.* NEW HAMPSHIRE. Sup. Ct. N. H. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted.

Certiorari Denied

No. 10–914. Poonja, Trustee *v.* Tramiel. C. A. 9th Cir. Certiorari denied. Reported below: 617 F. 3d 1102.

No. 10–937. Damra *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 621 F. 3d 474.

No. 10–1031. National Corn Growers Assn. et al. *v.* Environmental Protection Agency et al. C. A. D. C. Cir. Certiorari denied. Reported below: 613 F. 3d 266.

No. 10–1045. Brown, Individually and as Personal Representative of the Estate of Brown, Deceased, et al. *v.* Callahan, Individually and in His Official Capacity as Sheriff, Wichita County, Texas. C. A. 5th Cir. Certiorari denied. Reported below: 623 F. 3d 249.

No. 10–1129. Aldridge et al. *v.* City of Memphis, Tennessee, et al. C. A. 6th Cir. Certiorari denied. Reported below: 404 Fed. Appx. 29.

No. 10–1160. Giesing *v.* Williams, Warden, et al. C. A. 9th Cir. Certiorari denied.

No. 10–1162. Gertskis *v.* New York City Department of Health and Mental Hygiene et al. C. A. 2d Cir. Certiorari denied. Reported below: 375 Fed. Appx. 138.

No. 10–1168. Hawkins, by His Next Friend Hawkins, Individually and on Behalf of All Others Similarly Situated *v.* Citicorp Credit Services, Inc. (USA), et al. C. A. 4th Cir. Certiorari denied. Reported below: 405 Fed. Appx. 789.

No. 10–1179. Hamilton et al. *v.* City of Romulus, Michigan, et al. C. A. 6th Cir. Certiorari denied. Reported below: 409 Fed. Appx. 826.

No. 10–1184. Hafeez-Bey *v.* Texas. Ct. App. Tex., 9th Dist. Certiorari denied.

No. 10–1187. Brown *v.* Florida Bar et al. C. A. 11th Cir. Certiorari denied. Reported below: 406 Fed. Appx. 434.

No. 10–1189. Seattle Collision Center, Inc., et al. *v.* American States Insurance Co. et al. C. A. 9th Cir. Certiorari denied. Reported below: 403 Fed. Appx. 249.

No. 10–1196. NOVARTIS PHARMACEUTICALS CORP. *v.* STEVENS. Sup. Ct. Mont. Certiorari denied. Reported below: 358 Mont. 474, 247 P. 3d 244.

No. 10–1206. DOE ET AL. *v.* OBAMA, PRESIDENT OF THE UNITED STATES, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 631 F. 3d 157.

No. 10–1236. WILL *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 329 Wis. 2d 712, 790 N. W. 2d 544.

No. 10–1245. LUDWIG *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 329 Wis. 2d 710, 790 N. W. 2d 543.

No. 10–1246. JACOBS *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 4 A. 3d 690.

No. 10–1269. ROHART *v.* E. H. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 49 So. 3d 1281.

No. 10–1274. AGNEW *v.* SUSSEX CONDOMINIUM UNIT OWNERS ASSN. Sup. Ct. Va. Certiorari denied.

No. 10–1287. WHITE *v.* DISTRICT OF COLUMBIA BOARD ON PROFESSIONAL RESPONSIBILITY. Ct. App. D. C. Certiorari denied. Reported below: 11 A. 3d 1226.

No. 10–1315. EDWARDS *v.* DISTRICT OF COLUMBIA BOARD ON PROFESSIONAL RESPONSIBILITY. Ct. App. D. C. Certiorari denied. Reported below: 990 A. 2d 501.

No. 10–1328. DAVIS ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 402 Fed. Appx. 915.

No. 10–1338. MUSAR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 405 Fed. Appx. 857.

No. 10–8135. LEWIS *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 57 So. 3d 807.

No. 10–8526. VASQUEZ *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 611 F. 3d 325.

No. 10–8548. FIGUEROA-CARTAGENA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 612 F. 3d 69.

No. 10–8558. Rodriguez Martinez *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 399 Fed. Appx. 919.

No. 10–8562. Castaneda-Alfaro *v.* United States (Reported below: 400 Fed. Appx. 813); and Isidro-Acosta *v.* United States (399 Fed. Appx. 25). C. A. 5th Cir. Certiorari denied.

No. 10–8732. Keeter *v.* Thaler, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied.

No. 10–8843. Brown *v.* California. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 10–9644. Gaston *v.* Curry, Warden. C. A. 9th Cir. Certiorari denied. Reported below: 406 Fed. Appx. 144.

No. 10–9662. Sanabria *v.* Ricci, Associate Administrator, New Jersey State Prison, et al. C. A. 3d Cir. Certiorari denied.

No. 10–9664. Smith *v.* Virginia. Sup. Ct. Va. Certiorari denied.

No. 10–9665. Scott *v.* Padula et al. C. A. 4th Cir. Certiorari denied. Reported below: 423 Fed. Appx. 310.

No. 10–9670. Butler *v.* Taylor, Acting Director, Illinois Department of Corrections, et al. C. A. 7th Cir. Certiorari denied.

No. 10–9675. Caballero *v.* Texas. Ct. Crim. App. Tex. Certiorari denied.

No. 10–9693. Kokal *v.* Buss, Secretary, Florida Department of Corrections, et al. C. A. 11th Cir. Certiorari denied. Reported below: 623 F. 3d 1331.

No. 10–9696. Bell *v.* Griffin et al. C. A. 7th Cir. Certiorari denied.

No. 10–9697. Tharpe *v.* Thaler, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied. Reported below: 628 F. 3d 719.

No. 10–9705. LeCroy *v.* Buss, Secretary, Florida Department of Corrections, et al. C. A. 11th Cir. Certiorari denied. Reported below: 397 Fed. Appx. 554.

No. 10–9706. Harris *v.* Board of Supervisors of Louisiana State University & Agricultural & Mechanical College. C. A. 5th Cir. Certiorari denied. Reported below: 409 Fed. Appx. 725.

No. 10–9707. Haile *v.* Zula, LLC. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 10–9716. Gibbs *v.* Kirkpatrick, Superintendent, Wende Correctional Facility. C. A. 2d Cir. Certiorari denied. Reported below: 402 Fed. Appx. 566.

No. 10–9719. Cray *v.* California. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 10–9720. Digsby *v.* Buss, Secretary, Florida Department of Corrections. C. A. 11th Cir. Certiorari denied. Reported below: 627 F. 3d 823.

No. 10–9729. Barrientos *v.* Texas. Ct. App. Tex., 13th Dist. Certiorari denied.

No. 10–9748. Peters *v.* Nooth, Superintendent, Snake River Correctional Institution. C. A. 9th Cir. Certiorari denied.

No. 10–9749. Promotor *v.* Pollard, Warden. C. A. 7th Cir. Certiorari denied. Reported below: 628 F. 3d 878.

No. 10–9755. Webster *v.* Buss, Secretary, Florida Department of Corrections. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 46 So. 3d 1139.

No. 10–9765. Muhammad *v.* Martel, Warden. C. A. 9th Cir. Certiorari denied.

No. 10–9766. Pugh *v.* Cooper, Warden. C. A. 5th Cir. Certiorari denied.

No. 10–9770. Thomas *v.* Ohio. Sup. Ct. Ohio. Certiorari denied. Reported below: 126 Ohio St. 3d 1579, 934 N. E. 2d 353.

No. 10–9776. MANKO *v.* LENOX HILL HOSPITAL. Ct. App. N. Y. Certiorari denied. Reported below: 16 N. Y. 3d 826, 946 N. E. 2d 177.

No. 10–9777. JONES *v.* CLARKE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 406 Fed. Appx. 718.

No. 10–9780. PARRA *v.* LEE, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 10–9817. HENDERSON *v.* DEPARTMENT OF HEALTH AND HUMAN SERVICES. C. A. 5th Cir. Certiorari denied. Reported below: 385 Fed. Appx. 388.

No. 10–9853. CAMARGO *v.* MCDANIEL, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 10–9877. BIGGINS *v.* BIDEN, ATTORNEY GENERAL OF DELAWARE, ET AL. Sup. Ct. Del. Certiorari denied. Reported below: 9 A. 3d 475.

No. 10–9893. BOZIC *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 997 A. 2d 1211.

No. 10–9918. ROMANCE *v.* BRADT, SUPERINTENDENT, ELMIRA CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 391 Fed. Appx. 89.

No. 10–9922. DUNN *v.* NOE ET AL. C. A. 9th Cir. Certiorari denied.

No. 10–9931. TENIENTE *v.* MURPHY, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 412 Fed. Appx. 96.

No. 10–9956. SHELTON *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied.

No. 10–9957. SHELTON *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied.

No. 10–9964. POWELL *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 56 So. 3d 988.

No. 10–9977. LORD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 404 Fed. Appx. 773.

No. 10–9987. LAGAS *v.* NEW YORK DEPARTMENT OF CORRECTIONAL SERVICES. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 78 App. Div. 3d 1344, 911 N. Y. S. 2d 242.

No. 10–9993. VARGAS SOTO *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 51 Cal. 4th 229, 245 P. 3d 410.

No. 10–10046. DELKER *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 50 So. 3d 300.

No. 10–10066. KELSON *v.* LOUISIANA. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 40 So. 3d 1194.

No. 10–10084. ARMWOOD *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 10–10106. ATKINS *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 10–10140. MORGANO *v.* RICCI, ADMINISTRATOR, NEW JERSEY STATE PRISON. C. A. 3d Cir. Certiorari denied.

No. 10–10165. BROWN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 416 Fed. Appx. 150.

No. 10–10194. LAMONDA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 384 Fed. Appx. 944.

No. 10–10197. CASTRO-FONSECA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 423 Fed. Appx. 351.

No. 10–10200. SLADE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 631 F. 3d 185.

No. 10–10202. STATON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 626 F. 3d 584.

No. 10–10203. RANKIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 480 Fed. Appx. 750.

No. 10–10212. JOHNSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 405 Fed. Appx. 746.

No. 10–10219. REDLIGHTNING *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 624 F. 3d 1090.

No. 10–10221. SWEENEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 402 Fed. Appx. 37.

No. 10–10225. JACKSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 633 F. 3d 703.

No. 10–10227. BAYARD *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 642 F. 3d 59.

No. 10–10229. BRITO-RODRIGUEZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 10–10235. JOYNER *v.* O'BRIEN, WARDEN. C. A. D. C. Cir. Certiorari denied.

No. 10–10239. BUTLER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 10–10240. ALEXANDER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 402 Fed. Appx. 970.

No. 10–10241. BOLDT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 409 Fed. Appx. 59.

No. 10–10242. NAVA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 624 F. 3d 226.

No. 10–10250. JACKSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 403 Fed. Appx. 919.

No. 10–10251. CAROTHERS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 630 F. 3d 959.

No. 10–10257. DIOSDADO-STAR, AKA GUERRERA, AKA GUITIEREZ-LLANAS, AKA COLLINS, AKA STAR, AKA VILLEREAL-JULIO, AKA GONZALEZ-RIVERA, AKA JORGE-VILLAREAL, AKA HERRERA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 630 F. 3d 359.

No. 10–10262. RAMAGE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 417 Fed. Appx. 292.

No. 10–10264. STOKES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 631 F. 3d 802.

No. 10–10265. JOHNSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 409 Fed. Appx. 688.

No. 10–10278. DICKSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 632 F. 3d 186.

No. 10–10282. WILLIAMS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 631 F. 3d 110.

No. 10–10283. WHITE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 10–10284. AYALA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 10–10288. GONZALEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 414 Fed. Appx. 189.

No. 10–10289. HERNANDEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 411 Fed. Appx. 265.

No. 10–10290. FERGUSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 412 Fed. Appx. 974.

No. 10–10292. HAIRSTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 409 Fed. Appx. 668.

No. 10–10299. HUGHES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 410 Fed. Appx. 285.

No. 10–10301. GONZALEZ-GONZALEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 409 Fed. Appx. 996.

No. 10–10303. MITCHELL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 405 Fed. Appx. 435.

No. 10–10308. MONGHAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 409 Fed. Appx. 872.

No. 10–10312. BATES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 10–961. KUMAR *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 617 F. 3d 612.

No. 10–1038. BLACK ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 625 F. 3d 386.

No. 10–1170. VAN ALLEN ET AL. *v.* SPARGO ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 391 Fed. Appx. 55.

No. 10–8540. SMITH, AKA BARBER, ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 398 Fed. Appx. 938.

No. 10–9846. TIMMS *v.* JOHNS, WARDEN. C. A. 4th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 627 F. 3d 525.

No. 10–10252. STAPLES *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

No. 10–10255. SHELTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

Rehearing Denied

No. 09–1088. CULLEN, ACTING WARDEN *v.* PINHOLSTER, *ante*, p. 170;

No. 10–7588. PETSOULES *v.* FLORIDA, *ante*, p. 918;

No. 10–8317. FOSTER *v.* TEXAS, 562 U. S. 1194;

No. 10–8610. NEAL *v.* HOOD ET AL., *ante*, p. 907;

No. 10–9221. STRADFORD, AKA SELLERS *v.* UNITED STATES, *ante*, p. 924;

No. 10–9233. IN RE HIEN ANH DAO, *ante*, p. 903;

No. 10–9461. IN RE PENNICK, *ante*, p. 917; and

No. 10–9721. IN RE DOYLE, *ante*, p. 934. Petitions for rehearing denied.

No. 10–9454. DANIELS *v.* UNITED STATES, *ante*, p. 956. Petition for rehearing denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

JUNE 2, 2011

Dismissal Under Rule 46

No. 10–514. STOK & ASSOCIATES, P. A. *v.* CITIBANK, N. A. C. A. 11th Cir. [Certiorari granted, 562 U. S. 1215.] Writ of certiorari dismissed under this Court's Rule 46.1.

JUNE 6, 2011

Certiorari Granted—Vacated and Remanded

No. 10–772. CITY OF HAZLETON, PENNSYLVANIA *v.* LOZANO ET AL. C. A. 3d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Chamber of Commerce of United States of America* v. *Whiting*, *ante*, p. 582. Reported below: 620 F. 3d 170.

Certiorari Dismissed

No. 10–9826. FOSTER *v.* BUCHANAN ET AL. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 10–9915. VAN STUYVESANT *v.* CONWAY, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY. C. A. 2d Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 10–9937. GILLARD *v.* SOUTHERN NEW ENGLAND SCHOOL OF LAW. C. A. 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)*.

Miscellaneous Orders

No. 10A1051. PEREZ *v.* ENAX, DIRECTOR, FORT BEND COUNTY ADULT COMMUNITY SUPERVISION AND CORRECTIONS DEPARTMENT. Application for certificate of appealability, addressed to JUSTICE SOTOMAYOR and referred to the Court, denied.

No. D–2564. IN RE DISBARMENT OF CRAIG. Disbarment entered. [For earlier order herein, see 562 U. S. 817.]

No. D–2565. IN RE DISBARMENT OF TOLEN. Disbarment entered. [For earlier order herein, see 562 U. S. 817.]

No. D–2566. IN RE DISBARMENT OF SCHWARTZ. Disbarment entered. [For earlier order herein, see 562 U. S. 817.]

No. D–2567. In re Disbarment of Mazur. Disbarment entered. [For earlier order herein, see 562 U. S. 817.]

No. D–2569. In re Disbarment of Edelson. Disbarment entered. [For earlier order herein, see 562 U. S. 818.]

No. D–2571. In re Disbarment of Moyler. Disbarment entered. [For earlier order herein, see 562 U. S. 818.]

No. D–2572. In re Disbarment of Stone. Disbarment entered. [For earlier order herein, see 562 U. S. 818.]

No. D–2573. In re Disbarment of McPherson. Disbarment entered. [For earlier order herein, see 562 U. S. 818.]

No. D–2574. In re Disbarment of LeBlanc. Disbarment entered. [For earlier order herein, see 562 U. S. 818.]

No. D–2575. In re Disbarment of Ponds. Disbarment entered. [For earlier order herein, see 562 U. S. 819.]

No. D–2576. In re Disbarment of Malkus. Disbarment entered. [For earlier order herein, see 562 U. S. 1039.]

No. D–2578. In re Disbarment of Kronemyer. Disbarment entered. [For earlier order herein, see 562 U. S. 1039.]

No. D–2579. In re Disbarment of Chin. Disbarment entered. [For earlier order herein, see 562 U. S. 1040.]

No. D–2580. In re Disbarment of Hunt. Disbarment entered. [For earlier order herein, see 562 U. S. 1040.]

No. 10M111. Sealed Defendant *v.* United States. Motion for leave to file petition for writ of certiorari under seal with redacted copies for the public record granted.

No. 10M112. Gomez *v.* California. Motion for leave to file petition for writ of certiorari under seal denied without prejudice to filing a renewed motion together with either a redacted petition or an explanation as to why the petition may not be redacted within 30 days.

No. 10–9801. In re Vinson; and

No. 10–10381. In re Smith. Petitions for writs of mandamus denied.

No. 10–9913. In re Davis. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of mandamus dismissed. See this Court's Rule 39.8.

Certiorari Granted

No. 10–879. Kurns, Executrix of the Estate of Corson, Deceased, et al. *v.* Railroad Friction Products Corp. et al. C. A. 3d Cir. Certiorari granted. Reported below: 620 F. 3d 392.

No. 10–1001. Martinez *v.* Ryan, Director, Arizona Department of Corrections. C. A. 9th Cir. Certiorari granted. Reported below: 623 F. 3d 731.

Certiorari Denied

No. 10–821. Quinn, Governor of Illinois *v.* Judge et al. C. A. 7th Cir. Certiorari denied. Reported below: 612 F. 3d 537.

No. 10–871. General Electric Co. *v.* Jackson, Administrator, Environmental Protection Agency, et al. C. A. D. C. Cir. Certiorari denied. Reported below: 610 F. 3d 110.

No. 10–933. Wellington *v.* Holder, Attorney General. C. A. 2d Cir. Certiorari denied. Reported below: 623 F. 3d 115.

No. 10–980. Griffith *v.* Rednour, Warden. C. A. 7th Cir. Certiorari denied. Reported below: 614 F. 3d 328.

No. 10–1029. Martinez et al. *v.* Regents of the University of California et al. Sup. Ct. Cal. Certiorari denied. Reported below: 50 Cal. 4th 1277, 241 P. 3d 855.

No. 10–1075. Snipes *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 611 F. 3d 855.

No. 10–1174. Alvarez *v.* Des Moines Bolt Supply, Inc. C. A. 8th Cir. Certiorari denied. Reported below: 626 F. 3d 410.

No. 10–1192. Jones *v.* Ohio. Ct. App. Ohio, Jefferson County. Certiorari denied. Reported below: 2010-Ohio-2704.

No. 10–1197. Bolliger *v.* Kane. Sup. Ct. Wash. Certiorari denied.

No. 10–1199. EXTREME NETWORKS, INC. *v.* ENTERASYS NETWORKS, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 395 Fed. Appx. 709.

No. 10–1201. MARICOPA COUNTY SHERIFF'S DEPARTMENT ET AL. *v.* BYRD. C. A. 9th Cir. Certiorari denied. Reported below: 629 F. 3d 1135.

No. 10–1203. EUBANKS *v.* TEXAS. Ct. App. Tex., 1st Dist. Certiorari denied. Reported below: 326 S. W. 3d 231.

No. 10–1212. STINE *v.* YARNALL. C. A. 9th Cir. Certiorari denied. Reported below: 412 Fed. Appx. 13.

No. 10–1223. CURRY *v.* MARSHALL, CHIEF JUSTICE, SUPREME JUDICIAL COURT OF MASSACHUSETTS, ET AL. C. A. 1st Cir. Certiorari denied.

No. 10–1229. BROUGHMAN *v.* CARVER. C. A. 4th Cir. Certiorari denied. Reported below: 624 F. 3d 670.

No. 10–1232. ANALYTICAL DIAGNOSTIC LABS, INC. *v.* KUSEL ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 626 F. 3d 135.

No. 10–1241. BLACK ET AL. *v.* METRO, OREGON. Ct. App. Ore. Certiorari denied. Reported below: 229 Ore. App. 210, 211 P. 3d 302.

No. 10–1252. BOKHARI *v.* HOLDER, ATTORNEY GENERAL. C. A. 5th Cir. Certiorari denied. Reported below: 622 F. 3d 357.

No. 10–1278. FLINT *v.* ARMSTRONG, JUDGE, DISTRICT COURT OF KENTUCKY, JEFFERSON COUNTY. C. A. 6th Cir. Certiorari denied.

No. 10–1291. CUADRA *v.* HOUSTON INDEPENDENT SCHOOL DISTRICT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 626 F. 3d 808.

No. 10–1300. PEEK-A-BOO LOUNGE OF BRADENTON, INC., DBA PEEK-A-BOO LOUNGE *v.* MANATEE COUNTY, FLORIDA. C. A. 11th Cir. Certiorari denied. Reported below: 630 F. 3d 1346.

No. 10–1307. ZEKRI ET AL. *v.* MACY'S RETAIL HOLDINGS, INC. C. A. 11th Cir. Certiorari denied.

No. 10–1309. PETERSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 632 F. 3d 1038.

No. 10–1312. VICKERS *v.* WEEKS MARINE, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 414 Fed. Appx. 656.

No. 10–1326. FULTON *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 402 Ill. App. 3d 1185, 1 N. E. 3d 118.

No. 10–1327. KIVISTO *v.* FLORIDA BAR. Sup. Ct. Fla. Certiorari denied. Reported below: 49 So. 3d 747.

No. 10–1342. AMEDSON *v.* WASHINGTON STATE BOARD OF PHARMACY ET AL. Ct. App. Wash. Certiorari denied. Reported below: 157 Wash. App. 1037.

No. 10–1345. BRITTON *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 1st Cir. Certiorari denied.

No. 10–1352. WADSWORTH ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 400 Fed. Appx. 289.

No. 10–1362. HERDEAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 10–1364. HENRY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 403 Fed. Appx. 137.

No. 10–7312. WEBSTER *v.* COOPER, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 10–7499. TYLMAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 618 F. 3d 619.

No. 10–7715. ESCOBAR *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 383 Fed. Appx. 858.

No. 10–8221. PITCHFORD *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 401 Ill. App. 3d 826, 929 N. E. 2d 655.

No. 10–8240. ALLEN *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 401 Ill. App. 3d 840, 929 N. E. 2d 583.

No. 10–8294. CATO *v.* SWARTHOUT, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 10–8419. MARSHALL *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 45 So. 3d 470.

No. 10–8615. TORRES-PINDAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 400 Fed. Appx. 839.

No. 10–8806. MARTIN *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 607 Pa. 165, 5 A. 3d 177.

No. 10–8825. GLYNN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 379 Fed. Appx. 84.

No. 10–9039. DUHANEY *v.* HOLDER, ATTORNEY GENERAL. C. A. 3d Cir. Certiorari denied. Reported below: 621 F. 3d 340.

No. 10–9095. WRIGHT *v.* CRAIG ET AL. C. A. 9th Cir. Certiorari denied.

No. 10–9189. COGSWELL *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist., Div. 1. Certiorari denied.

No. 10–9222. HENDERSON *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 626 F. 3d 773.

No. 10–9229. BECKER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 625 F. 3d 1309.

No. 10–9260. IDE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 624 F. 3d 666.

No. 10–9261. GRAHAM *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 622 F. 3d 445.

No. 10–9539. PRITCHARD *v.* HAYDEN. C. A. 7th Cir. Certiorari denied.

No. 10–9783. NEAL *v.* RADDATZ ET AL. C. A. 6th Cir. Certiorari denied.

No. 10–9785. REYES *v.* LEE, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 10–9787. KARUPAIYAN ET AL. *v.* BROWN ET AL. Ct. App. Ark. Certiorari denied.

No. 10–9788. JONES *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 53 So. 3d 230.

No. 10–9791. RICKS *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 10–9793. QUIRE *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied.

No. 10–9795. CASTLEMAN *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 10–9796. CUMBERLAND *v.* MIRANDE. Ct. App. Ohio, Hamilton County. Certiorari denied.

No. 10–9803. BLACKHOUSE *v.* CONNELLY. Sup. Jud. Ct. Me. Certiorari denied.

No. 10–9806. BARROS *v.* WETZEL, ACTING SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 3d Cir. Certiorari denied.

No. 10–9811. GREER *v.* SAFEWAY, INC., ET AL. C. A. 9th Cir. Certiorari denied.

No. 10–9812. HARRIS *v.* CITY OF AUGUSTA, GEORGIA, ET AL. C. A. 11th Cir. Certiorari denied.

No. 10–9813. CRIM *v.* BAYSHORE OF NAPLES, INC. Sup. Ct. Fla. Certiorari denied. Reported below: 39 So. 3d 320.

No. 10–9820. HUBLER *v.* LANDER. C. A. 10th Cir. Certiorari denied. Reported below: 413 Fed. Appx. 81.

No. 10–9822. GALEAS, AKA GEVARA *v.* NEELY. C. A. 4th Cir. Certiorari denied. Reported below: 412 Fed. Appx. 650.

No. 10–9823. FERRIS *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 48 So. 3d 54.

No. 10–9825. REED *v.* SYMMES, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 10–9829. HEADE *v.* WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY. C. A. D. C. Cir. Certiorari denied.

No. 10–9833. DELEON MARTINEZ *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 327 S. W. 3d 727.

No. 10–9852. EARP *v.* MARTEL, ACTING WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 623 F. 3d 1065.

No. 10–9860. WHITLEY *v.* NEVADA. Sup. Ct. Nev. Certiorari denied.

No. 10–9862. WEST *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied.

No. 10–9869. LITTLE *v.* WARREN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 10–9872. DOANE *v.* CLARKE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 387 Fed. Appx. 424.

No. 10–9874. ORTIZ *v.* LEE, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 10–9876. BISHOP *v.* TOYS "R" US, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 385 Fed. Appx. 38.

No. 10–9880. WHITLEY *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 10–9881. TERRELL *v.* WOODS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 10–9883. WILLIAMS *v.* TEXAS. Ct. App. Tex., 2d Dist. Certiorari denied.

No. 10–9884. TALLEY *v.* CITY OF ATLANTIC CITY, NEW JERSEY, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 406 Fed. Appx. 584.

No. 10–9885. WINDING *v.* GEO GROUP, INC. C. A. 5th Cir. Certiorari denied.

No. 10–9892. BEGELTON *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 10–9959. CREAGER *v.* WEST VIRGINIA. Cir. Ct. Berkeley County, W. Va. Certiorari denied.

No. 10–9982. ARCHIBEQUE *v.* CALIFORNIA. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 10–10004. NUNES *v.* HOLDER, ATTORNEY GENERAL. C. A. 3d Cir. Certiorari denied.

No. 10–10005. DAVIS *v.* SHINSEKI, SECRETARY OF VETERANS AFFAIRS. C. A. Fed. Cir. Certiorari denied. Reported below: 401 Fed. Appx. 533.

No. 10–10022. BENTON *v.* BOOKER, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 403 Fed. Appx. 984.

No. 10–10024. BACON *v.* NEVADA. Sup. Ct. Nev. Certiorari denied.

No. 10–10042. HOLMES *v.* WASHINGTON. Ct. App. Wash. Certiorari denied.

No. 10–10096. WOODWARD *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 291 Kan. ix, 248 P. 3d 280.

No. 10–10104. BOTANY *v.* HUIBREGTSE, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 10–10120. SMITH *v.* CLARKE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 406 Fed. Appx. 701.

No. 10–10156. ALLEN *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 288 Ga. 263, 702 S. E. 2d 869.

No. 10–10163. BURGIN *v.* LAHAYE ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 399 Fed. Appx. 464.

No. 10–10172. COADES *v.* COURT OF COMMON PLEAS OF PENNSYLVANIA, CHESTER COUNTY, NUMBERS 0–190–197 APRIL TERM 1976. C. A. 3d Cir. Certiorari denied.

No. 10–10224. NESBITT *v.* HOUSTON, DIRECTOR, NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES. C. A. 8th Cir. Certiorari denied.

No. 10–10226. WILLIAMS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 399 Ill. App. 3d 1224, 990 N. E. 2d 932.

No. 10–10243. BREWINGTON *v.* WALSH, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT DALLAS, ET AL. C. A. 3d Cir. Certiorari denied.

No. 10–10276. OCON-PARADA, AKA OCAN-PARADA *v.* YOUNG, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 399 Fed. Appx. 788.

No. 10–10280. SWIERZBINSKI *v.* HOLDER, ATTORNEY GENERAL. C. A. 10th Cir. Certiorari denied. Reported below: 408 Fed. Appx. 188.

No. 10–10296. SHEEHAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 414 Fed. Appx. 19.

No. 10–10300. HUGHES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 632 F. 3d 956.

No. 10–10313. BROWN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 393 Fed. Appx. 686.

No. 10–10317. ORTEGA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 464 Fed. Appx. 202.

No. 10–10318. DISTANCE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 404 Fed. Appx. 746.

No. 10–10319. EVANS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 401 Fed. Appx. 788.

No. 10–10320. RICHARDSON *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 10–10323. SMITH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 409 Fed. Appx. 631.

No. 10–10324. CAWTHON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 10–10329. KRAMER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 631 F. 3d 900.

No. 10–10332. WARD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 400 Fed. Appx. 991.

No. 10–10343. QUINONEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 10–10346. SIMMONS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 404 Fed. Appx. 100.

No. 10–10348. RODRIGUEZ *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 409 Fed. Appx. 866.

No. 10–10349. CORTES-MEZA, AKA CORTES MEZA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 411 Fed. Appx. 284.

No. 10–10353. SHELBY *v.* WHITEHOUSE ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 399 Fed. Appx. 121.

No. 10–10359. HERRERA-SIFUENTES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 627 F. 3d 161.

No. 10–10360. INFANTAS-SALAS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 10–10363. GRAHAM *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 408 Fed. Appx. 976.

No. 10–10364. GONZALEZ-MOLINA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 409 Fed. Appx. 751.

No. 10–10366. ROBLES-PANTOJA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 415 Fed. Appx. 526.

No. 10–10367. SAVELYEV *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 410 Fed. Appx. 600.

No. 10–10369. BALLESTEROS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 410 Fed. Appx. 692.

No. 10–10372. BASHEER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 10–10375. GARRIGOS-DIAZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 426 Fed. Appx. 228.

No. 10–10376. JARAMILLO-HOYOS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 10–10384. BROOKS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 419 Fed. Appx. 189.

No. 10–10391. LAI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 404 Fed. Appx. 181.

No. 10–10393. THOMPSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 396 Fed. Appx. 971.

No. 10–10395. COLEMAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 416 Fed. Appx. 41.

No. 10–10396. DE LA CRUZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 413 Fed. Appx. 338.

No. 10–10399. MOLINA-GARCIA, AKA GARCIA-MOLINA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 405 Fed. Appx. 393.

No. 10–10400. DIAZ PUNZALAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 409 Fed. Appx. 173.

No. 10–10402. LOPEZ-VILLEGAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 413 Fed. Appx. 992.

No. 10–10403. MADERA-ORTIZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 637 F. 3d 26.

No. 10–10423. VARGAS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 408 Fed. Appx. 982.

No. 10–10430. PARKER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 10–367. BURRIS, UNITED STATES SENATOR *v.* JUDGE ET AL. C. A. 7th Cir. Certiorari before judgment denied.

No. 10–9871. MARTINEZ *v.* ARTUS, SUPERINTENDENT, CLINTON CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition.

No. 10–10305. VONDETTE *v.* UNITED STATES (two judgments). C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 351 Fed. Appx. 502 (first judgment); and 394 Fed. Appx. 833 (second judgment).

No. 10–10336. MINCEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 408 Fed. Appx. 730.

No. 10–10347. ROBERTSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 396 Fed. Appx. 968.

No. 10–10386. BRUCE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 633 F. 3d 116.

Rehearing Denied

No. 10–1023. TABB *v.* BORDIER, *ante*, p. 937;

No. 10–1072. ATP OIL & GAS CORP. *v.* DEPARTMENT OF THE INTERIOR ET AL., *ante*, p. 961;

No. 10–7180. SAINT *v.* MASSACHUSETTS REHABILITATION COMMISSION HOME CARE ASSISTANCE PROGRAM, 562 U. S. 1147;

No. 10–7265. RAMOS-ROMERO *v.* UNITED STATES, 562 U. S. 1077;

No. 10–8351. SALLIS *v.* AURORA HEALTH CARE, INC., 562 U. S. 1292;

No. 10–8440. CARLIN *v.* LEAHY-CARLIN, *ante*, p. 905;

No. 10–8509. TRAINI *v.* CURTIN, WARDEN, *ante*, p. 906;

No. 10–8754. ARMANT *v.* RADER, WARDEN, *ante*, p. 909;

No. 10–8764. SMART *v.* REYNOLDS, WARDEN, 562 U. S. 1277;

No. 10–8822. JOHNSON *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, *ante*, p. 940;

No. 10–8912. IN RE SOTO, 562 U. S. 1269;

No. 10–8922. NIFAS *v.* WETZEL, ACTING SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL., *ante*, p. 941;

No. 10–8933. DECKER-WEGENER *v.* WEGENER ET AL., *ante*, p. 942;

No. 10–9036. MCDONALD *v.* ILLINOIS, *ante*, p. 923;

No. 10–9192. IN RE MOORE, 562 U. S. 1285;

No. 10–9242. WILLIAMS *v.* MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, *ante*, p. 947;

No. 10–9340. WHEELER *v.* SCHMALENBERGER, WARDEN, *ante*, p. 947;

No. 10–9471. BERGER *v.* UNITED STATES, *ante*, p. 950; and
No. 10–9473. BERGER *v.* UNITED STATES, *ante*, p. 950. Petitions for rehearing denied.

No. 10–8489. MCPHERSON *v.* UNITED STATES ET AL., 562 U. S. 1304;
No. 10–9402. GARCIA *v.* UNITED STATES, *ante*, p. 930; and
No. 10–9882. TURPIN *v.* UNITED STATES, *ante*, p. 983. Petitions for rehearing denied. JUSTICE KAGAN took no part in the consideration or decision of these petitions.

AMENDMENTS TO FEDERAL RULES OF APPELLATE PROCEDURE

The following amendments to the Federal Rules of Appellate Procedure were prescribed by the Supreme Court of the United States on April 26, 2011, pursuant to 28 U. S. C. § 2072, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1046. The Judicial Conference report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2074, such amendments shall take effect no earlier than December 1 of the year in which they are transmitted to Congress unless otherwise provided by law.

For earlier publication of the Federal Rules of Appellate Procedure and amendments thereto, see 389 U. S. 1063, 398 U. S. 971, 401 U. S. 1029, 406 U. S. 1005, 441 U. S. 973, 475 U. S. 1153, 490 U. S. 1125, 500 U. S. 1007, 507 U. S. 1059, 511 U. S. 1155, 514 U. S. 1137, 517 U. S. 1255, 523 U. S. 1147, 535 U. S. 1123, 538 U. S. 1071, 544 U. S. 1151, 547 U. S. 1221, 550 U. S. 983, 556 U. S. 1291, and 559 U. S. 1119.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 26, 2011

To the Senate and House of Representatives of the United States of America in Congress Assembled:

I have the honor to submit to the Congress the amendments to the Federal Rules of Appellate Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

(Signed) JOHN G. ROBERTS, JR.
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

APRIL 26, 2011

ORDERED:

1. That the Federal Rules of Appellate Procedure be, and they hereby are, amended by including therein amendments to Appellate Rules 4 and 40.

[See *infra*, pp. 1049–1050.]

2. That the foregoing amendments to the Federal Rules of Appellate Procedure shall take effect on December 1, 2011, and shall govern in all proceedings in appellate cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Appellate Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE

Rule 4. Appeal as of right—when taken.

(*a*) *Appeal in a civil case.*

(*1*) *Time for filing a notice of appeal.*

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after entry of the judgment or order appealed from.

(B) The notice of appeal may be filed by any party within 60 days after entry of the judgment or order appealed from if one of the parties is:

(i) the United States;

(ii) a United States agency;

(iii) a United States officer or employee sued in an official capacity; or

(iv) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf—including all instances in which the United States represents that person when the judgment or order is entered or files the appeal for that person.

. . . . .

Rule 40. Petition for panel rehearing.

(*a*) *Time to file; contents; answer; action by the court if granted.*

(*1*) *Time.*—Unless the time is shortened or extended by order or local rule, a petition for panel rehearing may be filed within 14 days after entry of judgment. But in a civil case, unless an order shortens or extends the time,

the petition may be filed by any party within 45 days after entry of judgment if one of the parties is:

(A) the United States;

(B) a United States agency;

(C) a United States officer or employee sued in an official capacity; or

(D) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf—including all instances in which the United States represents that person when the court of appeals' judgment is entered or files the petition for that person.

. . . . .

AMENDMENTS TO FEDERAL RULES OF BANKRUPTCY PROCEDURE

The following amendments to the Federal Rules of Bankruptcy Procedure were prescribed by the Supreme Court of the United States on April 26, 2011, pursuant to 28 U. S. C. § 2075, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1052. The Judicial Conference report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2075, such amendments shall take effect no earlier than December 1 of the year in which they are transmitted to Congress unless otherwise provided by law.

For earlier publication of the Federal Rules of Bankruptcy Procedure and amendments thereto, see, *e. g.*, 461 U. S. 973, 471 U. S. 1147, 480 U. S. 1077, 490 U. S. 1119, 500 U. S. 1017, 507 U. S. 1075, 511 U. S. 1169, 514 U. S. 1145, 517 U. S. 1263, 520 U. S. 1285, 526 U. S. 1169, 529 U. S. 1147, 532 U. S. 1077, 535 U. S. 1139, 538 U. S. 1075, 541 U. S. 1097, 544 U. S. 1163, 547 U. S. 1227, 550 U. S. 989, 553 U. S. 1105, 556 U. S. 1307, and 559 U. S. 1127.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 26, 2011

To the Senate and House of Representatives of the United States of America in Congress Assembled:

I have the honor to submit to the Congress the amendments to the Federal Rules of Bankruptcy Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2075 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

(Signed) JOHN G. ROBERTS, JR.
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

APRIL 26, 2011

ORDERED:

1. That the Federal Rules of Bankruptcy Procedure be, and they hereby are, amended by including therein amendments to Bankruptcy Rules 2003, 2019, 3001, 4004, and 6003, and new Rules 1004.2 and 3002.1.

[See *infra*, pp. 1055–1062.]

2. That the foregoing amendments to the Federal Rules of Bankruptcy Procedure shall take effect on December 1, 2011, and shall govern in all proceedings in bankruptcy cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Bankruptcy Procedure in accordance with the provisions of Section 2075 of Title 28, United States Code.

AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rule 1004.2. Petition in Chapter 15 cases.

(*a*) *Designating center of main interests.*—A petition for recognition of a foreign proceeding under chapter 15 of the Code shall state the country where the debtor has its center of main interests. The petition shall also identify each country in which a foreign proceeding by, regarding, or against the debtor is pending.

(*b*) *Challenging designation.*—The United States trustee or a party in interest may file a motion for a determination that the debtor's center of main interests is other than as stated in the petition for recognition commencing the chapter 15 case. Unless the court orders otherwise, the motion shall be filed no later than seven days before the date set for the hearing on the petition. The motion shall be transmitted to the United States trustee and served on the debtor, all persons or bodies authorized to administer foreign proceedings of the debtor, all entities against whom provisional relief is being sought under § 1519 of the Code, all parties to litigation pending in the United States in which the debtor was a party as of the time the petition was filed, and such other entities as the court may direct.

Rule 2003. Meeting of creditors or equity security holders.

. . . . .

(*e*) *Adjournment.*—The meeting may be adjourned from time to time by announcement at the meeting of the adjourned date and time. The presiding official shall promptly file a statement specifying the date and time to which the meeting is adjourned.

. . . . .

Rule 2019. Disclosure regarding creditors and equity security holders in Chapter 9 and Chapter 11 cases.

(*a*) *Definitions.*—In this rule the following terms have the meanings indicated:

(1) "Disclosable economic interest" means any claim, interest, pledge, lien, option, participation, derivative instrument, or any other right or derivative right granting the holder an economic interest that is affected by the value, acquisition, or disposition of a claim or interest.

(2) "Represent" or "represents" means to take a position before the court or to solicit votes regarding the confirmation of a plan on behalf of another.

(*b*) *Disclosure by groups, committees, and entities.*

(1) In a chapter 9 or 11 case, a verified statement setting forth the information specified in subdivision (c) of this rule shall be filed by every group or committee that consists of or represents, and every entity that represents, multiple creditors or equity security holders that are (A) acting in concert to advance their common interests, and (B) not composed entirely of affiliates or insiders of one another.

(2) Unless the court orders otherwise, an entity is not required to file the verified statement described in paragraph (1) of this subdivision solely because of its status as:

(A) an indenture trustee;

(B) an agent for one or more other entities under an agreement for the extension of credit;

(C) a class action representative; or

(D) a governmental unit that is not a person.

(*c*) *Information required.*—The verified statement shall include:

(1) the pertinent facts and circumstances concerning:

(A) with respect to a group or committee, other than a committee appointed under § 1102 or § 1114 of the Code, the formation of the group or committee, including the name of each entity at whose instance the group

or committee was formed or for whom the group or committee has agreed to act; or

(B) with respect to an entity, the employment of the entity, including the name of each creditor or equity security holder at whose instance the employment was arranged;

(2) if not disclosed under subdivision (c)(1), with respect to an entity, and with respect to each member of a group or committee:

(A) name and address;

(B) the nature and amount of each disclosable economic interest held in relation to the debtor as of the date the entity was employed or the group or committee was formed; and

(C) with respect to each member of a group or committee that claims to represent any entity in addition to the members of the group or committee, other than a committee appointed under § 1102 or § 1114 of the Code, the date of acquisition by quarter and year of each disclosable economic interest, unless acquired more than one year before the petition was filed;

(3) if not disclosed under subdivision (c)(1) or (c)(2), with respect to each creditor or equity security holder represented by an entity, group, or committee, other than a committee appointed under § 1102 or § 1114 of the Code:

(A) name and address; and

(B) the nature and amount of each disclosable economic interest held in relation to the debtor as of the date of the statement; and

(4) a copy of the instrument, if any, authorizing the entity, group, or committee to act on behalf of creditors or equity security holders.

(*d*) *Supplemental statements.*—If any fact disclosed in its most recently filed statement has changed materially, an entity, group, or committee shall file a verified supplemental statement whenever it takes a position before the court or solicits votes on the confirmation of a plan. The supplemen-

tal statement shall set forth the material changes in the facts required by subdivision (c) to be disclosed.

(*e*) *Determination of failure to comply; sanctions.*

(1) On motion of any party in interest, or on its own motion, the court may determine whether there has been a failure to comply with any provision of this rule.

(2) If the court finds such a failure to comply, it may:

(A) refuse to permit the entity, group, or committee to be heard or to intervene in the case;

(B) hold invalid any authority, acceptance, rejection, or objection given, procured, or received by the entity, group, or committee; or

(C) grant other appropriate relief.

Rule 3001. Proof of claim.

. . . . .

(*c*) *Supporting information.*

(*1*) *Claim based on a writing.*—When a claim, or an interest in property of the debtor securing the claim, is based on a writing, the original or a duplicate shall be filed with the proof of claim. If the writing has been lost or destroyed, a statement of the circumstances of the loss or destruction shall be filed with the claim.

(*2*) *Additional requirements in an individual debtor case; sanctions for failure to comply.*—In a case in which the debtor is an individual:

(A) If, in addition to its principal amount, a claim includes interest, fees, expenses, or other charges incurred before the petition was filed, an itemized statement of the interest, fees, expenses, or charges shall be filed with the proof of claim.

(B) If a security interest is claimed in the debtor's property, a statement of the amount necessary to cure any default as of the date of the petition shall be filed with the proof of claim.

(C) If a security interest is claimed in property that is the debtor's principal residence, the attachment prescribed by the appropriate Official Form shall be filed

with the proof of claim. If an escrow account has been established in connection with the claim, an escrow account statement prepared as of the date the petition was filed and in a form consistent with applicable nonbankruptcy law shall be filed with the attachment to the proof of claim.

(D) If the holder of a claim fails to provide any information required by this subdivision (c), the court may, after notice and hearing, take either or both of the following actions:

(i) preclude the holder from presenting the omitted information, in any form, as evidence in any contested matter or adversary proceeding in the case, unless the court determines that the failure was substantially justified or is harmless; or

(ii) award other appropriate relief, including reasonable expenses and attorney's fees caused by the failure.

. . . . .

Rule 3002.1. Notice relating to claims secured by security interest in the debtor's principal residence.

(*a*) *In general.*—This rule applies in a chapter 13 case to claims that are (1) secured by a security interest in the debtor's principal residence, and (2) provided for under § 1322(b)(5) of the Code in the debtor's plan.

(*b*) *Notice of payment changes.*—The holder of the claim shall file and serve on the debtor, debtor's counsel, and the trustee a notice of any change in the payment amount, including any change that results from an interest rate or escrow account adjustment, no later than 21 days before a payment in the new amount is due.

(*c*) *Notice of fees, expenses, and charges.*—The holder of the claim shall file and serve on the debtor, debtor's counsel, and the trustee a notice itemizing all fees, expenses, or charges (1) that were incurred in connection with the claim after the bankruptcy case was filed, and (2) that the holder asserts are recoverable against the debtor or against the

debtor's principal residence. The notice shall be served within 180 days after the date on which the fees, expenses, or charges are incurred.

(*d*) *Form and content.*—A notice filed and served under subdivision (b) or (c) of this rule shall be prepared as prescribed by the appropriate Official Form, and filed as a supplement to the holder's proof of claim. The notice is not subject to Rule 3001(f).

(*e*) *Determination of fees, expenses, or charges.*—On motion of the debtor or trustee filed within one year after service of a notice under subdivision (c) of this rule, the court shall, after notice and hearing, determine whether payment of any claimed fee, expense, or charge is required by the underlying agreement and applicable nonbankruptcy law to cure a default or maintain payments in accordance with § 1322(b)(5) of the Code.

(*f*) *Notice of final cure payment.*—Within 30 days after the debtor completes all payments under the plan, the trustee shall file and serve on the holder of the claim, the debtor, and debtor's counsel a notice stating that the debtor has paid in full the amount required to cure any default on the claim. The notice shall also inform the holder of its obligation to file and serve a response under subdivision (g). If the debtor contends that final cure payment has been made and all plan payments have been completed, and the trustee does not timely file and serve the notice required by this subdivision, the debtor may file and serve the notice.

(*g*) *Response to notice of final cure payment.*—Within 21 days after service of the notice under subdivision (f) of this rule, the holder shall file and serve on the debtor, debtor's counsel, and the trustee a statement indicating (1) whether it agrees that the debtor has paid in full the amount required to cure the default on the claim, and (2) whether the debtor is otherwise current on all payments consistent with § 1322(b)(5) of the Code. The statement shall itemize the required cure or postpetition amounts, if any, that the holder contends remain unpaid as of the date of the statement.

The statement shall be filed as a supplement to the holder's proof of claim and is not subject to Rule 3001(f).

(*h*) *Determination of final cure and payment.*—On motion of the debtor or trustee filed within 21 days after service of the statement under subdivision (g) of this rule, the court shall, after notice and hearing, determine whether the debtor has cured the default and paid all required postpetition amounts.

(*i*) *Failure to notify.*—If the holder of a claim fails to provide any information as required by subdivision (b), (c), or (g) of this rule, the court may, after notice and hearing, take either or both of the following actions:

(1) preclude the holder from presenting the omitted information, in any form, as evidence in any contested matter or adversary proceeding in the case, unless the court determines that the failure was substantially justified or is harmless; or

(2) award other appropriate relief, including reasonable expenses and attorney's fees caused by the failure.

Rule 4004. Grant or denial of discharge.

. . . . .

(*b*) *Extension of time.*

(1) On motion of any party in interest, after notice and hearing, the court may for cause extend the time to object to discharge. Except as provided in subdivision (b)(2), the motion shall be filed before the time has expired.

(2) A motion to extend the time to object to discharge may be filed after the time for objection has expired and before discharge is granted if (A) the objection is based on facts that, if learned after the discharge, would provide a basis for revocation under § 727(d) of the Code, and (B) the movant did not have knowledge of those facts in time to permit an objection. The motion shall be filed promptly after the movant discovers the facts on which the objection is based.

. . . . .

Rule 6003. Interim and final relief immediately following the commencement of the case—applications for employment; motions for use, sale, or lease of property; and motions for assumption or assignment of executory contracts.

Except to the extent that relief is necessary to avoid immediate and irreparable harm, the court shall not, within 21 days after the filing of the petition, issue an order granting the following:

(a) an application under Rule 2014;

(b) a motion to use, sell, lease, or otherwise incur an obligation regarding property of the estate, including a motion to pay all or part of a claim that arose before the filing of the petition, but not a motion under Rule 4001; or

(c) a motion to assume or assign an executory contract or unexpired lease in accordance with § 365.

AMENDMENTS TO FEDERAL RULES OF CRIMINAL PROCEDURE

The following amendments to the Federal Rules of Criminal Procedure were prescribed by the Supreme Court of the United States on April 26, 2011, pursuant to 28 U. S. C. § 2072, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1064. The Judicial Conference report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2074, such amendments shall take effect no earlier than December 1 of the year in which they are transmitted to Congress unless otherwise provided by law.

For earlier publication of the Federal Rules of Criminal Procedure and amendments thereto, see 327 U. S. 821, 335 U. S. 917, 949, 346 U. S. 941, 350 U. S. 1017, 383 U. S. 1087, 389 U. S. 1125, 401 U. S. 1025, 406 U. S. 979, 415 U. S. 1056, 416 U. S. 1001, 419 U. S. 1136, 425 U. S. 1157, 441 U. S. 985, 456 U. S. 1021, 461 U. S. 1117, 471 U. S. 1167, 480 U. S. 1041, 485 U. S. 1057, 490 U. S. 1135, 495 U. S. 967, 500 U. S. 991, 507 U. S. 1161, 511 U. S. 1175, 514 U. S. 1159, 517 U. S. 1285, 520 U. S. 1313, 523 U. S. 1227, 526 U. S. 1189, 529 U. S. 1179, 535 U. S. 1157, 541 U. S. 1103, 544 U. S. 1181, 547 U. S. 1269, 550 U. S. 1165, 553 U. S. 1155, 556 U. S. 1363, and 559 U. S. 1151.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 26, 2011

To the Senate and House of Representatives of the United States of America in Congress Assembled:

I have the honor to submit to the Congress the amendments to the Federal Rules of Criminal Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

(Signed) JOHN G. ROBERTS, JR.
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

APRIL 26, 2011

ORDERED:

1. That the Federal Rules of Criminal Procedure be, and they hereby are, amended by including therein amendments to Criminal Rules 1, 3, 4, 6, 9, 32, 40, 41, 43, and 49, and new Rule 4.1.

[See *infra*, pp. 1067–1074.]

2. That the foregoing amendments to the Federal Rules of Criminal Procedure shall take effect on December 1, 2011, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Criminal Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 1. Scope; definitions.

. . . . .

(*b*) *Definitions.*—The following definitions apply to these rules:

. . . . .

(11) "Telephone" means any technology for transmitting live electronic voice communication.

(12) "Victim" means a "crime victim" as defined in 18 U. S. C. § 3771(e).

. . . . .

Rule 3. The complaint.

The complaint is a written statement of the essential facts constituting the offense charged. Except as provided in Rule 4.1, it must be made under oath before a magistrate judge or, if none is reasonably available, before a state or local judicial officer.

Rule 4. Arrest warrant or summons on a complaint.

. . . . .

(*c*) *Execution or service, and return.*

. . . . .

(*3*) *Manner.*

(A) A warrant is executed by arresting the defendant. Upon arrest, an officer possessing the original or a duplicate original warrant must show it to the defendant. If the officer does not possess the warrant, the officer must inform the defendant of the warrant's existence and of the offense charged and, at the defendant's request,

must show the original or a duplicate original warrant to the defendant as soon as possible.

. . . . .

(*4*) *Return.*

(A) After executing a warrant, the officer must return it to the judge before whom the defendant is brought in accordance with Rule 5. The officer may do so by reliable electronic means. At the request of an attorney for the government, an unexecuted warrant must be brought back to and canceled by a magistrate judge or, if none is reasonably available, by a state or local judicial officer.

. . . . .

(*d*) *Warrant by telephone or other reliable electronic means.*—In accordance with Rule 4.1, a magistrate judge may issue a warrant or summons based on information communicated by telephone or other reliable electronic means.

Rule 4.1. Complaint, warrant, or summons by telephone or other reliable electronic means.

(*a*) *In general.*—A magistrate judge may consider information communicated by telephone or other reliable electronic means when reviewing a complaint or deciding whether to issue a warrant or summons.

(*b*) *Procedures.*—If a magistrate judge decides to proceed under this rule, the following procedures apply:

(*1*) *Taking testimony under oath.*—The judge must place under oath—and may examine—the applicant and any person on whose testimony the application is based.

(*2*) *Creating a record of the testimony and exhibits.*

(*A*) *Testimony limited to attestation.*—If the applicant does no more than attest to the contents of a written affidavit submitted by reliable electronic means, the judge must acknowledge the attestation in writing on the affidavit.

(*B*) *Additional testimony or exhibits.*—If the judge considers additional testimony or exhibits, the judge must:

(i) have the testimony recorded verbatim by an electronic recording device, by a court reporter, or in writing;

(ii) have any recording or reporter's notes transcribed, have the transcription certified as accurate, and file it;

(iii) sign any other written record, certify its accuracy, and file it; and

(iv) make sure that the exhibits are filed.

(*3*) *Preparing a proposed duplicate original of a complaint, warrant, or summons.*—The applicant must prepare a proposed duplicate original of a complaint, warrant, or summons, and must read or otherwise transmit its contents verbatim to the judge.

(*4*) *Preparing an original complaint, warrant, or summons.*—If the applicant reads the contents of the proposed duplicate original, the judge must enter those contents into an original complaint, warrant, or summons. If the applicant transmits the contents by reliable electronic means, the transmission received by the judge may serve as the original.

(*5*) *Modification.*—The judge may modify the complaint, warrant, or summons. The judge must then:

(A) transmit the modified version to the applicant by reliable electronic means; or

(B) file the modified original and direct the applicant to modify the proposed duplicate original accordingly.

(*6*) *Issuance.*—To issue the warrant or summons, the judge must:

(A) sign the original documents;

(B) enter the date and time of issuance on the warrant or summons; and

(C) transmit the warrant or summons by reliable electronic means to the applicant or direct the applicant to sign the judge's name and enter the date and time on the duplicate original.

(*c*) *Suppression limited.*—Absent a finding of bad faith, evidence obtained from a warrant issued under this rule is not subject to suppression on the ground that issuing the warrant in this manner was unreasonable under the circumstances.

Rule 6. The grand jury.

. . . . .

(*f*) *Indictment and return.*—A grand jury may indict only if at least 12 jurors concur. The grand jury—or its foreperson or deputy foreperson—must return the indictment to a magistrate judge in open court. To avoid unnecessary cost or delay, the magistrate judge may take the return by video teleconference from the court where the grand jury sits. If a complaint or information is pending against the defendant and 12 jurors do not concur in the indictment, the foreperson must promptly and in writing report the lack of concurrence to the magistrate judge.

. . . . .

Rule 9. Arrest warrant or summons on an indictment or information.

. . . . .

(*d*) *Warrant by telephone or other means.*—In accordance with Rule 4.1, a magistrate judge may issue an arrest warrant or summons based on information communicated by telephone or other reliable electronic means.

Rule 32. Sentencing and judgment.

. . . . .

(*d*) *Presentence report.*

. . . . .

(*2*) *Additional information.*—The presentence report must also contain the following:

(A) the defendant's history and characteristics, including:

(i) any prior criminal record;

(ii) the defendant's financial condition; and

(iii) any circumstances affecting the defendant's behavior that may be helpful in imposing sentence or in correctional treatment;

(B) information that assesses any financial, social, psychological, and medical impact on any victim;

(C) when appropriate, the nature and extent of nonprison programs and resources available to the defendant;

(D) when the law provides for restitution, information sufficient for a restitution order;

(E) if the court orders a study under 18 U. S. C. § 3552(b), any resulting report and recommendation;

(F) a statement of whether the government seeks forfeiture under Rule 32.2 and any other law; and

(G) any other information that the court requires, including information relevant to the factors under 18 U. S. C. § 3553(a).

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Rule 40. Arrest for failing to appear in another district or for violating conditions of release set in another district.

. . . . .

(*d*) *Video teleconferencing.*—Video teleconferencing may be used to conduct an appearance under this rule if the defendant consents.

Rule 41. Search and seizure.

. . . . .

(*d*) *Obtaining a warrant.*

. . . . .

(*3*) *Requesting a warrant by telephonic or other reliable electronic means.*—In accordance with Rule 4.1, a magistrate judge may issue a warrant based on information communicated by telephone or other reliable electronic means.

(*e*) *Issuing the warrant.*

. . . . .

(*2*) *Contents of the warrant.*

. . . . .

(*C*) *Warrant for a tracking device.*—A tracking-device warrant must identify the person or property to be tracked, designate the magistrate judge to whom it must be returned, and specify a reasonable length of time that the device may be used. The time must not exceed 45 days from the date the warrant was issued. The court may, for good cause, grant one or more extensions for a reasonable period not to exceed 45 days each. The warrant must command the officer to:

(i) complete any installation authorized by the warrant within a specified time no longer than 10 days;

(ii) perform any installation authorized by the warrant during the daytime, unless the judge for good cause expressly authorizes installation at another time; and

(iii) return the warrant to the judge designated in the warrant.

(*f*) *Executing and returning the warrant.*

(*1*) *Warrant to search for and seize a person or property.*

. . . . .

(*D*) *Return.*—The officer executing the warrant must promptly return it—together with a copy of the inventory—to the magistrate judge designated on the warrant. The officer may do so by reliable electronic means. The judge must, on request, give a copy of the inventory to the person from whom, or from whose premises, the property was taken and to the applicant for the warrant.

(*2*) *Warrant for a tracking device.*

(*A*) *Noting the time.*—The officer executing a tracking-device warrant must enter on it the exact date and time the device was installed and the period during which it was used.

(*B*) *Return.*—Within 10 days after the use of the tracking device has ended, the officer executing the warrant must return it to the judge designated in the warrant. The officer may do so by reliable electronic means.

(*C*) *Service.*—Within 10 days after the use of the tracking device has ended, the officer executing a tracking-device warrant must serve a copy of the warrant on the person who was tracked or whose property was tracked. Service may be accomplished by delivering a copy to the person who, or whose property, was tracked; or by leaving a copy at the person's residence or usual place of abode with an individual of suitable age and discretion who resides at that location and by mailing a copy to the person's last known address. Upon request of the government, the judge may delay notice as provided in Rule 41(f)(3).

. . . . .

Rule 43. Defendant's presence.

. . . . .

(*b*) *When not required.*—A defendant need not be present under any of the following circumstances:

(*1*) *Organizational defendant.*—The defendant is an organization represented by counsel who is present.

(*2*) *Misdemeanor offense.*—The offense is punishable by fine or by imprisonment for not more than one year, or both, and with the defendant's written consent, the court permits arraignment, plea, trial, and sentencing to occur by video teleconferencing or in the defendant's absence.

. . . . .

Rule 49. Serving and filing papers.

(*a*) *When required.*—A party must serve on every other party any written motion (other than one to be heard ex parte), written notice, designation of the record on appeal, or similar paper.

. . . . .

(*e*) *Electronic service and filing.*—A court may, by local rule, allow papers to be filed, signed, or verified by electronic means that are consistent with any technical standards established by the Judicial Conference of the United States. A local rule may require electronic filing only if reasonable exceptions are allowed. A paper filed electronically in compliance with a local rule is written or in writing under these rules.

AMENDMENTS TO FEDERAL RULES OF EVIDENCE

The following amendments to the Federal Rules of Evidence were prescribed by the Supreme Court of the United States on April 26, 2011, pursuant to 28 U. S. C. § 2072, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1076. The Judicial Conference report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2074, such amendments shall take effect no earlier than December 1 of the year in which they are transmitted to Congress unless otherwise provided by law.

For earlier reference to the Federal Rules of Evidence, see 409 U. S. 1132. For earlier publication of the Federal Rules of Evidence and amendments thereto, see 441 U. S. 1005, 480 U. S. 1023, 485 U. S. 1049, 493 U. S. 1173, 500 U. S. 1001, 507 U. S. 1187, 511 U. S. 1187, 520 U. S. 1323, 523 U. S. 1235, 529 U. S. 1189, 538 U. S. 1097, 547 U. S. 1281, and 559 U. S. 1157.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 26, 2011

To the Senate and House of Representatives of the United States of America in Congress Assembled:

I have the honor to submit to the Congress the amendments to the Federal Rules of Evidence that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

(Signed) JOHN G. ROBERTS, JR.
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

APRIL 26, 2011

ORDERED:

1. That the Federal Rules of Evidence be, and they hereby are, amended by including therein the amendments to Evidence Rules 101–1103.

[See *infra*, pp. 1079–1116.]

2. That the foregoing amendments to the Federal Rules of Evidence shall take effect on December 1, 2011, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Evidence in accordance with the provisions of Section 2072 of Title 28, United States Code.

AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE

Article I. General Provisions

Rule 101. Scope; definitions.

(*a*) *Scope.*—These rules apply to proceedings in United States courts. The specific courts and proceedings to which the rules apply, along with exceptions, are set out in Rule 1101.

(*b*) *Definitions.*—In these rules:

(1) "civil case" means a civil action or proceeding;

(2) "criminal case" includes a criminal proceeding;

(3) "public office" includes a public agency;

(4) "record" includes a memorandum, report, or data compilation;

(5) a "rule prescribed by the Supreme Court" means a rule adopted by the Supreme Court under statutory authority; and

(6) a reference to any kind of written material or any other medium includes electronically stored information.

Rule 102. Purpose.

These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.

Rule 103. Rulings on evidence.

(*a*) *Preserving a claim of error.*—A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and:

(1) if the ruling admits evidence, a party, on the record:

(A) timely objects or moves to strike; and

(B) states the specific ground, unless it was apparent from the context; or

(2) if the ruling excludes evidence, a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context.

(*b*) *Not needing to renew an objection or offer of proof.*—Once the court rules definitively on the record—either before or at trial—a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

(*c*) *Court's statement about the ruling; directing an offer of proof.*—The court may make any statement about the character or form of the evidence, the objection made, and the ruling. The court may direct that an offer of proof be made in question-and-answer form.

(*d*) *Preventing the jury from hearing inadmissible evidence.*—To the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means.

(*e*) *Taking notice of plain error.*—A court may take notice of a plain error affecting a substantial right, even if the claim of error was not properly preserved.

Rule 104. Preliminary questions.

(*a*) *In general.*—The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.

(*b*) *Relevance that depends on a fact.*—When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later.

(*c*) *Conducting a hearing so that the jury cannot hear it.*—The court must conduct any hearing on a preliminary question so that the jury cannot hear it if:

(1) the hearing involves the admissibility of a confession;

(2) a defendant in a criminal case is a witness and so requests; or

(3) justice so requires.

(*d*) *Cross-examining a defendant in a criminal case.*—By testifying on a preliminary question, a defendant in a criminal case does not become subject to cross-examination on other issues in the case.

(*e*) *Evidence relevant to weight and credibility.*—This rule does not limit a party's right to introduce before the jury evidence that is relevant to the weight or credibility of other evidence.

Rule 105. Limiting evidence that is not admissible against other parties or for other purposes.

If the court admits evidence that is admissible against a party or for a purpose—but not against another party or for another purpose—the court, on timely request, must restrict the evidence to its proper scope and instruct the jury accordingly.

Rule 106. Remainder of or related writings or recorded statements.

If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part—or any other writing or recorded statement—that in fairness ought to be considered at the same time.

Article II. Judicial Notice

Rule 201. Judicial notice of adjudicative facts.

(*a*) *Scope.*—This rule governs judicial notice of an adjudicative fact only, not a legislative fact.

(*b*) *Kinds of facts that may be judicially noticed.*—The court may judicially notice a fact that is not subject to reasonable dispute because it:

(1) is generally known within the trial court's territorial jurisdiction; or

(2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

(*c*) *Taking notice.*—The court:

(1) may take judicial notice on its own; or

(2) must take judicial notice if a party requests it and the court is supplied with the necessary information.

(*d*) *Timing.*—The court may take judicial notice at any stage of the proceeding.

(*e*) *Opportunity to be heard.*—On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.

(*f*) *Instructing the jury.*—In a civil case, the court must instruct the jury to accept the noticed fact as conclusive. In a criminal case, the court must instruct the jury that it may or may not accept the noticed fact as conclusive.

Article III. Presumptions in Civil Cases

Rule 301. Presumptions in civil cases generally.

In a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally.

Rule 302. Applying state law to presumptions in civil cases.

In a civil case, state law governs the effect of a presumption regarding a claim or defense for which state law supplies the rule of decision.

Article IV. Relevance and Its Limits

Rule 401. Test for relevant evidence.

Evidence is relevant if:

(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and

(b) the fact is of consequence in determining the action.

Rule 402. General admissibility of relevant evidence.

Relevant evidence is admissible unless any of the following provides otherwise:

- the United States Constitution;
- a federal statute;
- these rules; or
- other rules prescribed by the Supreme Court.

Irrelevant evidence is not admissible.

Rule 403. Excluding relevant evidence for prejudice, confusion, waste of time, or other reasons.

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Rule 404. Character evidence; crimes or other acts.

(*a*) *Character evidence.*

(*1*) *Prohibited uses.*—Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.

(*2*) *Exceptions for a defendant or victim in a criminal case.*—The following exceptions apply in a criminal case:

(A) a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it;

(B) subject to the limitations in Rule 412, a defendant may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted, the prosecutor may:

(i) offer evidence to rebut it; and

(ii) offer evidence of the defendant's same trait; and

(C) in a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.

(*3*) *Exceptions for a witness.*—Evidence of a witness's character may be admitted under Rules 607, 608, and 609.

(*b*) *Crimes, wrongs, or other acts.*

(*1*) *Prohibited uses.*—Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(*2*) *Permitted uses; notice in a criminal case.*—This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must:

(A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and

(B) do so before trial—or during trial if the court, for good cause, excuses lack of pretrial notice.

Rule 405. Methods of proving character.

(*a*) *By reputation or opinion.*—When evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation or by testimony in the form of an opinion. On cross-examination of the character witness, the court may allow an inquiry into relevant specific instances of the person's conduct.

(*b*) *By specific instances of conduct.*—When a person's character or character trait is an essential element of a charge, claim, or defense, the character or trait may also be proved by relevant specific instances of the person's conduct.

Rule 406. Habit; routine practice.

Evidence of a person's habit or an organization's routine practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice. The court may admit this evidence regardless of whether it is corroborated or whether there was an eyewitness.

Rule 407. Subsequent remedial measures.

When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove:

- negligence;
- culpable conduct;
- a defect in a product or its design; or
- a need for a warning or instruction.

But the court may admit this evidence for another purpose, such as impeachment or—if disputed—proving ownership, control, or the feasibility of precautionary measures.

Rule 408. Compromise offers and negotiations.

(*a*) *Prohibited uses.*—Evidence of the following is not admissible—on behalf of any party—either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:

(1) furnishing, promising, or offering—or accepting, promising to accept, or offering to accept—a valuable consideration in compromising or attempting to compromise the claim; and

(2) conduct or a statement made during compromise negotiations about the claim—except when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority.

(*b*) *Exceptions.*—The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Rule 409. Offers to pay medical and similar expenses.

Evidence of furnishing, promising to pay, or offering to pay medical, hospital, or similar expenses resulting from an injury is not admissible to prove liability for the injury.

Rule 410. Pleas, plea discussions, and related statements.

(*a*) *Prohibited uses.*—In a civil or criminal case, evidence of the following is not admissible against the defendant who made the plea or participated in the plea discussions:

(1) a guilty plea that was later withdrawn;

(2) a nolo contendere plea;

(3) a statement made during a proceeding on either of those pleas under Federal Rule of Criminal Procedure 11 or a comparable state procedure; or

(4) a statement made during plea discussions with an attorney for the prosecuting authority if the discussions did not result in a guilty plea or they resulted in a later-withdrawn guilty plea.

(*b*) *Exceptions.*—The court may admit a statement described in Rule 410(a)(3) or (4):

(1) in any proceeding in which another statement made during the same plea or plea discussions has been introduced, if in fairness the statements ought to be considered together; or

(2) in a criminal proceeding for perjury or false statement, if the defendant made the statement under oath, on the record, and with counsel present.

Rule 411. Liability insurance.

Evidence that a person was or was not insured against liability is not admissible to prove whether the person acted negligently or otherwise wrongfully. But the court may admit this evidence for another purpose, such as proving a witness's bias or prejudice or proving agency, ownership, or control.

Rule 412. Sex-offense cases: the victim's sexual behavior or predisposition.

(*a*) *Prohibited uses.*—The following evidence is not admissible in a civil or criminal proceeding involving alleged sexual misconduct:

(1) evidence offered to prove that a victim engaged in other sexual behavior; or

(2) evidence offered to prove a victim's sexual predisposition.

(*b*) *Exceptions.*

(*1*) *Criminal cases.*—The court may admit the following evidence in a criminal case:

(A) evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence;

(B) evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor; and

(C) evidence whose exclusion would violate the defendant's constitutional rights.

(*2*) *Civil cases.*—In a civil case, the court may admit evidence offered to prove a victim's sexual behavior or sexual predisposition if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. The court may admit evidence of a victim's reputation only if the victim has placed it in controversy.

(*c*) *Procedure to determine admissibility.*

(*1*) *Motion.*—If a party intends to offer evidence under Rule 412(b), the party must:

(A) file a motion that specifically describes the evidence and states the purpose for which it is to be offered;

(B) do so at least 14 days before trial unless the court, for good cause, sets a different time;

(C) serve the motion on all parties; and

(D) notify the victim or, when appropriate, the victim's guardian or representative.

(*2*) *Hearing.*—Before admitting evidence under this rule, the court must conduct an in camera hearing and give the victim and parties a right to attend and be heard. Unless the court orders otherwise, the motion, related mate-

rials, and the record of the hearing must be and remain sealed.

(*d*) *Definition of "victim."*—In this rule, "victim" includes an alleged victim.

Rule 413. Similar crimes in sexual-assault cases.

(*a*) *Permitted uses.*—In a criminal case in which a defendant is accused of a sexual assault, the court may admit evidence that the defendant committed any other sexual assault. The evidence may be considered on any matter to which it is relevant.

(*b*) *Disclosure to the defendant.*—If the prosecutor intends to offer this evidence, the prosecutor must disclose it to the defendant, including witnesses' statements or a summary of the expected testimony. The prosecutor must do so at least 15 days before trial or at a later time that the court allows for good cause.

(*c*) *Effect on other rules.*—This rule does not limit the admission or consideration of evidence under any other rule.

(*d*) *Definition of "sexual assault."*—In this rule and Rule 415, "sexual assault" means a crime under federal law or under state law (as "state" is defined in 18 U. S. C. § 513) involving:

(1) any conduct prohibited by 18 U. S. C. chapter 109A;

(2) contact, without consent, between any part of the defendant's body—or an object—and another person's genitals or anus;

(3) contact, without consent, between the defendant's genitals or anus and any part of another person's body;

(4) deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on another person; or

(5) an attempt or conspiracy to engage in conduct described in subparagraphs (1)–(4).

Rule 414. Similar crimes in child-molestation cases.

(*a*) *Permitted uses.*—In a criminal case in which a defendant is accused of child molestation, the court may admit evi-

dence that the defendant committed any other child molestation. The evidence may be considered on any matter to which it is relevant.

(*b*) *Disclosure to the defendant.*—If the prosecutor intends to offer this evidence, the prosecutor must disclose it to the defendant, including witnesses' statements or a summary of the expected testimony. The prosecutor must do so at least 15 days before trial or at a later time that the court allows for good cause.

(*c*) *Effect on other rules.*—This rule does not limit the admission or consideration of evidence under any other rule.

(*d*) *Definition of "child" and "child molestation."*—In this rule and Rule 415:

(1) "child" means a person below the age of 14; and

(2) "child molestation" means a crime under federal law or under state law (as "state" is defined in 18 U. S. C. § 513) involving:

(A) any conduct prohibited by 18 U. S. C. chapter 109A and committed with a child;

(B) any conduct prohibited by 18 U. S. C. chapter 110;

(C) contact between any part of the defendant's body—or an object—and a child's genitals or anus;

(D) contact between the defendant's genitals or anus and any part of a child's body;

(E) deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on a child; or

(F) an attempt or conspiracy to engage in conduct described in subparagraphs (A)–(E).

Rule 415. Similar acts in civil cases involving sexual assault or child molestation.

(*a*) *Permitted uses.*—In a civil case involving a claim for relief based on a party's alleged sexual assault or child molestation, the court may admit evidence that the party committed any other sexual assault or child molestation. The evidence may be considered as provided in Rules 413 and 414.

(*b*) *Disclosure to the opponent.*—If a party intends to offer this evidence, the party must disclose it to the party against whom it will be offered, including witnesses' statements or a summary of the expected testimony. The party must do so at least 15 days before trial or at a later time that the court allows for good cause.

(*c*) *Effect on other rules.*—This rule does not limit the admission or consideration of evidence under any other rule.

Article V. Privileges

Rule 501. Privilege in general.

The common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege unless any of the following provides otherwise:

- the United States Constitution;
- a federal statute; or
- rules prescribed by the Supreme Court.

But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.

Rule 502. Attorney-client privilege and work product; limitations on waiver.

The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.

(*a*) *Disclosure made in a federal proceeding or to a federal office or agency; scope of a waiver.*—When the disclosure is made in a federal proceeding or to a federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a federal or state proceeding only if:

(1) the waiver is intentional;

(2) the disclosed and undisclosed communications or information concern the same subject matter; and

(3) they ought in fairness to be considered together.

(*b*) *Inadvertent disclosure.*—When made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if:

(1) the disclosure is inadvertent;

(2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and

(3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).

(*c*) *Disclosure made in a state proceeding.*—When the disclosure is made in a state proceeding and is not the subject of a state-court order concerning waiver, the disclosure does not operate as a waiver in a federal proceeding if the disclosure:

(1) would not be a waiver under this rule if it had been made in a federal proceeding; or

(2) is not a waiver under the law of the state where the disclosure occurred.

(*d*) *Controlling effect of a court order.*—A federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court—in which event the disclosure is also not a waiver in any other federal or state proceeding.

(*e*) *Controlling effect of a party agreement.*—An agreement on the effect of disclosure in a federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

(*f*) *Controlling effect of this rule.*—Notwithstanding Rules 101 and 1101, this rule applies to state proceedings and to federal court-annexed and federal court-mandated arbitration proceedings, in the circumstances set out in the rule. And notwithstanding Rule 501, this rule applies even if state law provides the rule of decision.

(*g*) *Definitions.*—In this rule:

(1) "attorney-client privilege" means the protection that applicable law provides for confidential attorney-client communications; and

(2) "work-product protection" means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.

Article VI. Witnesses

Rule 601. Competency to testify in general.

Every person is competent to be a witness unless these rules provide otherwise. But in a civil case, state law governs the witness's competency regarding a claim or defense for which state law supplies the rule of decision.

Rule 602. Need for personal knowledge.

A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to a witness's expert testimony under Rule 703.

Rule 603. Oath or affirmation to testify truthfully.

Before testifying, a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness's conscience.

Rule 604. Interpreter.

An interpreter must be qualified and must give an oath or affirmation to make a true translation.

Rule 605. Judge's competency as a witness.

The presiding judge may not testify as a witness at the trial. A party need not object to preserve the issue.

Rule 606. Juror's competency as a witness.

(*a*) *At the trial.*—A juror may not testify as a witness before the other jurors at the trial. If a juror is called to testify, the court must give a party an opportunity to object outside the jury's presence.

(b) During an inquiry into the validity of a verdict or indictment.

(*1*) *Prohibited testimony or other evidence.*—During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.

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

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

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

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

Rule 607. Who may impeach a witness.

Any party, including the party that called the witness, may attack the witness's credibility.

Rule 608. A witness's character for truthfulness or untruthfulness.

(*a*) *Reputation or opinion evidence.*—A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.

(*b*) *Specific instances of conduct.*—Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of:

(1) the witness; or

(2) another witness whose character the witness being cross-examined has testified about.

By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness's character for truthfulness.

Rule 609. Impeachment by evidence of a criminal conviction.

(*a*) *In general.*—The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:

(1) for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:

(A) must be admitted, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a defendant; and

(B) must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant; and

(2) for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving—or the witness's admitting—a dishonest act or false statement.

(*b*) *Limit on using the evidence after 10 years.*—This subdivision (b) applies if more than 10 years have passed since the witness's conviction or release from confinement for it, whichever is later. Evidence of the conviction is admissible only if:

(1) its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and

(2) the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use.

(*c*) *Effect of a pardon, annulment, or certificate of rehabilitation.*—Evidence of a conviction is not admissible if:

(1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding that the person has been rehabilitated, and the person has not been convicted of a later crime punishable by death or by imprisonment for more than one year; or

(2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(*d*) *Juvenile adjudications.*—Evidence of a juvenile adjudication is admissible under this rule only if:

(1) it is offered in a criminal case;

(2) the adjudication was of a witness other than the defendant;

(3) an adult's conviction for that offense would be admissible to attack the adult's credibility; and

(4) admitting the evidence is necessary to fairly determine guilt or innocence.

(*e*) *Pendency of an appeal.*—A conviction that satisfies this rule is admissible even if an appeal is pending. Evidence of the pendency is also admissible.

Rule 610. Religious beliefs or opinions.

Evidence of a witness's religious beliefs or opinions is not admissible to attack or support the witness's credibility.

Rule 611. Mode and order of examining witnesses and presenting evidence.

(*a*) *Control by the court; purposes.*—The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to:

(1) make those procedures effective for determining the truth;

(2) avoid wasting time; and

(3) protect witnesses from harassment or undue embarrassment.

(*b*) *Scope of cross-examination.*—Cross-examination should not go beyond the subject matter of the direct examination and matters affecting the witness's credibility. The court may allow inquiry into additional matters as if on direct examination.

(*c*) *Leading questions.*—Leading questions should not be used on direct examination except as necessary to develop the witness's testimony. Ordinarily, the court should allow leading questions:

(1) on cross-examination; and

(2) when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.

Rule 612. Writing used to refresh a witness's memory.

(*a*) *Scope.*—This rule gives an adverse party certain options when a witness uses a writing to refresh memory:

(1) while testifying; or

(2) before testifying, if the court decides that justice requires the party to have those options.

(*b*) *Adverse party's options; deleting unrelated matter.*—Unless 18 U. S. C. § 3500 provides otherwise in a criminal case, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony. If the producing party claims that the writing includes unrelated matter, the court must examine the writing in camera, delete any unrelated portion, and order that the rest be delivered to the adverse party. Any portion deleted over objection must be preserved for the record.

(*c*) *Failure to produce or deliver the writing.*—If a writing is not produced or is not delivered as ordered, the court may

issue any appropriate order. But if the prosecution does not comply in a criminal case, the court must strike the witness's testimony or—if justice so requires—declare a mistrial.

Rule 613. Witness's prior statement.

(*a*) *Showing or disclosing the statement during examination.*—When examining a witness about the witness's prior statement, a party need not show it or disclose its contents to the witness. But the party must, on request, show it or disclose its contents to an adverse party's attorney.

(*b*) *Extrinsic evidence of a prior inconsistent statement.*—Extrinsic evidence of a witness's prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it, or if justice so requires. This subdivision (b) does not apply to an opposing party's statement under Rule 801(d)(2).

Rule 614. Court's calling or examining a witness.

(*a*) *Calling.*—The court may call a witness on its own or at a party's request. Each party is entitled to cross-examine the witness.

(*b*) *Examining.*—The court may examine a witness regardless of who calls the witness.

(*c*) *Objections.*—A party may object to the court's calling or examining a witness either at that time or at the next opportunity when the jury is not present.

Rule 615. Excluding witnesses.

At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize excluding:

(a) a party who is a natural person;

(b) an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney;

(c) a person whose presence a party shows to be essential to presenting the party's claim or defense; or

(d) a person authorized by statute to be present.

Article VII. Opinions and Expert Testimony

Rule 701. Opinion testimony by lay witnesses.

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

(a) rationally based on the witness's perception;

(b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and

(c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Rule 702. Testimony by expert witnesses.

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

Rule 703. Bases of an expert's opinion testimony.

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

Rule 704. Opinion on an ultimate issue.

(*a*) *In general—not automatically objectionable.*—An opinion is not objectionable just because it embraces an ultimate issue.

(*b*) *Exception.*—In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone.

Rule 705. Disclosing the facts or data underlying an expert's opinion.

Unless the court orders otherwise, an expert may state an opinion—and give the reasons for it—without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.

Rule 706. Court-appointed expert witnesses.

(*a*) *Appointment process.*—On a party's motion or on its own, the court may order the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations. The court may appoint any expert that the parties agree on and any of its own choosing. But the court may only appoint someone who consents to act.

(*b*) *Expert's role.*—The court must inform the expert of the expert's duties. The court may do so in writing and have a copy filed with the clerk or may do so orally at a conference in which the parties have an opportunity to participate. The expert:

(1) must advise the parties of any findings the expert makes;

(2) may be deposed by any party;

(3) may be called to testify by the court or any party; and

(4) may be cross-examined by any party, including the party that called the expert.

(*c*) *Compensation.*—The expert is entitled to a reasonable compensation, as set by the court. The compensation is payable as follows:

(1) in a criminal case or in a civil case involving just compensation under the Fifth Amendment, from any funds that are provided by law; and

(2) in any other civil case, by the parties in the proportion and at the time that the court directs—and the compensation is then charged like other costs.

(*d*) *Disclosing the appointment to the jury.*—The court may authorize disclosure to the jury that the court appointed the expert.

(*e*) *Parties' choice of their own experts.*—This rule does not limit a party in calling its own experts.

Article VIII. Hearsay

Rule 801. Definitions that apply to this article; exclusions from hearsay.

(*a*) *Statement.*—"Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.

(*b*) *Declarant.*—"Declarant" means the person who made the statement.

(*c*) *Hearsay.*—"Hearsay" means a statement that:

(1) the declarant does not make while testifying at the current trial or hearing; and

(2) a party offers in evidence to prove the truth of the matter asserted in the statement.

(*d*) *Statements that are not hearsay.*—A statement that meets the following conditions is not hearsay:

(*1*) *A declarant-witness's prior statement.*—The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

(A) is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;

(B) is consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or

(C) identifies a person as someone the declarant perceived earlier.

(*2*) *An opposing party's statement.*—The statement is offered against an opposing party and:

(A) was made by the party in an individual or representative capacity;

(B) is one the party manifested that it adopted or believed to be true;

(C) was made by a person whom the party authorized to make a statement on the subject;

(D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or

(E) was made by the party's coconspirator during and in furtherance of the conspiracy.

The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

Rule 802. The rule against hearsay.

Hearsay is not admissible unless any of the following provides otherwise:

- a federal statute;
- these rules; or
- other rules prescribed by the Supreme Court.

Rule 803. Exceptions to the rule against hearsay—regardless of whether the declarant is available as a witness.

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

(*1*) *Present sense impression.*—A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.

(*2*) *Excited utterance.*—A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.

(*3*) *Then-existing mental, emotional, or physical condition.*—A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.

(*4*) *Statement made for medical diagnosis or treatment.*—A statement that:

(A) is made for—and is reasonably pertinent to—medical diagnosis or treatment; and

(B) describes medical history; past or present symptoms or sensations; their inception; or their general cause.

(*5*) *Recorded recollection.*—A record that:

(A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;

(B) was made or adopted by the witness when the matter was fresh in the witness's memory; and

(C) accurately reflects the witness's knowledge.

If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.

(*6*) *Records of a regularly conducted activity.*—A record of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by —or from information transmitted by—someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

(E) neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.

(*7*) *Absence of a record of a regularly conducted activity.*—Evidence that a matter is not included in a record described in paragraph (6) if:

(A) the evidence is admitted to prove that the matter did not occur or exist;

(B) a record was regularly kept for a matter of that kind; and

(C) neither the possible source of the information nor other circumstances indicate a lack of trustworthiness.

(*8*) *Public records.*—A record or statement of a public office if:

(A) it sets out:

(i) the office's activities;

(ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or

(iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and

(B) neither the source of information nor other circumstances indicate a lack of trustworthiness.

(*9*) *Public records of vital statistics.*—A record of a birth, death, or marriage, if reported to a public office in accordance with a legal duty.

(*10*) *Absence of a public record.*—Testimony—or a certification under Rule 902—that a diligent search failed to disclose a public record or statement if the testimony or certification is admitted to prove that:

(A) the record or statement does not exist; or

(B) a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind.

(*11*) *Records of religious organizations concerning personal or family history.*—A statement of birth, legitimacy,

ancestry, marriage, divorce, death, relationship by blood or marriage, or similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(*12*) *Certificates of marriage, baptism, and similar ceremonies.*—A statement of fact contained in a certificate:

(A) made by a person who is authorized by a religious organization or by law to perform the act certified;

(B) attesting that the person performed a marriage or similar ceremony or administered a sacrament; and

(C) purporting to have been issued at the time of the act or within a reasonable time after it.

(*13*) *Family records.*—A statement of fact about personal or family history contained in a family record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a portrait, or engraving on an urn or burial marker.

(*14*) *Records of documents that affect an interest in property.*—The record of a document that purports to establish or affect an interest in property if:

(A) the record is admitted to prove the content of the original recorded document, along with its signing and its delivery by each person who purports to have signed it;

(B) the record is kept in a public office; and

(C) a statute authorizes recording documents of that kind in that office.

(*15*) *Statements in documents that affect an interest in property.*—A statement contained in a document that purports to establish or affect an interest in property if the matter stated was relevant to the document's purpose—unless later dealings with the property are inconsistent with the truth of the statement or the purport of the document.

(*16*) *Statements in ancient documents.*—A statement in a document that is at least 20 years old and whose authenticity is established.

(*17*) *Market reports and similar commercial publications.*—Market quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations.

(*18*) *Statements in learned treatises, periodicals, or pamphlets.*—A statement contained in a treatise, periodical, or pamphlet if:

(A) the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and

(B) the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.

If admitted, the statement may be read into evidence but not received as an exhibit.

(*19*) *Reputation concerning personal or family history.*—A reputation among a person's family by blood, adoption, or marriage—or among a person's associates or in the community—concerning the person's birth, adoption, legitimacy, ancestry, marriage, divorce, death, relationship by blood, adoption, or marriage, or similar facts of personal or family history.

(*20*) *Reputation concerning boundaries or general history.*—A reputation in a community—arising before the controversy—concerning boundaries of land in the community or customs that affect the land, or concerning general historical events important to that community, state, or nation.

(*21*) *Reputation concerning character.*—A reputation among a person's associates or in the community concerning the person's character.

(*22*) *Judgment of a previous conviction.*—Evidence of a final judgment of conviction if:

(A) the judgment was entered after a trial or guilty plea, but not a nolo contendere plea;

(B) the conviction was for a crime punishable by death or by imprisonment for more than a year;

(C) the evidence is admitted to prove any fact essential to the judgment; and

(D) when offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant.

The pendency of an appeal may be shown but does not affect admissibility.

(*23*) *Judgments involving personal, family, or general history, or a boundary.*—A judgment that is admitted to prove a matter of personal, family, or general history, or boundaries, if the matter:

(A) was essential to the judgment; and

(B) could be proved by evidence of reputation.

(*24*) *[Other exceptions.]* [Transferred to Rule 807.]

Rule 804. Exceptions to the rule against hearsay—when the declarant is unavailable as a witness.

(*a*) *Criteria for being unavailable.*—A declarant is considered to be unavailable as a witness if the declarant:

(1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;

(2) refuses to testify about the subject matter despite a court order to do so;

(3) testifies to not remembering the subject matter;

(4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or

(5) is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure:

(A) the declarant's attendance, in the case of a hearsay exception under Rule 804(b)(1) or (6); or

(B) the declarant's attendance or testimony, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4).

But this subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.

(*b*) *The exceptions.*—The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

(*1*) *Former testimony.*—Testimony that:

(A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and

(B) is now offered against a party who had—or, in a civil case, whose predecessor in interest had—an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

(*2*) *Statement under the belief of imminent death.*—In a prosecution for homicide or in a civil case, a statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.

(*3*) *Statement against interest.*—A statement that:

(A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

(B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

(*4*) *Statement of personal or family history.*—A statement about:

(A) the declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood, adoption, or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact; or

(B) another person concerning any of these facts, as well as death, if the declarant was related to the person

by blood, adoption, or marriage or was so intimately associated with the person's family that the declarant's information is likely to be accurate.

(*5*) *[Other exceptions.]* [Transferred to Rule 807.]

(*6*) *Statement offered against a party that wrongfully caused the declarant's unavailability.*—A statement offered against a party that wrongfully caused—or acquiesced in wrongfully causing—the declarant's unavailability as a witness, and did so intending that result.

Rule 805. Hearsay within hearsay.

Hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception to the rule.

Rule 806. Attacking and supporting the declarant's credibility.

When a hearsay statement—or a statement described in Rule 801(d)(2)(C), (D), or (E)—has been admitted in evidence, the declarant's credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness. The court may admit evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it. If the party against whom the statement was admitted calls the declarant as a witness, the party may examine the declarant on the statement as if on cross-examination.

Rule 807. Residual exception.

(*a*) *In general.*—Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804:

(1) the statement has equivalent circumstantial guarantees of trustworthiness;

(2) it is offered as evidence of a material fact;

(3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and

(4) admitting it will best serve the purposes of these rules and the interests of justice.

(*b*) *Notice.*—The statement is admissible only if, before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.

Article IX. Authentication and Identification

Rule 901. Authenticating or identifying evidence.

(*a*) *In general.*—To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.

(*b*) *Examples.*—The following are examples only—not a complete list—of evidence that satisfies the requirement:

(*1*) *Testimony of a witness with knowledge.*—Testimony that an item is what it is claimed to be.

(*2*) *Nonexpert opinion about handwriting.*—A nonexpert's opinion that handwriting is genuine, based on a familiarity with it that was not acquired for the current litigation.

(*3*) *Comparison by an expert witness or the trier of fact.*—A comparison with an authenticated specimen by an expert witness or the trier of fact.

(*4*) *Distinctive characteristics and the like.*—The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.

(*5*) *Opinion about a voice.*—An opinion identifying a person's voice—whether heard firsthand or through mechanical or electronic transmission or recording—based on hearing the voice at any time under circumstances that connect it with the alleged speaker.

(*6*) *Evidence about a telephone conversation.*—For a telephone conversation, evidence that a call was made to the number assigned at the time to:

(A) a particular person, if circumstances, including self-identification, show that the person answering was the one called; or

(B) a particular business, if the call was made to a business and the call related to business reasonably transacted over the telephone.

(*7*) *Evidence about public records.*—Evidence that:

(A) a document was recorded or filed in a public office as authorized by law; or

(B) a purported public record or statement is from the office where items of this kind are kept.

(*8*) *Evidence about ancient documents or data compilations.*—For a document or data compilation, evidence that it:

(A) is in a condition that creates no suspicion about its authenticity;

(B) was in a place where, if authentic, it would likely be; and

(C) is at least 20 years old when offered.

(*9*) *Evidence about a process or system.*—Evidence describing a process or system and showing that it produces an accurate result.

(*10*) *Methods provided by a statute or rule.*—Any method of authentication or identification allowed by a federal statute or a rule prescribed by the Supreme Court.

Rule 902. Evidence that is self-authenticating.

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

(*1*) *Domestic public documents that are sealed and signed.*—A document that bears:

(A) a seal purporting to be that of the United States; any state, district, commonwealth, territory, or insular

possession of the United States; the former Panama Canal Zone; the Trust Territory of the Pacific Islands; a political subdivision of any of these entities; or a department, agency, or officer of any entity named above; and

(B) a signature purporting to be an execution or attestation.

(*2*) *Domestic public documents that are not sealed but are signed and certified.*—A document that bears no seal if:

(A) it bears the signature of an officer or employee of an entity named in Rule 902(1)(A); and

(B) another public officer who has a seal and official duties within that same entity certifies under seal—or its equivalent—that the signer has the official capacity and that the signature is genuine.

(*3*) *Foreign public documents.*—A document that purports to be signed or attested by a person who is authorized by a foreign country's law to do so. The document must be accompanied by a final certification that certifies the genuineness of the signature and official position of the signer or attester—or of any foreign official whose certificate of genuineness relates to the signature or attestation or is in a chain of certificates of genuineness relating to the signature or attestation. The certification may be made by a secretary of a United States embassy or legation; by a consul general, vice consul, or consular agent of the United States; or by a diplomatic or consular official of the foreign country assigned or accredited to the United States. If all parties have been given a reasonable opportunity to investigate the document's authenticity and accuracy, the court may, for good cause, either:

(A) order that it be treated as presumptively authentic without final certification; or

(B) allow it to be evidenced by an attested summary with or without final certification.

(*4*) *Certified copies of public records.*—A copy of an official record—or a copy of a document that was recorded or

filed in a public office as authorized by law—if the copy is certified as correct by:

(A) the custodian or another person authorized to make the certification; or

(B) a certificate that complies with Rule 902(1), (2), or (3), a federal statute, or a rule prescribed by the Supreme Court.

(*5*) *Official publications.*—A book, pamphlet, or other publication purporting to be issued by a public authority.

(*6*) *Newspapers and periodicals.*—Printed material purporting to be a newspaper or periodical.

(*7*) *Trade inscriptions and the like.*—An inscription, sign, tag, or label purporting to have been affixed in the course of business and indicating origin, ownership, or control.

(*8*) *Acknowledged documents.*—A document accompanied by a certificate of acknowledgment that is lawfully executed by a notary public or another officer who is authorized to take acknowledgments.

(*9*) *Commercial paper and related documents.*—Commercial paper, a signature on it, and related documents, to the extent allowed by general commercial law.

(*10*) *Presumptions under a federal statute.*—A signature, document, or anything else that a federal statute declares to be presumptively or prima facie genuine or authentic.

(*11*) *Certified domestic records of a regularly conducted activity.*—The original or a copy of a domestic record that meets the requirements of Rule 803(6)(A)–(C), as shown by a certification of the custodian or another qualified person that complies with a federal statute or a rule prescribed by the Supreme Court. Before the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer the record—and must make the record and certification available for inspection—so that the party has a fair opportunity to challenge them.

(*12*) *Certified foreign records of a regularly conducted activity.*—In a civil case, the original or a copy of a foreign record that meets the requirements of Rule 902(11), modified as follows: the certification, rather than complying with a

federal statute or Supreme Court rule, must be signed in a manner that, if falsely made, would subject the maker to a criminal penalty in the country where the certification is signed. The proponent must also meet the notice requirements of Rule 902(11).

Rule 903. Subscribing witness's testimony.

A subscribing witness's testimony is necessary to authenticate a writing only if required by the law of the jurisdiction that governs its validity.

Article X. Contents of Writings, Recordings, and Photographs

Rule 1001. Definitions that apply to this article.

In this article:

(a) A "writing" consists of letters, words, numbers, or their equivalent set down in any form.

(b) A "recording" consists of letters, words, numbers, or their equivalent recorded in any manner.

(c) A "photograph" means a photographic image or its equivalent stored in any form.

(d) An "original" of a writing or recording means the writing or recording itself or any counterpart intended to have the same effect by the person who executed or issued it. For electronically stored information, "original" means any printout—or other output readable by sight—if it accurately reflects the information. An "original" of a photograph includes the negative or a print from it.

(e) A "duplicate" means a counterpart produced by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that accurately reproduces the original.

Rule 1002. Requirement of the original.

An original writing, recording, or photograph is required in order to prove its content unless these rules or a federal statute provides otherwise.

Rule 1003. Admissibility of duplicates.

A duplicate is admissible to the same extent as the original unless a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate.

Rule 1004. Admissibility of other evidence of content.

An original is not required and other evidence of the content of a writing, recording, or photograph is admissible if:

(a) all the originals are lost or destroyed, and not by the proponent acting in bad faith;

(b) an original cannot be obtained by any available judicial process;

(c) the party against whom the original would be offered had control of the original; was at that time put on notice, by pleadings or otherwise, that the original would be a subject of proof at the trial or hearing; and fails to produce it at the trial or hearing; or

(d) the writing, recording, or photograph is not closely related to a controlling issue.

Rule 1005. Copies of public records to prove content.

The proponent may use a copy to prove the content of an official record—or of a document that was recorded or filed in a public office as authorized by law—if these conditions are met: the record or document is otherwise admissible; and the copy is certified as correct in accordance with Rule 902(4) or is testified to be correct by a witness who has compared it with the original. If no such copy can be obtained by reasonable diligence, then the proponent may use other evidence to prove the content.

Rule 1006. Summaries to prove content.

The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at

a reasonable time and place. And the court may order the proponent to produce them in court.

Rule 1007. Testimony or statement of a party to prove content.

The proponent may prove the content of a writing, recording, or photograph by the testimony, deposition, or written statement of the party against whom the evidence is offered. The proponent need not account for the original.

Rule 1008. Functions of the court and jury.

Ordinarily, the court determines whether the proponent has fulfilled the factual conditions for admitting other evidence of the content of a writing, recording, or photograph under Rule 1004 or 1005. But in a jury trial, the jury determines—in accordance with Rule 104(b)—any issue about whether:

(a) an asserted writing, recording, or photograph ever existed;

(b) another one produced at the trial or hearing is the original; or

(c) other evidence of content accurately reflects the content.

Article XI. Miscellaneous Rules

Rule 1101. Applicability of the rules.

(*a*) *To courts and judges.*—These rules apply to proceedings before:

- United States district courts;
- United States bankruptcy and magistrate judges;
- United States courts of appeals;
- the United States Court of Federal Claims; and
- the district courts of Guam, the Virgin Islands, and the Northern Mariana Islands.

(*b*) *To cases and proceedings.*—These rules apply in:

- civil cases and proceedings, including bankruptcy, admiralty, and maritime cases;
- criminal cases and proceedings; and

• contempt proceedings, except those in which the court may act summarily.

(*c*) *Rules on privilege.*—The rules on privilege apply to all stages of a case or proceeding.

(*d*) *Exceptions.*—These rules—except for those on privilege—do not apply to the following:

(1) the court's determination, under Rule 104(a), on a preliminary question of fact governing admissibility;

(2) grand-jury proceedings; and

(3) miscellaneous proceedings such as:

• extradition or rendition;

• issuing an arrest warrant, criminal summons, or search warrant;

• a preliminary examination in a criminal case;

• sentencing;

• granting or revoking probation or supervised release; and

• considering whether to release on bail or otherwise.

(*e*) *Other statutes and rules.*—A federal statute or a rule prescribed by the Supreme Court may provide for admitting or excluding evidence independently from these rules.

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FOURTH AMENDMENT. See **Constitutional Law,** III.

FREEDOM OF INFORMATION ACT. See **False Claims Act.**

HABEAS CORPUS.

1. *Capital jury instructions—Penalty phase—Consideration of mandatory death sentence before life-imprisonment sentence.*—Instructions requiring a capital jury to consider a mandatory death sentence before considering a sentence of life imprisonment were not, under 28 U. S. C. § 2254(d)(1), "contrary to" *Beck* v. *Alabama,* 447 U. S. 625, which concerned guilt, not penalty, proceedings. Bobby v. Mitts, p. 395.

2. *State-court decision contrary to, or involving unreasonable application of, federal law—Scope of review.*—In determining whether a federal habeas claim that has been "adjudicated on the merits in State court" can be granted on ground that "the adjudication" "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law," 28 U. S. C. § 2254(d)(1), review is limited to record that was before state court that adjudicated claim on merits; on that record, Pinholster was not entitled to federal habeas relief. Cullen v. Pinholster, p. 170.

ILLEGAL IMMIGRATION REFORM AND CONTROL ACT. See **Pre-emption,** 2.

IMMUNITY FROM SUIT. See **Constitutional Law,** IV.

JURISDICTION. See **Federal Courts.**

MONTANA. See **Yellowstone River Compact.**

MOOTNESS. See **Supreme Court,** 5.

PATENTS.

Induced infringement—Knowledge of infringement—Willful-blindness doctrine.—Induced infringement of a patent under 35 U. S. C. § 271(b) requires knowledge that induced acts constitute patent infringement, not simply deliberate indifference to a known risk that a patent exists; although Federal Circuit applied a deliberate indifference test in this case, its judgment must be affirmed because evidence was plainly sufficient to support a finding of petitioners' culpability under doctrine of willful blindness. Global-Tech Appliances, Inc. v. SEB S. A., p. 754.

PRE-EMPTION.

1. *Federal Arbitration Act—California's Discover Bank rule.*—California's *Discover Bank* rule—which permits certain class waivers in consumer arbitration agreements to be found unconscionable—is pre-empted by Act. AT&T Mobility LLC v. Concepcion, p. 333.

PRE-EMPTION—Continued.

2. *Illegal Immigration Reform and Control Act—Arizona licensing law—Suspension or revocation of state employers' licenses for employing unauthorized aliens.*—Arizona Act, which provides for suspension or revocation of licenses of state employers that knowingly or intentionally employ unauthorized aliens, is not pre-empted by federal Illegal Immigration Reform and Control Act, which invalidates "any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ . . . unauthorized aliens," 8 U. S. C. § 1324a(h)(2). Chamber of Commerce of United States of America v. Whiting, p. 582.

PRISON LITIGATION REFORM ACT OF 1995. See **Constitutional Law,** II.

PROPERTY RIGHTS. See **University and Small Business Patent Procedure Act of 1980.**

PUBLIC HEALTH SERVICES ACT.

Price-ceiling contracts between drug manufacturers and Health and Human Services Secretary—Suits by health care facilities as third party beneficiaries.—Where § 340B of Act imposes ceilings on prices drug manufacturers may charge for medications sold to specified health care facilities, those facilities may not sue allegedly overcharging manufacturers as third-party beneficiaries of ceiling-price contracts that run between drug manufacturers and Secretary of Health and Human Services. Astra USA, Inc. v. Santa Clara County, p. 110.

QUALIFIED IMMUNITY FROM SUIT. See **Constitutional Law,** III, 1; **Supreme Court,** 5.

RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT OF 2000. See **Constitutional Law,** IV.

RULE 10B–5. See **Securities Exchange Act of 1934.**

SEARCHES AND SEIZURES. See **Constitutional Law,** III.

SECTION 1983. See **Civil Rights Act of 1871.**

SECURITIES EXCHANGE ACT OF 1934.

1. *Fraud cause of action—Failure to disclose possible link between medication and loss of smell.*—Respondents stated a claim in this securities fraud action, when they alleged that petitioners violated § 10(b) of Act and Securities and Exchange Commission Rule 10b–5 by failing to disclose reports of a possible link between company's Zicam Cold Remedy and loss of smell (anosmia), rendering statements made by them misleading. Matrixx Initiatives, Inc. v. Siracusano, p. 27.

SECURITIES EXCHANGE ACT OF 1934—Continued.

2. *Fraud cause of action—"Loss causation" requirement—Class certification.*—Although securities fraud plaintiffs must demonstrate that a defendant's deceptive conduct caused their claimed economic loss ("loss causation" requirement) to prevail in a private securities fraud action, they need not prove loss causation in order to obtain class certification under Federal Rule of Civil Procedure 23. Erica P. John Fund, Inc. v. Halliburton Co., p. 804.

SENTENCING. See **Armed Career Criminal Act; Habeas Corpus.**

SOVEREIGN IMMUNITY. See **Connstitutional Law,** III, 1.

SPEEDY TRIAL ACT OF 1974.

Requirement that trial begin within 70 days after arraignment—Exclusion for delay resulting from pretrial motions.—Act—which provides that in "any case in which a plea of not guilty is entered, the trial . . . shall commence within seventy days" after arraignment, 18 U. S. C. § 3161(c)(1), but lists a number of exclusions from 70-day period, including "delay resulting from any pretrial motion," § 3161(h)(1)(D)—contains no requirement that filing of a pretrial motion actually caused, or was expected to cause, a trial's delay; rather, subparagraph (D) stops clock from running automatically upon filing of such a motion irrespective of whether motion has any impact on when trial begins. United States v. Tinklenberg, p. 647.

STANDING. See **Constitutional Law,** I.

STATES' IMMUNITY FROM SUIT. See **Constitutional Law,** IV.

SUPREME COURT.

1. Amendments to Federal Rules of Appellate Procedure, p. 1045.
2. Amendments to Federal Rules of Bankruptcy Procedure, p. 1051.
3. Amendments to Federal Rules of Criminal Procedure, p. 1063.
4. Amendments to Federal Rules of Evidence, p. 1075.
5. *Power to grant certiorari—Government officials prevailing on qualified immunity grounds—Mootness.*—This Court generally may review a lower court's constitutional ruling at behest of government officials who have prevailed on qualified immunity grounds; because mootness of this case has frustrated Camreta's ability to challenge Ninth Circuit's ruling that he must obtain a warrant before interviewing a suspected child abuse victim at school, that part of Ninth Circuit's decision must be vacated. Camreta v. Greene, p. 692.

TAXES. See **Constitutional Law,** I.

UNIVERSITY AND SMALL BUSINESS PATENT PROCEDURES ACT OF 1980.

Title to federally funded inventions—Federal contractors.—Act does not automatically vest title to federally funded inventions in federal contractors or authorize contractors to unilaterally take title to such inventions. Board of Trustees of Leland Stanford Junior Univ. v. Roche Molecular Systems, Inc., p. 776.

WITNESSES. See **Constitutional Law,** III, 1**; Criminal Law.**

WORDS AND PHRASES.

"*Filed any complaint.*" Fair Labor Standards Act of 1938, 29 U. S. C. § 215(a)(3). Kasten v. Saint-Gobain Performance Plastics Corp., p. 1.

"*Report.*" False Claims Act, 31 U. S. C. § 3730(e)(4)(A). Schindler Elevator Corp. v. United States ex rel. Kirk, p. 401.

"*[Suits] for or in respect to [the same claim] against the United States [or its agents].*" 28 U. S. C. § 1500. United States v. Tohono O'odham Nation, p. 307.

WYOMING. See **Yellowstone River Compact.**

YELLOWSTONE RIVER COMPACT.

Appropriation doctrine—Irrigation system improvements—Detrimental effect on downstream appropriators.—Because Article V(A) of Compact incorporates ordinary doctrine of appropriation, and because in Wyoming and Montana that doctrine allows appropriators to improve their irrigation systems, even to detriment of downstream appropriators, Montana's allegation that Wyoming has allowed its upstream users to switch to a more efficient irrigation system with less return flow fails to state a claim for breach of Compact under Article V(A). Montana v. Wyoming, p. 368.