(ORDER LIST: 598 U.S.)

MONDAY, NOVEMBER 7, 2022

APPEAL -- SUMMARY DISPOSITION

22-92 BANERIAN, MICHAEL, ET AL. V. BENSON, MI SEC. OF STATE, ET AL.

The appeal is dismissed as moot.

CERTIORARI -- SUMMARY DISPOSITION

22-5235 McINTOSH, LOUIS V. UNITED STATES

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Second Circuit for further consideration in light of *United States* v. *Taylor*, 596 U. S. ___ (2022).

ORDERS IN PENDING CASES

22A261 RAVENELL, KENNETH V. UNITED STATES

The application for bail addressed to Justice Sotomayor and referred to the Court is denied.

22A267 BISHAY, BAHIG V. HARRIS, SCOTT, ET AL.

The application for injunction addressed to Justice Thomas and referred to the Court is denied.

22M26 HINES, FRANCES V. TOYOTA MOTOR SALES, U.S.A., INC.

The motion to direct the Clerk to file a petition for a writ of certiorari out of time is denied.

22M27 WHISTLEBLOWER 7107-16W V. CIR

The motion for leave to file a petition for a writ of certiorari under seal with redacted copies for the public record

is granted.

22M28 STREB, KENDALL V. UNITED STATES

The motion for leave to file a petition for a writ of certiorari with the supplemental appendix under seal is granted.

22M29 LINDBLOOM, ROBERT V. PARRISH CEMETERY ASSN., ET AL.

The motion to direct the Clerk to file a petition for a writ of certiorari out of time is denied.

22M30 FLORES-VAZQUEZ, ENRIQUE M. V. McDONOUGH, SEC. OF VA

The motion for leave to proceed as a veteran is denied.

22M31 WINGATE, JEFFREY V. UNITED STATES

The motion for leave to file a petition for a writ of certiorari with the supplemental appendix under seal is granted.

21-1052 U.S., EX REL. POLANSKY V. EXECUTIVE HEALTH, ET AL.

The motion of the Solicitor General for divided argument is granted.

21-1158 PERCOCO, JOSEPH V. UNITED STATES

The motion of respondent Steven Aiello in support of petitioner for divided argument is denied.

21-1270 MOAC MALL HOLDINGS LLC V. TRANSFORM HOLDCO LLC, ET AL.

The motion of the Solicitor General for leave to participate in oral argument as *amicus curiae*, for divided argument, and for enlargement of time for oral argument is granted.

21-1271 MOORE, TIMOTHY K., ET AL. V. HARPER, REBECCA, ET AL.

The motion of respondents for divided argument and for enlargement of time for oral argument is granted. The motion of the Solicitor General for leave to participate in oral argument

as *amicus curiae*, for divided argument, and for enlargement of time for oral argument is granted.

21-8259 IN RE JOHNNY B. GREGORY

The motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* is denied.

22-5497 SHAW, WILLIAM C. V. HAY, ED, ET AL.

The motion of petitioner for leave to proceed *in forma pauperis* is denied. Petitioner is allowed until November 28, 2022, 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.

CERTIORARI DENIED

21-1494 DAMIAN-GALLARDO, DARIA V. GARLAND, ATT'Y GEN.

21-1566 JUNO THERAPEUTICS, INC., ET AL. V. KITE PHARMA, INC.

21-7629 HOLMES, C. V. GRANUAILE, LLC, ET AL.

21-7934 SCHEUERMAN, ROBERT C. V. KANSAS

21-8051 DELGADO, MICHAEL R. V. UNITED STATES

21-8212 OTT, ANTHONY N. V. NEW YORK

21-8220 NELSON-ROGERS, MARY A. V. IRS, ET AL.

22-194 MIR, JEHAN Z. V. STATE FARM, ET AL.

22-202 NUNCIO, LEONARDO V. TEXAS

22-208 BROOKENS, BENOIT V. GAMBLE, LaRHONDA, ET AL.

22-213 POLK, DELORES, ET AL. V. YEE, BETTY, ET AL.

22-216 COOLEY, TERRY C. V. CA LAW ENFORCEMENT ASSN., ET AL.

22-230 GOLDEN 1 CREDIT UNION V. BURGARDT, DWAINE

22-236 McGOVERN, JAKE J. V. NEBRASKA

22-244 TANNER, STEPHEN A. V. ID DEPT. OF FISH & GAME, ET AL.

22-249 CHAMBERS SELF-STORAGE OAKDALE V. WASHINGTON CTY., MN

22-266 CHRISTENSEN, GARY S. V. UNITED STATES

22-283 MOSBY, RACHEL V. BYRON, GA

22-284 FRISBY, GARY V. SONY MUSIC ENTERTAINMENT, ET AL.

22-286 ROGERS, FRIEDA M., ET AL. V. WILMINGTON TRUST CO., ET AL.

22-291 McLANE, BRIAN H. V. CIR

22-348 TAYLER, FLOYD V. WASHINGTON

22-5019 GUYGER, AMBER R. V. TEXAS

22-5024 RODRIGUEZ, JEROD V. DIXON, SEC., FL DOC

22-5433 WILSON, TEDD V. STATE FARM

22-5493 WILEY, PATRICK V. MASTERSON, R., ET AL.

22-5498 STRIZ, AARON V. COLLIER, BRYAN, ET AL.

22-5499 REPELLA, SCOTT J. V. LUZERNE CHILDREN SRVCS., ET AL.

22-5507 SWANSON, EDWARD F. V. TEXAS

22-5513 JENKINS, JEROME V. SOUTH CAROLINA

22-5517 CUNGTION, CHRISTOPHER L. V. IOWA

22-5520 SIMS, ANTHONY V. NEW JERSEY

22-5544 SANDERS, JASON L. V. MACAULEY, WARDEN, ET AL.

22-5570 ENCARNACION, BERNABE V. ANNUCCI, COMM'R, NY DOC, ET AL.

22-5585 MARVIN, MARK V. PELDUNAS, MARTHA, ET AL.

22-5624 MARION, TIFFANY L. V. NORTH CAROLINA

22-5629 WILLIAMS, SAUL V. SOUTH CAROLINA

22-5705 ALAGBADA, LATEEF V. UNITED STATES

22-5714 ZORNES, TRACY A. V. BOLIN, WARDEN

22-5716 TARVIN, MICHAEL V. MISSISSIPPI

22-5732 ARRINGTON, RICHARD M. V. WISCONSIN

22-5753 SCOTT, PHILLIP V. DISTRICT COURT OF IA

22-5762 MATTOX, JONATHAN V. ARIZONA

22-5772 LOTT, ROLLIE A. V. UNITED STATES

22-5779 JOHNSON, JAMES M. V. UNITED STATES

22-5781 WOODSON, JOSEPH V. UNITED STATES

22-5782 TASSIN, MATTHEW V. UNITED STATES

22-5790 DELVA, DAVID V. UNITED STATES

22-5792 GATLING, ARMAD J. V. UNITED STATES

22-5806 GOULD, JESSICA L. V. JOHNSON, ISAIAH B.

22-5809 MORALEZ, SIRRON V. UNITED STATES

22-5810 PEREZ-BARRIOS, MARTIN V. UNITED STATES

22-5811 POULIN, MATTHEW V. UNITED STATES

22-5816 LAM, TONY V. UNITED STATES

22-5821 NORIEGA, FELIPE V. UNITED STATES

22-5829 BARRONETTE, MONTANA, ET AL. V. UNITED STATES

22-5830 RICHTER, WILLIAM V. OBAISI, GHALIAH

22-5833 ZUNIGA-GARCIA, CARLOS A. V. UNITED STATES

22-5835 KERR, NORMAN A. V. GOMEZ, WARDEN

The petitions for writs of certiorari are denied.

22-5509 LUEVANO, JAIME V. LUMPKIN, DIR., TX DCJ

The motion of petitioner for leave to proceed *in forma pauperis* is denied, and the petition for a writ of certiorari is dismissed. See Rule 39.8. As the 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*).

22-5528 COWAN, FELIX L. V. BIDEN, PRESIDENT OF U.S., ET AL.

The petition for a writ of certiorari is denied. Justice

Thomas took no part in the consideration or decision of this petition.

MANDAMUS DENIED

22-326 IN RE ADAM BRUZZESE

22-5804 IN RE DAVID K. LEWIS

The petitions for writs of mandamus are denied.

REHEARING DENIED

21-8026 KAETZ, WILLIAM F. V. ED. CREDIT MGMT. CORP., ET AL.

The petition for rehearing is denied. Justice Alito took no part in the consideration or decision of this petition.

SUPREME COURT OF THE UNITED STATES

THOMAS H. BUFFINGTON *v.* DENIS R. MCDONOUGH, SECRETARY OF VETERAN AFFAIRS

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

No. 21–972. Decided November 7, 2022

The petition for a writ of certiorari is denied.

JUSTICE GORSUCH, dissenting from the denial of certiorari.

Thomas Buffington served this Nation well but the Department of Veterans Affairs (VA) failed him. Relying on its own internal regulations, the agency denied Mr. Buffington disability benefits that Congress promised him by statute. Nor is Mr. Buffington's case an isolated one. The VA's misguided rules harm a wide swath of disabled veterans. Making matters worse, the lower courts in this case turned aside Mr. Buffington's petition asking them to set aside the agency's regulations and apply Congress's statutory instructions as written. Instead, the courts invoked "*Chevron* deference," bypassed any independent review of the relevant statutes, and allowed the agency to continue to employ its rules to the detriment of veterans. Respectfully, those who have served in the Nation's Armed Forces deserve better from our agencies and courts alike.

*

During his eight years in the Air Force in the 1990s, Mr. Buffington suffered a facial scar, a back injury, and tinnitus. After his discharge in 2000, he joined the Air National Guard. At about the same time and in recognition of injuries he suffered while on active duty, the VA assessed Mr. Buffington 10 percent disabled and awarded him benefits. The VA did this pursuant to a congressional promise that "the United States will pay" compensation "[f]or disability

resulting from personal injury suffered or disease contracted in line of duty." 38 U. S. C. §1131.

Mr. Buffington's time away from active duty proved short lived. In 2003, the federal government called his Guard unit into service. As a result, Mr. Buffington served again on active duty, including from July 2003 to June 2004, and from November 2004 to July 2005. During Mr. Buffington's time on active duty, the VA suspended his disability benefits. In doing so, everyone agrees that the agency acted properly under a statute that empowers it to withhold benefits "for any period for which [a service member] receives active service pay." §5304(c).

The trouble began after Mr. Buffington left active duty in 2005 and the VA failed to resume his disability benefits. When Mr. Buffington realized what had happened and inquired about the problem in January 2009, the agency acknowledged its legal duty to pay and agreed to resume future benefits. But the agency also informed Mr. Buffington that it refused to pay benefits retroactively beyond February 2008. All of which meant that Mr. Buffington missed out on about three years of disability payments, from 2005 to 2008.

Why did the VA refuse to pay these benefits? According to current agency rules, a veteran must *ask* for his disability payments to resume after a second (or subsequent) stint on active duty. If a veteran fails to ask for his benefits again, the agency will not provide them. Nor will the agency pay benefits retroactively beyond "1 year prior to the date" of a veteran's reinstatement request. 38 CFR §3.654(b)(2) (2021).

In the Court of Appeals for Veterans Claims, Mr. Buffington challenged the agency's rules as inconsistent with Congress's statutory commands. After all, the law says that the VA may suspend disability payments *only* for periods when a veteran "receives active service pay." 38 U. S. C. §5304(c). The court, however, found it unnecessary to decide for itself

whether Mr. Buffington's reading of the law was the best one. Instead, the court concluded that "Congress did not speak to the precise question at issue: Whether the Secretary may predicate the effective date for the recommencement of benefits on the date of the veteran's claim." *Buffington* v. *Wilkie*, 31 Vet. App. 293, 301 (Ct. App. Vet. Cl. 2019). Given that asserted ambiguity, the court invoked *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984), and deferred to the agency's rules. More of the same awaited Mr. Buffington in his appeal to the Federal Circuit. See 7 F. 4th 1361 (2021).

Still, not everyone saw the case the same way. In the Federal Circuit, Judge O'Malley dissented, arguing that Mr. Buffington should have prevailed based on bedrock principles of statutory interpretation. The law Congress adopted promised Mr. Buffington benefits from the moment he left active duty in 2005; the VA had no business requiring him to petition for them a second time; and the agency had no business withholding three years' worth of overdue payments. See *id.*, at 1367–1368. In the Court of Appeals for Veterans Claims, Judge Greenberg contended that the majority's invocation of *Chevron* was "nothing more than a rubber stamping of the Government's attempt to misuse its authority granted" by Congress. 31 Vet. App., at 308. Courts, he said, must "stop this business of making up excuses for judges to abdicate their job of interpreting the law." *Id.*, at 307 (internal quotation marks omitted).

I very much doubt that the courts below did right by Mr. Buffington. As Judges O'Malley and Greenberg highlighted, Congress has instructed the VA to make disability payments to injured veterans like Mr. Buffington. In §5304(c), Congress suspended that obligation only for periods when a veteran "receives active service pay." Nothing in the statute requires a veteran to ask the agency to resume benefits it is already legally obligated to pay. Nor

does anything in the statute allow the VA to withhold overdue benefits. It seems that even the VA once acknowledged all this. Before adopting its current rules, the agency's *previous* rule imposed no time bar and indicated that payments "may be resumed *the day following release* from active duty if otherwise in order." 26 Fed. Reg. 1599 (1961) (emphasis added) (establishing 38 CFR §3.654(b)).

Even more troubling than the answer the lower courts reached in this case, however, is *how* they got there. Neither the Court of Appeals for Veterans Claims nor the Federal Circuit offered a definitive and independent interpretation of the law Congress wrote. Instead, both courts simply deferred to the agency's (current) regulations as "reasonable" ones and said this Court's decision in *Chevron* required them to do so. That kind of judicial abdication disserves both our veterans and the law.

*

From the beginning of the Republic, the American people have rightly expected our courts to resolve disputes about their rights and duties under law without fear or favor to any party—the Executive Branch included. See A. Bamzai, The Origins of Judicial Deference to Executive Interpretation, 126 Yale L. J. 908, 987 (2017). In this country, it was "well established" early on that courts are not "bound by . . . administrative construction[s]" of the law and those constructions may "be taken into account only to the extent that [they are] supported by valid reasons." *Burnet* v. *Chicago Portrait Co.*, 285 U. S. 1, 16 (1932).

To be sure, as the administrative state spread its wings in the 1940s this Court toyed with the possibility of "depart[ing] from [this] longstanding tradition of independent, non-deferential judicial determination of questions of law," at least when it came to "so-called mixed questions of law and fact." E. Bernick, Envisioning Administrative Procedure Act Originalism, 70 Admin. L. Rev. 807, 814 (2018);

see, *e.g.*, *Gray* v. *Powell*, 314 U. S. 402, 411–412 (1941); *NLRB* v. *Hearst Publications*, *Inc.*, 322 U. S. 111, 131 (1944). But it didn't take long for a chorus of prominent voices to denounce that prospect. For example, Roscoe Pound, a former Dean of Harvard Law School, led a committee of the American Bar Association (ABA) that protested against the "recen[t]" trend of "giving the interpretation of [statutes] to the executive, or to administrative officials"—a trend that Pound worried would lead to "administrative absolutism." The Place of the Judiciary in a Democratic Polity, 27 A. B. A. J. 133, 136–137 (1941) (Pound); see also *Gray*, 314 U. S., at 418–421 (Roberts, J., dissenting) (warning this Court against "abdicat[ing] its function as a court of review" and "complete[ly] revers[ing] . . . the normal and usual method of construing a statute").

In 1946, Congress put any question in this area to rest when it adopted the Administrative Procedure Act (APA). Despite sharp divisions along partisan lines, Congress passed the APA unanimously thanks to a "hard-fought compromise" based in part on proposals from Pound and the ABA. G. Shepherd, Fierce Compromise: The Administrative Procedure Act Emerges From New Deal Politics, 90 Nw. U. L. Rev. 1557, 1560, 1646–1647, 1649–1652 (1996). On the one hand, the APA allowed agencies to issue binding regulations and required courts to defer to agency factfindings. See 5 U. S. C. §§553, 556–557, 706(2)(E). On the other hand, the APA provided that courts "*shall decide all* relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of agency action." §706 (emphasis added); see also §§706(2)(A)–(C) (instructing courts to "hold unlawful and set aside" agency actions "not in accordance with law").

In short, the APA appeared "unequivocally to instruct courts to apply independent judgment on all questions of law." T. Merrill, The *Chevron* Doctrine: Its Rise and Fall,

and the Future of the Administrative State 47 (2022) (Merrill 2022). As a leading contemporary scholar of administrative law put it, the statute imposed a "clear mandate" for courts to decide questions of law "for [themselves] in the exercise of [their] own independent judgment." J. Dickinson, Administrative Procedure Act: Scope and Grounds of Broadened Judicial Review, 33 A. B. A. J. 434, 516 (1947). "More explicit words to impose this mandate could hardly be found." *Ibid.*

After the APA's passage, courts more or less followed this mandate faithfully for decades. As Justice Robert H. Jackson—himself an ardent New Dealer before joining the bench—explained, courts would respectfully *consider* Executive Branch interpretations of the law, but the weight courts afforded them "depend[ed] upon the[ir] thoroughness . . . , [their] consistency with earlier and later pronouncements, and all those factors which g[i]ve [them] power to persuade." *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140 (1944); accord, *United States* v. *American Trucking Assns., Inc.*, 310 U. S. 534, 544 (1940) ("The interpretation of the meaning of statutes, as applied to justiciable controversies, is exclusively a judicial function"). In fact, many prominent judicial opinions in the decades following the adoption of the APA never even *mentioned* Executive Branch interpretation of disputed statutory terms. See J. Beermann, End the Failed *Chevron* Experiment Now: How *Chevron* Has Failed and Why It Can and Should Be Overruled, 42 Conn. L. Rev. 779, 792 (2010).

As some tell it, *Chevron* effected a revolution in 1984. As the story goes, the decision overthrew all that came before and enshrined a new rule requiring courts to defer to Executive Branch interpretations of the law. No longer did executive officials have to be right about the law's meaning to prevail in court—all they had to do was point to some relevant statutory ambiguity or silence and avoid being egregiously wrong. The lower courts in this case adopted just

this line of reasoning when they turned aside Mr. Buffington's appeal.

That view of *Chevron*, however, reads too much into too little. Doubtless, *Chevron* contained language that later courts would read as representing a "significant departur[e]from prior law." T. Merrill, The Story of *Chevron*: The Making of an Accidental Landmark, 66 Admin. L. Rev. 253, 255 (2014) (Merrill 2014). Most notably, *Chevron* included a passage musing that, "if [a] statute is silent or ambiguous with respect to [a] specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." 467 U. S., at 843. But *Chevron* also proceeded to *restate* the traditional rule: "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Ibid.*, and n. 9.

Tellingly, too, *Chevron* did not express disagreement with (let alone purport to overrule) precedents reciting the traditional rule that judges must exercise independent judgment about the law's meaning. Nor did the decision argue that the APA either tolerates or commands deference to Executive Branch views of the law. To the contrary, *Chevron* professed merely to apply "well-settled principles." *Id.*, at 845. Many of the cases *Chevron* cited to support its judgment stood only for the traditional proposition that courts afford respectful consideration, not deference, to executive interpretations of the law. See, *e.g.*, *Burnet*, 285 U. S., at 16 ("The Court is not bound by an administrative construction, and if that construction is not uniform and consistent, it will be taken into account only to the extent that it is supported by valid reasons"); *United States* v. *Moore*, 95 U. S. 760, 762–763 (1878) (an executive interpretation that had "always heretofore obtained" was "entitled to the most respectful consideration"). And the decision's sole citation to legal scholarship, 467 U. S., at 843, was to Roscoe Pound,

who long championed *de novo* judicial review. Pound 136–137.

If *Chevron* amounted to a revolution, it seems almost everyone missed it. The decision, issued by a bare quorum of the Court, sparked not a single word in concurrence or dissent. *Chevron*'s author, Justice Stevens, later characterized the decision as a "simpl[e] . . . restatement of existing law, nothing more or less." Merrill 2014, at 275, and n. 77. And in the "19 argued cases" in the following term "that presented some kind of question about whether the Court should defer to an agency interpretation of statutory law," this Court cited *Chevron* just once. Merrill 2014, at 276. By many estimations, *Chevron* seemed "destined to obscurity." Merrill 2014, at 276.

In truth, it took years for *Chevron* to morph into something truly revolutionary. Three years after *Chevron*, Justice Scalia wrote a concurrence that seized on its passing musings about deference and argued for a new rule requiring courts to defer to "reasonable" Executive Branch interpretations of the law whenever a "'statute is silent or ambiguous.'" *NLRB* v. *Food & Commercial Workers*, 484 U. S. 112, 133–134 (1987). Two years later, Justice Scalia continued his campaign in an academic article. See Judicial Deference to Administrative Interpretations of Law, 1989 Duke L. J. 511 (1989). Eventually, these efforts began to bear fruit as a majority of the Court came to embrace Justice Scalia's view. See Merrill 2022, at 93–94.

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Over time, however, experience has exposed grave problems with this expansive reconstruction of *Chevron*. So much so that even the initial champion of the project came to express a change of heart. Not only does reading *Chevron* so broadly badly stretch the terms of the original decision. Not only does it call on courts to depart from the terms of

the APA and our longstanding and never-overruled precedent. It also turns out to pose a serious threat to some of our most fundamental commitments as judges and courts.

In this country, we like to boast that persons who come to court are entitled to have independent judges, not politically motivated actors, resolve their rights and duties under law. Here, we promise, individuals may appeal to neutral magistrates to resolve their disputes about "what the law is." *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803). Everyone, we say, is entitled to a judicial decision "without respect to persons," 28 U. S. C. §453, and a "fair trial in a fair tribunal," *In re Murchison*, 349 U. S. 133, 136 (1955).

Under a broad reading of *Chevron*, however, courts often fail to deliver on all these promises. Rather than provide individuals with the best understanding of their rights and duties under law a neutral magistrate can muster, we outsource our interpretive responsibilities. Rather than say what the law is, we tell those who come before us to go ask a bureaucrat. In the process, we introduce into judicial proceedings a "systematic bias toward one of the parties." P. Hamburger, *Chevron* Bias, 84 Geo. Wash. L. Rev. 1187, 1212 (2016). Nor do we exhibit bias in favor of just any party. We place a finger on the scales of justice in favor of the most powerful of litigants, the federal government, and against everyone else. In these ways, a maximalist account of *Chevron* risks turning *Marbury* on its head.

Overreading *Chevron* introduces still other incongruities into our law. Often we insist that it is a basic requirement of due process that "'no man can be a judge in his own case.'" *Williams* v. *Pennsylvania*, 579 U. S. 1, 8–9 (2016). As far back as *Calder* v. *Bull*, 3 Dall. 386 (1798), this Court recognized that it would be "against all reason" to "entrust a Legislature" with the power to "mak[e] a man a Judge in his own cause," and therefore "it cannot be presumed that [the people] have done it," *id.*, at 388 (opinion of Chase, J.)

(emphasis deleted). Yet a broad reading of *Chevron* requires us to presume exactly that. So long as Executive Branch officials can identify a statutory ambiguity or silence, we must assume that the law permits them to judge the scope of their own powers and duties—at least so long as their decisions can be said to be "reasonable." See K. Saunders, Agency Interpretations and Judicial Review: A Search for Limitations on the Controlling Effect Given Agency Constructions, 30 Ariz. L. Rev. 769, 788–789 (1988).

Then there are the ancient doctrines of lenity and *contra proferentem*. From the founding, courts in this country have construed ambiguities in penal laws *against* the government and with lenity toward affected persons—here, we promise, our courts favor individual liberty, not prosecutors, prison time, and penal fines. See *Wooden* v. *United States*, 595 U. S. ___, ___ (2022) (GORSUCH, J., concurring in judgment) (slip op., at 6). Traditionally, too, our courts have long and often understood that, "as between the government and the individual[,] the benefit of the doubt" about the meaning of an ambiguous law must be "given to the individual, not to authority; for the state makes the laws." *Lane* v. *State*, 120 Neb. 302, 232 N. W. 96, 98 (1930); see, *e.g.*, *Caldwell* v. *State*, 115 Ohio St. 458, 460–461, 154 N. E. 792, 793 (1926). A rule requiring judicial deference to executive interpretations of statutory laws—especially laws that carry both civil and criminal penalties for their violation (as so many do)—cannot be easily reconciled with either of these historic commitments.

A broad reconstruction of *Chevron* defies still other norms. When reading statutes, we insist that courts pay careful attention to text, context, and traditional tools of interpretation. We demand interpretations that comport with how a reasonable reader would have understood the law at the time of its adoption. See, *e.g.*, *New Prime Inc.* v. *Oliveira*, 586 U. S. ___, ___ (2019). A rule requiring us to

suppose that statutory silences and ambiguities are both always intentional and always created by Congress to favor the government over its citizens fits with none of this. A rule like that is neither a traditional nor a reasonable way to read laws. It is a fiction through and through—and "one that requires a pretty hefty suspension of disbelief at that." *Gutierrez-Brizuela* v. *Lynch*, 834 F. 3d 1142, 1153 (CA10 2016) (Gorsuch, J., concurring).

Nor has the maximalist reading of *Chevron* even proven workable in practice. To this day, the federal government, *Chevron*'s biggest beneficiary, has yet to offer a coherent explanation for when a statute is sufficiently ambiguous to trigger deference. See, *e.g.*, Tr. of Oral Arg. in *American Hospital Assn.* v. *Becerra*, O. T. 2021, No. 20–1114, pp. 71–72 (Assistant to the Solicitor General: "I don't think I can give you an answer to th[e] question" of "[h]ow much ambiguity is enough"). Thanks to all this ambiguity about ambiguity, courts have pursued "wildly different" approaches. B. Kavanaugh, Fixing Statutory Interpretation, 129 Harv. L. Rev. 2118, 2152 (2016) (Kavanaugh). Along the way, too, *Chevron* has become pitted with exceptions and caveats—including for cases of "vast economic and political significance," *Utility Air Regulatory Group* v. *EPA*, 573 U. S. 302, 324 (2014) (internal quotation marks omitted), and those in which Congress has not delegated authority to an agency "to make rules with force of law," *United States* v. *Mead Corp.*, 533 U. S. 218, 237 (2001). Far from proving a clear and stable rule, the maximalist account of *Chevron* has left behind only a wake of uncertainty.

Overreading *Chevron* has profound consequences for how our government operates as well. It encourages executive officials to write ever more ambitious rules on the strength of ever thinner statutory terms, all in the hope that some later court will find their work to be at least marginally reasonable. When one administration departs and the next arrives, a broad reading of *Chevron* frees new officials to undo

the ambitious work of their predecessors and proceed in the opposite direction with equal zeal. In the process, we encourage executive agents not to aspire to fidelity to the statutes Congress has adopted, but to do what they might while they can. See R. Pierce, The Combination of *Chevron* and Political Polarity Has Awful Effects, 70 Duke L. J. Online 91, 92 (2021).

Consider the regulations before us. Some time ago, the VA promulgated a rule consistent with Congress's instructions, one providing that a veteran's disability benefits "may be resumed the day following [his] release from active duty." 26 Fed. Reg. 1599 (establishing 38 CFR §3.654(b)). In the years that followed, Congress did not amend its laws in any relevant way. Yet agency officials proceeded to revise their rules anyway to place new burdens on veterans and make their own jobs easier. Expansive views of *Chevron* encourage and reward just these sorts of self-serving gambits.

Overreading *Chevron* holds still other consequences for the rule of law. When the law's meaning is never liquidated by a final independent judicial decision, when executive agents can at any time replace one reasonable interpretation with another, individuals can never be sure of their legal rights and duties. Instead, they are left to guess what some executive official might "reasonably" decree the law to be today, tomorrow, next year, or after the next election. "[E]very relevant actor may agree" that the agency's latest pronouncement does not represent best interpretation of the law, yet all the same each new iteration "carries the force of law." Kavanaugh 2151. Fair notice gives way to vast uncertainty.

Nor does everyone suffer equally. Sophisticated entities may be able to find their way. They or their lawyers can follow the latest editions of the Code of Federal Regulations—the compilation of Executive Branch rules that now

clocks in at over 180,000 pages and sees thousands of further pages added each year. The powerful and wealthy can plan for and predict future regulatory changes. More than that, they can lobby agencies for new rules that match their preferences. Sometimes they can even capture the very agencies charged with regulating them. But what about ordinary Americans?

Today, administrative law doesn't confine itself to the regulation of large and sophisticated entities. Our administrative state "touches almost every aspect of daily life." *Free Enterprise Fund* v. *Public Company Accounting Oversight Bd.*, 561 U. S. 477, 499 (2010). And often it is ordinary individuals who are unexpectedly caught in the whipsaw of all the rule changes a broad reading of *Chevron* invites. Mr. Buffington's case illustrates the impact on disabled veterans. Those who left active service before the VA changed its rule received all their promised benefits; those who served later do not. Not because of any change in law, only a change in an agency's view. So many other individuals who interact with the federal government have found themselves facing similar fates—including retirees who depend on federal social security benefits, immigrants hoping to win lawful admission to this country, and those who seek federal health care benefits promised by law. See, *e.g.*, *Lambert* v. *Saul*, 980 F. 3d 1266, 1275–1276 (CA9 2020); *Valent* v. *Commissioner of Social Security*, 918 F. 3d 516, 525 (CA6 2019) (Kethledge, J., dissenting); *Gonzalez* v. *United States Atty. Gen.*, 820 F. 3d 399, 404–406 (CA11 2016) (*per curiam*); *Padilla-Caldera* v. *Holder*, 637 F. 3d 1140 (CA10 2011).

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With the passage of time, the problems with reading too much into *Chevron* have become widely appreciated. Even Justice Scalia reconsidered his earlier support for broad judicial deference to executive interpretations of the law. See

Decker v. *Northwest Environmental Defense Center*, 568 U. S. 597, 617–618, 621 (2013) (opinion concurring in part and dissenting in part) (calling on the Court to overrule the related *Auer* deference doctrine, which Justice Scalia had also pioneered); *Perez* v. *Mortgage Bankers Assn.*, 575 U. S. 92, 109–110 (2015) (opinion concurring in judgment). Many other Members of this Court have expressly questioned *Chevron* maximalism. See, *e.g.*, *Pereira* v. *Sessions*, 585 U. S. ___, ___ (2018) (Kennedy, J., concurring); *Michigan* v. *EPA*, 576 U. S. 743, 760–764 (2015) (THOMAS, J., concurring); *Arlington* v. *FCC*, 569 U. S. 290, 312–328 (2013) (ROBERTS, C. J., dissenting); *Gutierrez-Brizuela*, 834 F. 3d, at 1153 (Gorsuch, J., concurring); Kavanaugh 2150–2156. The federal government itself now often waives or forfeits arguments for *Chevron* deference before this Court—and it does so even in cases that might have once seemed obvious candidates for the doctrine's application. See, *e.g.*, *HollyFrontier Cheyenne Refining, LLC* v. *Renewable Fuels Assn.*, 594 U. S.___, ___ (2021) (slip op., at 11) (because the government did not seek *Chevron* deference we "decline[d] to consider" it). As a result of these developments, this Court has not invoked the broad reading of *Chevron* in many years.

Lower federal courts have also largely disavowed the project. One recent survey revealed that a substantial majority of federal appellate judges disapprove of the broad reading of *Chevron* and avoid applying it when they can. See A. Gluck & R. Posner, Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals, 131 Harv. L. Rev. 1298, 1312–1313 (2018). An extraordinary number of federal judges have written about the problems associated with reading *Chevron* broadly too. See, *e.g.*, *Egan* v. *Delaware River Port Auth.*, 851 F. 3d 263, 278 (CA3 2017) (Jordan, J., concurring); *Voigt* v. *Coyote Creek Mining Co.*, 980 F. 3d 1191, 1203–1204 (CA8 2020) (Stras, J., dissenting); *Valent*, 918 F. 3d, at 524 (Kethledge,

J., dissenting); *United States* v. *Havis*, 907 F. 3d 439, 448–450 (CA6 2019) (Thapar, J., concurring), rev'd en banc, 927 F. 3d 382 (*per curiam*); *Carter* v. *Welles-Bowen Realty*, *Inc.*, 736 F. 3d 722, 729–736 (CA6 2013) (Sutton, J., concurring).

Other notable voices have also spoken. Several state courts have refused to import a broad understanding of *Chevron* in their own administrative law jurisprudence. See, *e.g.*, *Tetra Tech EC*, *Inc.* v. *Wisconsin Dept. of Revenue*, 2018 WI 75, ¶67, 382 Wis. 2d 496, 554–555, 914 N. W. 2d 21, 50; *Ellis-Hall Consultants* v. *Pub. Serv. Comm'n*, 2016 UT 34, ¶32, 379 P. 3d 1270, 1275; see generally L. Phillips, *Chevron* in the States? Not So Much, 89 Miss. L. J. 313, 364 (2020) (observing that most States have declined to follow *Chevron*). Fifteen States have filed an *amici* brief in this case asking us to follow their lead. Brief for Indiana et al. as *Amici Curiae* on Pet. for Cert. 1. And courts in other countries that often consult American administrative law practices have declined to adopt the doctrine. See, *e.g.*, K. Barnett & L. Vinson, *Chevron* Abroad, 96 Notre Dame L. Rev. 621, 651 (2020) (under British law, an "error of law" is generally "subject to judicial review de novo"); M. Bernatt, Transatlantic Perspective on Judicial Deference in Administrative Law, 22 Colum. J. European L. 275, 313 (2016) ("[I]t is clear, that there is no counterpart to the *Chevron* doctrine on the EU level"); E. Jordão & S. Rose-Ackerman, Judicial Review of Executive Policymaking in Advanced Democracies: Beyond Rights Review, 66 Admin. L. Rev. 1, 8 (2014).

Unsurprisingly given all this, the aggressive reading of *Chevron* has more or less fallen into desuetude—the government rarely invokes it, and courts even more rarely rely upon it. The Federal Circuit's decision at issue here is thus something of an outlier. And maybe that is a reason to deny review of this case. Maybe *Chevron* maximalism has died of its own weight and is already effectively buried. But even if all that's true, it offers little comfort for Mr. Buffington

and the future veterans who will be forced to live with the VA's rule and the Federal Circuit's precedent. The same goes for other Americans who still find themselves caught in *Chevron*'s maw from time to time. No measure of silence (on this Court's part) and no number of separate writings (on my part and so many others) will protect them. At this late hour, the whole project deserves a tombstone no one can miss. We should acknowledge forthrightly that *Chevron* did not undo, and could not have undone, the judicial duty to provide an independent judgment of the law's meaning in the cases that come before the Nation's courts. Someday soon I hope we might.

SUPREME COURT OF THE UNITED STATES

WILLARD ANTHONY *v.* LOUISIANA

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF LOUISIANA, FIFTH CIRCUIT

No. 21–993. Decided November 7, 2022

The petition for a writ of certiorari is denied.

JUSTICE SOTOMAYOR, with whom JUSTICE JACKSON joins, dissenting from the denial of certiorari.

Petitioner Willard Anthony was charged with several counts related to sex trafficking. At trial, the State called two witnesses who testified that they witnessed and experienced physical and sexual abuse by Anthony. Defense counsel sought to impeach these witnesses, who had been arrested but not charged with prostitution, by suggesting they may have negotiated a deal in exchange for their testimony. To rebut this suggestion, the State called as a witness the prosecutor who presented Anthony's case to the grand jury. The prosecutor's testimony, however, went far beyond that limited purpose. Spanning 70 transcript pages, and over defense counsel's repeated and vociferous objections and motions for mistrial, the grand jury prosecutor expressed his belief that Anthony was guilty beyond a reasonable doubt, referenced his own investigation and evidence outside of the record, testified that he believed the State's two witnesses were credible, and bolstered his own credibility by reiterating the sworn oath he took as a prosecutor. Anthony was subsequently convicted and sentenced to life without the possibility of parole.

The prosecutorial misconduct in this case is not only blatant and egregious, but a clear due process violation. The court below nonetheless held that admission of the prosecutor's testimony was harmless error. The court reached this

holding after applying an incorrect harmless-error standard and disregarding compelling record evidence of prejudice. Because the court below clearly misapplied existing law in a manner that denies fundamental justice, I would summarily reverse.

I

Willard Anthony was indicted by a grand jury in Jefferson Parish, Louisiana, on two counts of aggravated rape and one count each of human trafficking, aggravated battery, second-degree battery, and possessing a firearm as a felon. At trial, Anthony conceded his guilt to being a felon in possession of a gun and to second-degree battery. He denied, however, charges that he raped a woman known as C. W., that he forced either C. W. or another woman known as Lee to work as a prostitute, and that he ever attacked C. W. with a gun. To carry its burden of proving the remaining counts of aggravated rape, human trafficking, aggravated battery, and sexual battery, the State relied almost entirely on testimony from C. W. and Lee themselves.[1]

Defense counsel sought to impeach and discredit those witnesses on cross-examination. Defense counsel pressed Lee on the fact that she had been arrested for prostitution and possession of cocaine, but that she had not been charged. Counsel asked "[y]ou certainly expect the District Attorney's Office to help you with [those potential charges], correct?" Tr. 53 (Dec. 10, 2016) (12/10 Tr.). Counsel also suggested that Lee had a motivation to curry favor with the prosecution, but Lee denied that she had made any deal

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[1]The physical evidence in the record included C. W.'s vaginal swab, which did not exclude Anthony's profile; DNA evidence from Anthony's gun that did not exclude C. W.'s, Anthony's, or a codefendant's profile; and cell phone records that confirmed that Anthony had posted pictures of C. W. and Lee on the internet. This evidence was consistent with Anthony's testimony that he had consensual sex with C. W., that he posted advertisements of C. W., Lee, and Grisby with their consent, and that C. W. had handled his gun, which he left unattended.

with the district attorney's office in exchange for her testimony.[2]

After Lee testified, the State called as a witness Assistant District Attorney (ADA) Thomas Block, the prosecutor who presented Anthony's case to the grand jury, ostensibly to rebut defense counsel's inference that Lee had made an agreement with the district attorney's office in exchange for her testimony. Instead, ADA Block began his testimony by explaining grand jury procedures. He testified, over objection, that he had "an obligation not to present what [he] believe[d] to be perjure[d] testimony." *Id.,* at 95. ADA Block elaborated: "[T]he only evidence that I present to a grand jury would be evidence that would be legally admissible in a court of law. I have a responsibility based upon my oath that I have taken to be an Assistant District Attorney as well as an officer of the Court and I take my job very seriously." *Id.,* at 100.

ADA Block then confirmed that his office did not file charges against Lee, but his testimony did not conclude there. The State asked ADA Block if he was aware of the information that the jury had already heard about Lee on her cross-examination, referring to the claim that Lee had worked as a prostitute and had been arrested for possessing cocaine. ADA Block testified, over objection, that he was aware of that information, as well as "police reports and . . . interviews that the detectives had done" with Lee and with another woman, Brittany Grisby, who was arrested along with Lee and C. W., and who did not testify at the trial. *Id.,* at 104. Asked again why Lee or C. W. were not charged after they had been arrested, ADA Block testified, again

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[2]Later in the trial, after Assistant District Attorney (ADA) Thomas Block testified, the government called C. W. as a witness. Defense counsel similarly cross-examined C. W. on her prostitution history, her drug and alcohol use during the events about which she testified, her prior felony convictions, and her recent arrest on an outstanding Florida warrant.

over objection,[3] to the legal conclusion that "[Lee] has an affirmative defense to the charges of prostitution . . . insofar as she was a victim of human trafficking as a result of his actions, Willard Anthony's actions." *Id.,* at 105. Defense counsel moved for a mistrial, which the trial court denied.

The State then focused ADA Block on the drug charges and battery charges that were initially part of Lee's arrest. ADA Block acknowledged that Lee and Grisby both hit C. W., but opined, over repeated objections and a further motion for mistrial,[4] that he had met and interviewed C. W., and concluded that Lee and Grisby hit C. W. specifically "because they were told to do so by Willard Anthony and they recognized that if they did not comply with his demands to beat [C. W.] after he had already beaten her, that they themselves would have sustained beatings." *Id.,* at 110. Regarding cocaine found in a motel room occupied by Lee, Grisby, and C. W. when they were all arrested, ADA Block explained to the jury that he "knew based upon the investigation that the defendants . . . were using drugs as a means to get the three ladies or the three female victims to commit the crimes for them as it relates to the human trafficking. That was just one of the things that they used to gain control over the females." *Id.,* at 115.

ADA Block confirmed that he had not made a deal with Lee, and reiterated that "as an officer of the Court and a representative of the people of Jefferson Parish and the

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[3] Here, defense counsel objected on the ground that ADA Block was "giving an opinion as to the credibility of Ms. Lee." 12/10 Tr. 106. Counsel explained: "[ADA Block] can't testify personally, his personal opinion based on this. You can't do that. I believe that's reversible error." *Id.,* at 107. The trial court overruled the objection.

[4] In one objection, defense counsel explained: "[ADA Block] can't sit here and comment on a witness' credibility before she's testified at this point. You can't, you can't support a witness like this. It's up to the jury to make that decision, not this man." *Id.*, at 112. The trial court overruled the objection. Defense counsel again moved for a mistrial, which the trial court also denied.

State of Louisiana," he had an obligation to decline charges that cannot be proved beyond a reasonable doubt. *Ibid.* When asked if ADA Block had tried to curry favor with Lee, he said no, and testified that Lee was "a victim." *Id.,* at 117. ADA Block reiterated that Lee did not receive a benefit from testifying, telling the jury that "[u]ltimately, she was going to have to come before you . . . and tell her story and then it would be up to you to determine whether or not you believed her." *Ibid.* Defense counsel raised an "ongoing objection." *Ibid.*

On cross-examination, defense counsel sought to question ADA Block about the limited and nonadversarial nature of grand jury proceedings, but the trial court sustained the State's objections to any questions involving the grand jury. At a bench conference, defense counsel argued that such questioning was necessary because ADA Block had vouched for the credibility of the State's witnesses, but the trial court disagreed, finding that ADA Block "testified as to what he has done regarding the [grand jury] screening process and the affirmative defenses available to these women." *Id.,* at 125. Defense counsel again moved for a mistrial, which the trial court again denied.

On redirect, ADA Block reiterated that he did not bring charges against Lee or nontestifying witness Grisby because in his view "[t]hey were victims. They were witnesses to the abuse of [C. W.]." *Id.,* at 155. ADA Block testified that there was consistency between what Lee and Grisby had told him. Defense counsel objected once more, this time because Grisby had not testified at trial; the trial court once again overruled the objection. ADA Block continued: "I believe that [Lee and Grisby] have an affirmative defense. I believe that they were victims of Willard Anthony . . . on a human trafficking, sex trafficking enterprise. I believe that they were witnesses to the crimes that this defendant before you stands accused of." *Id.,* at 156. Seemingly addressing the jury directly, ADA Block testified: "I would never in

good conscience bring charges against them for the reasons I have stated to you, ladies and gentlemen, today." *Ibid.* When asked by the State whether ADA Block would prosecute Lee or Grisby, ADA Block answered "I would not do that . . . for the reasons I've stated. They are victims of sex trafficking." *Id.,* at 158. ADA Block emphasized: "I have a responsibility and obligation as an officer of the Court when I was sworn in in 1993 as a lawyer and then sworn in as a prosecutor to prosecute in good faith pursuant to the laws in the State of Louisiana and take only those cases that we can prove beyond a reasonable doubt." *Ibid.*

The State, in its closing argument, reminded the jury of ADA Block's testimony, asking (over defense counsel's objection, which the trial court overruled): "You understand why the charges were refused against Ms. Grisby and Ms. Lee? No back room deals. . . . There are no deals here." Tr. 256–258 (Dec. 11, 2016). The jury convicted Anthony on all counts, and the judge sentenced him to an aggregate life without the possibility of parole sentence.

II

The Court of Appeal of Louisiana, Fifth Circuit, vacated Anthony's convictions on direct appeal. The court recognized that "a prosecutor may assume the dual role of witness and advocate only under extraordinary circumstances." 2017–372, p. 15 (La. App. 5 Cir. 2/20/19), 266 So. 3d 415, 426. "The danger," the court observed, "is that the jury might give inordinate weight to the prosecutor's testimony." *Ibid.*

Applying those principles here, the court concluded that "Mr. Block's testimony exceeded the scope permissible for a fair and impartial trial" in violation of Anthony's constitutional rights to due process and a fair trial. *Id.,* at 426–427. That was so, the court reasoned, because ADA Block "vouched for the credibility of the State witnesses," suggested that he "was aware of further evidence that was not

presented to the jury," and "improperly commented on [Anthony's] guilt." *Id.,* at 427–428. ADA Block did so "while using the prestige and dignity of his office to bolster the State's case." *Id.,* at 427. The court accordingly found that ADA Block's testimony amounted to structural error because the testimony violated Anthony's right to a "presumption of innocence." *Id.,* at 430.

In a *per curiam* opinion, the Louisiana Supreme Court vacated and remanded the Court of Appeal's decision on the ground that the lower court should have applied harmless-error analysis, not the structural-error doctrine. On remand, Judge Liljeberg of the Court of Appeal, who had authored the prior opinion, recused himself on the ground that "the facts and merits of this particular case were made a primary issue during [his] campaign for the Louisiana Supreme Court." App. to Pet. for Cert. 33a.[5]

In a split decision, the new Court of Appeal panel affirmed the conviction. All three judges agreed that Anthony's convictions for possession of a firearm and second-degree battery were valid. The majority upheld Anthony's other convictions, finding ADA Block's testimony to be harmless error. The majority reasoned that "the record shows that there was sufficient evidence to support defendant's convictions." 2017–372, p. 12 (La. App. 5 Cir. 12/30/20), 309 So. 3d 912, 923. In light of the "volume and strength of evidence introduced at trial in support of defendant's convictions," the majority concluded that ADA Block's testimony was harmless error. *Id.,* at 924.

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[5] For instance, one TV advertisement against Judge Liljeberg charged that Judge Liljeberg had made a "'reckless decision'" favoring "'a monster'" (Anthony): "'It didn't matter the victim was beaten, strangled and forced into a prostitution ring . . . . Liljeberg still sided with the criminal. It was wrong.'" J. Simerman, Ad War Heats Up Louisiana Supreme Court Race With a Week to Go, NOLA.com (Nov. 9, 2019), https://www.nola.com/news/politics/elections/article_fb7e524e-0323-11ea-a4c9-1f07984fbd56.html.

Judge Wicker dissented. She began by cataloging the errors the trial court committed by permitting ADA Block's wide-ranging testimony, explaining that ADA Block "usurped the exclusive province of the jury to weigh the evidence, including the credibility of all witnesses"; "testified concerning evidence the State received from Brittany Grisby, a witness who did not testify at trial"; "bolstered the credibility of State's witnesses"; and "gave an opinion as to the ultimate issue of fact: the Defendant's guilt beyond a reasonable doubt." *Id.,* at 931. Judge Wicker concluded that ADA Block's testimony was "much more egregious" than cases in which a prosecutor made impermissible statements during closing argument, because ADA Block "was a sworn witness," presenting evidence "to be considered by the jury in its deliberations." *Id.,* at 944. Applying the proper harmless-error standard, Judge Wicker explained, there was a reasonable possibility the evidence complained of might have contributed to the conviction. *Id.,* at 945.

The Supreme Court of Louisiana declined a writ of certiorari, with Justice Hughes noting his dissent for the reasons stated by Judge Wicker. 2021–00176 (La. 10/12/21), 325 So. 3d 1067.

III

A

This Court has explained that prosecutorial misconduct may rise to a due process violation in different circumstances, including when a prosecutor "vouche[s] for the credibility of witnesses," *United States* v. *Robinson*, 485 U. S. 25, 33, n. 5 (1988), "express[es] his personal opinion concerning the guilt of the accused," *United States* v. *Young*, 470 U. S. 1, 18 (1985), or "suggest[s] by his questions that statements had been made to him personally out of court," *Berger* v. *United States*, 295 U. S. 78, 84 (1935). The ultimate question has been whether a prosecutor's conduct "so infected the trial with unfairness as to make the resulting

conviction a denial of due process." *Donnelly* v. *DeChristoforo*, 416 U. S. 637, 643 (1974).

The Court in *Young* identified at least "two dangers" to help determine whether misconduct rises to the level of a due process violation. 470 U. S., at 18. First, a prosecutor may convey to the jury the impression that the prosecutor is aware of information, unknown to the jury, that suggests the defendant's guilt. *Ibid.* Second, the prosecutor's opinion may "carr[y] with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence." *Id.,* at 18–19. When these dangers arise, they implicate due process because they "jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury." *Id.,* at 18.

This case involves all three examples of misconduct present in prior cases and presents both dangers discussed in *Young*. The Court of Appeal therefore correctly concluded, in its first decision, that ADA Block's testimony constituted a violation of Anthony's due process rights.[6] ADA Block vouched for C. W.'s and Lee's credibility, opining that they were victims of Anthony's crimes and imploring the jury that Lee "deserves respect." 12/10 Tr. 117. Most explicitly, ADA Block testified that C. W.'s and Lee's "statements were corroborated as to [Anthony's] actions," based upon his view of "the totality of the circumstances." *Id.,* at 140.

ADA Block also repeatedly testified that he believed Anthony was guilty. He testified that he did not bring charges against Lee, C. W., or Grisby because he believed that they were victims of Anthony's sex trafficking. See *id.,* at 104–105 ("Based upon the actions of Willard Anthony," Lee had "an affirmative defense" because "she was a victim of human trafficking as a result of . . . Anthony's actions"). ADA

[6]The Court need not, and does not, decide whether ADA Block's testimony constituted structural error.

Block further communicated his belief in Anthony's guilt by testifying that he had a responsibility to "take only those cases that we can prove beyond a reasonable doubt," unmistakably signaling his view that Anthony was guilty beyond a reasonable doubt. *Id.,* at 158. ADA Block directly testified: "I know that Willard Anthony assaulted [C. W.] with a handgun; threatened to kill her; beat her; strangled her; choked her to the point of unconsciousness." *Id.,* at 141.

ADA Block did not merely suggest that he knew of evidence that was not before the jury, he said so. ADA Block testified that in deciding to bring charges against Anthony, he had reviewed extra record police reports and interviews with Grisby, a witness who did not testify. He further testified that Grisby's out-of-trial interview corroborated the accounts of C. W. and Lee, the State's key witnesses. ADA Block's testimony thus informed the jury of outside evidence that bolstered the credibility of the State's witnesses. ADA Block also testified that he had personal knowledge, outside of the evidence admitted at trial, that Anthony "us[ed] drugs as a means" to lure women into prostitution. *Id.,* at 115.

ADA Block made these comments while also invoking the *imprimatur* of his office. Several times he remarked on his "responsibility and obligation" as an officer of the court, *id.,* at 158, referencing the oath he took to become an assistant district attorney, *id.,* at 100. More disturbingly, he did so as a sworn witness. In the context of closing arguments, where the prosecutor is clearly speaking as an advocate, courts give prosecutors some leeway to comment on the evidence. Even in that context, however, "it is the height of summation misconduct for a prosecutor to argue to the jury his personal opinion as to a defendant's guilt." *Bellamy* v. *New York*, 914 F. 3d 727, 763 (CA2 2019); see also *Robinson*, 485 U. S., at 33, n. 5. This context is more serious. ADA Block appeared before the jury as a sworn witness, presenting evidence that could be considered in the jury's

deliberations. In that capacity, while underscoring his obligation as a prosecutor, ADA Block told the jury that he personally believed in the credibility of the State's witnesses, that Anthony was guilty, and that other evidence outside of the record confirmed Anthony's guilt.

B

Finding that ADA Block's testimony rose to the level of a due process violation does not end the matter, because constitutional errors may nevertheless be harmless. In assessing whether this error was harmless, however, the Court of Appeal of Louisiana applied a standard that is contrary to settled precedent. The majority below found the error harmless because "[t]he evidence at trial supports defendant's convictions, even excluding Mr. Block's testimony." 309 So. 3d, at 922. At no point did the majority consider the specific effect of ADA Block's testimony on the jury's verdict, except as to one passing reference asserting that the two convictions to which Anthony confessed (which are no longer at issue) "were surely unattributable to any alleged error in admitting Mr. Block's testimony." *Ibid.* In other words, the majority's reasoning with respect to the contested counts of conviction was based solely on the sufficiency of the evidence that remained after excising ADA Block's testimony.

This Court has repeatedly repudiated such an approach. As a species of harmless-error review generally, review of constitutional error in a criminal trial does not ask an appellate court to assess "whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered." *Sullivan* v. *Louisiana*, 508 U. S. 275, 279 (1993); see also *Kotteakos* v. *United States*, 328 U. S. 750, 765 (1946) (holding, as a general matter, that the harmless-error inquiry "cannot be merely whether there was enough to support the result, apart from the phase affected by the error"). Instead, *Chapman* v. *California*, 386 U. S. 18

(1967), requires that the government bear the burden of proving "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained," *id.*, at 24, with the appellate court focusing on "the guilty verdict actually rendered in *this* trial," *Sullivan*, 508 U. S., at 279. "That must be so, because to hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury-trial guarantee." *Id.,* at 279–280.

Although the court below correctly recognized that the *Chapman* standard governed, see 309 So. 3d, at 922, it failed to apply the proper standard, as Judge Wicker explained. First, and most obviously, the court did not assess "what effect [the error] had upon the guilty verdict in the case at hand." *Sullivan*, 508 U. S., at 279. The court failed to ask, let alone attempt to answer, the core question: What effect did ADA Block's extensive testimony, including his wide-ranging commentary on and vouching for the State's evidence and testimony and his references to extra record evidence, have on the jury's deliberations? That inquiry, the Court has explained time and again, is the core of assessing harmless error. See, *e.g., Yates* v. *Evatt*, 500 U. S. 391, 408 (1991) (harmless-error analysis requires determining whether the error "contributed to the jury's verdict"); *Arizona* v. *Fulminante*, 499 U. S. 279, 296 (1991) (analyzing harmless error by asking whether the error "contribute[d] to [the defendant's] conviction"); *Harrington* v. *California*, 395 U. S. 250, 254 (1969) (harmless-error analysis "must be based on our own reading of the record and on what seems to us to have been the probable impact of the [error] on the minds of an average jury"); *Chapman*, 386 U. S., at 23–24 ("An error in admitting plainly relevant evidence which possibly influenced the jury adversely to a litigant cannot . . . be conceived of as harmless"); *Fahy* v. *Connecticut*, 375 U. S. 85, 86–87 (1963) ("We are not concerned here with

whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of. The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction").

Instead of heeding this precedent, the court below imagined a hypothetical trial where the grand jury prosecutor did not testify, and concluded that sufficient evidence supported conviction. That is exactly the inquiry that this Court's harmless-error cases forbid.

C

Under the correct standard, ADA Block's testimony was clearly not harmless error. By using the weight of his office to vouch for and validate the State's evidence, and by opining on the conclusions to be drawn from that evidence, ADA Block's testimony created a legitimating lens through which the jury was invited to view the entirety of the State's case. It is thus impossible to say beyond a reasonable doubt that his pervasive testimony did not contribute to the jury's verdict. Three instances in particular illustrate how fully his testimony colored the jury's deliberations.

Consider first Anthony's human trafficking conviction. The court below found harmless error as to this conviction because "the undisputed testimony established that C. W. attempted to escape from defendant [once in Louisiana]." 309 So. 3d, at 922. Even assuming that is true, however, the court overlooked that the Louisiana crime of human trafficking for commercial sexual activity, as it then existed, had additional elements. Specifically, an individual had to defraud, force, or coerce the victim into providing sexual services for value gained. See La. Rev. Stat. Ann. §14:46.2 (West 2014) (effective Aug. 1, 2014 to July 31, 2016). The trial testimony related to this element was far from decisive. Lee testified that she and Grisby were not forced into prostitution, Tr. 335–336 (Dec. 9, 2016), and

C. W. acknowledged a history of voluntary prostitution, Tr. 63 (Dec. 11, 2016).

ADA Block's testimony, however, left no ambiguity on the matter. He repeatedly stated that the women were "victims of Willard Anthony . . . on a human trafficking, sex trafficking enterprise." 12/10 Tr. 156. Indeed, he cited this fact to explain why Lee and Grisby were not charged for participating in C. W.'s beating. *Ibid.* It is impossible to conclude that these remarks and others by ADA Block did not sway the jury to convict Anthony of human trafficking.

Consider next Anthony's conviction for aggravated battery with a handgun. While Anthony admitted beating C. W., he denied using his handgun to do so. Tr. 207 (Dec. 11, 2016). Lee, who was there for the beating, could not recall whether Anthony had his gun out. Tr. 317 (Dec. 9, 2016). ADA Block, however, boldly testified "I know that Willard Anthony assaulted [C. W.] with a handgun." 12/10 Tr. 141. Surely, this testimony was not harmless.

Finally, consider Anthony's convictions for aggravated rape. The jury instructions included a number of lesser included offenses as alternative verdicts. Record 319–322. A showing of prejudice here thus requires only reasonable doubt as to whether ADA Block's testimony contributed to the jury's decision to convict Anthony of aggravated rape, as opposed to a lesser included offense. The court below overlooked this critical point in its analysis. The omission is especially concerning given ADA Block's repeated testimony that a prosecutor would not charge an offense unless there was enough evidence to convict. In one characteristic remark, he explained: "[Y]ou have to meet the elements of the offense in order to charge the person and each and every element of the offense must be met beyond a reasonable doubt . . . . [I]f the evidence shows that the elements are not there . . . then I have a responsibility and an obligation not to charge someone with a crime." 12/10 Tr. 103–104. There is a reasonable possibility that this and other similar

statements influenced the jury's decision to convict Anthony of the most aggravated offenses with which he was charged.

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Our criminal justice system holds prosecutors to a high standard. The prosecutor is "the representative not of an ordinary party to a controversy, but of a sovereignty." *Berger*, 295 U. S., at 88. From that special role, "improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none." *Ibid.* It is an inescapable truth that the "power and force of the government tend to impart an implicit stamp of believability to what the prosecutor says." *Hall* v. *United States*, 419 F. 2d 582, 583–584 (CA5 1969).

These principles demand careful scrutiny of the rare cases in which a prosecutor takes the stand as a sworn witness in a jury trial. Because this case presents one of the most egregious instances of prosecutorial testimony amounting to prosecutorial misconduct, I respectfully dissent from the Court's refusal to issue a summary reversal.

SUPREME COURT OF THE UNITED STATES

CAROL V. CLENDENING, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF GARY J. CLENDENING *v.* UNITED STATES

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

No. 21–1410. Decided November 7, 2022

The petition for a writ of certiorari is denied.

JUSTICE THOMAS, dissenting from denial of certiorari.

While stationed at Camp Lejeune, Gary Clendening allegedly was exposed to toxins and contaminated water. He later died of leukemia. Gary's widow, petitioner Carol Clendening, then filed this tort suit against the United States. For most plaintiffs like Carol, the Federal Tort Claims Act (FTCA) waives the United States' sovereign immunity and allows for recovery. Nevertheless, the District Court determined that Carol's suit was barred by *Feres* v. *United States*, 340 U. S. 135 (1950), which held that military personnel cannot sue the United States for any injury "incident to military service," *id.,* at 144, even if the FTCA would otherwise allow the suit. Affirming, the Court of Appeals noted that "criticism of the *Feres* doctrine abounds," but it "'le[ft] to [this] Court the prerogative of overruling its own decisions.'" 19 F. 4th 421, 431 (CA4 2021).

We should accept the invitation. As I have explained several times, *Feres* should be overruled. The FTCA "'renders the United States liable to *all* persons, including servicemen, injured by the negligence of Government employees.'" *Lanus* v. *United States*, 570 U. S. 932 (2013) (opinion dissenting from denial of certiorari) (quoting *United States* v. *Johnson*, 481 U. S. 681, 693 (1987) (Scalia, J., dissenting)). The Act expressly excepts only a specific class of military-related claims: those "arising out of . . . combatant activities

. . . during time of war." 28 U. S. C. §2680(j). Nothing in the Act bars suits by servicemen based on their military status alone. *Doe* v. *United States*, 593 U. S. ___, ___–___ (2021) (THOMAS, J., dissenting from denial of certiorari) (slip op., at 1–2). Yet, in *Feres*, this Court invented an atextual, policy-based carveout that prevents servicemen from taking advantage of the FTCA's sweeping waiver of sovereign immunity. *Feres* "'heartily deserves the widespread, almost universal criticism it has received.'" *Lanus*, 570 U. S., at 933 (opinion of THOMAS, J.) (quoting *Johnson*, 481 U. S., at 700 (Scalia, J., dissenting)); see also J. Turley, *Pax Militaris*: The *Feres* Doctrine and the Retention of Sovereign Immunity in the Military System of Governance, 71 Geo. Wash. L. Rev. 1, 68 (2003) ("At a minimum, *Feres* represented a total departure from principles of judicial restraint and deference to the political branches"). I write yet again to highlight the consequences of this Court's refusal to reconsider *Feres*.

The lower courts' attempts to apply *Feres*' "incident to military service" standard are marked by incoherence. One might be surprised to learn, for example, that a serviceman's exposure to excessive carbon monoxide at Fort Benning is not incident to service, *Elliott* v. *United States*, 13 F. 3d 1555, 1556–1557 (CA11 1994),[1] but exposure to contaminated drinking water at Camp Lejeune is, *Gros* v. *United States*, 232 Fed. App. 417, 418–419 (CA5 2007) (*per curiam*).[2] Or that the dissemination of personal materials stored on a military base by fellow servicemen is not

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[1] In *Elliott*, rehearing en banc was granted and the panel opinion vacated, 28 F. 3d 1076; the en banc court then affirmed the result by an equally divided vote, 37 F. 3d 617.

[2] The Camp Lejeune Justice Act of 2022, Pub. L. 117–168, §804, 136 Stat. 1802–1804, does not alter the availability of recovery under the FTCA. Rather, the Act provides an alternative remedy to the FTCA that presupposes multiple routes to recovery. See §804(e)(1), *id.,* at 1803. It is also much narrower in scope than the FTCA.

incident to service, *Lutz* v. *Secretary of the Air Force*, 944 F. 2d 1477, 1478–1479 (CA9 1991), but a West Point cadet's *rape* by a fellow cadet is, *Doe* v. *Hagenbeck*, 870 F. 3d 36, 44–49 (CA2 2017).

Far from limiting *Feres*, this Court "'has embarked on a course dedicated to broadening the *Feres* doctrine to encompass, at a minimum, *all* injuries suffered by military personnel that are even remotely related to the individual's *status* as a member of the military.'" 19 F. 4th, at 428. This expansion has led to further distortion and incoherence in our jurisprudence. Take, for example, *Air & Liquid Systems Corp.* v. *DeVries*, 586 U. S. ___ (2019). There, manufacturers provided the Navy with asbestos-free equipment—to which *the Navy* subsequently added asbestos, allegedly causing cancer in servicemen-decedents. See *Daniel* v. *United States*, 587 U. S. ___, ___–___ (2019) (THOMAS, J., dissenting from denial of certiorari) (slip op., at 1–2). Yet the Navy's immunity under *Feres* led us to "twis[t] traditional tort principles" to allow for recovery against the manufacturers. *Id.,* at ___ (slip op., at 2). The force of *Feres* thereby distorts even longstanding principles of tort law. *E.g., Sebright* v. *General Elec. Co.*, 525 F. Supp. 3d 217, 241 (Mass. 2021) (significantly limiting a sophisticated-purchaser defense because, under *Feres*, the serviceman-plaintiff "might not have recourse against anyone other than equipment manufacturers").

Further, *Feres'* professed concern with military discipline is anomalous, if not downright hypocritical, against the backdrop of military law more generally. We preclude run-of-the-mill tort claims that are "remotely related" to military status because of their potential to undermine military discipline.[3] But we have "never held . . . that military per-

[3] "[W]e have repeatedly cited the later-conceived-of 'military discipline' rationale as the 'best' explanation for" *Feres*. *United States* v. *Johnson*,

sonnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service." *Chappell* v. *Wallace*, 462 U. S. 296, 304 (1983). To the contrary, servicemen "routinely sue their government and bring military decision-making and decision-makers into court" seeking injunctive relief. Turley, 71 Geo. Wash. L. Rev., at 21. For example, we recently left in place an injunction that dictated personnel decisions to the Navy. *Austin* v. *U. S. Navy Seals 1–26*, 595 U. S. ____ (2022) (partially staying injunction that prevents Navy from taking any adverse personnel actions against Navy SEAL plaintiffs, but only "insofar as it precludes the Navy from . . . making deployment, assignment, and other operational decisions"). Apparently, the Court cares about the chain of command when considering money-damages suits against the Government, but our concerns evaporate when servicemen seek injunctions against their superior officers' personnel decisions.

That is completely backwards. "Injunctions and regulations tell people what they must do and what they must not do, and it is *these* types of intrusions that would entangle courts in military affairs." *Taber* v. *Maine*, 67 F. 3d 1029, 1048 (CA2 1995). By contrast, "[t]ort judgments do neither of these things." *Ibid.*; see also *Johnson*, 481 U. S., at 700 (Scalia, J., dissenting) ("[P]erhaps Congress assumed that, since liability under the FTCA is imposed upon the Government, and not upon individual employees, military decisionmaking was unlikely to be affected greatly"). If military discipline is not sufficiently harmed by judicial decisions countermanding military personnel choices, it is difficult to see how *Feres*' concern with preserving the chain of command has any validity.[4]

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481 U. S. 681, 698 (1987) (Scalia, J., dissenting).

[4] The courts below held that one of Clendening's claims survived *Feres* but was barred under the FTCA's textual discretionary-function exception. See 19 F. 4th 421, 432–436 (CA4 2021); 28 U. S. C. §2680(a). The

It would be one thing if Congress itself were responsible for this incoherence. But Congress set out a comprehensive scheme waiving sovereign immunity that we have disregarded in the military context for nearly 75 years. Because we caused this chaos, it is our job to fix it.

FTCA's specific exceptions could mitigate the discipline concerns driving the maintenance of *Feres*' atextual "incident to military service" exception. See *Johnson*, 481 U. S., at 699–700 (Scalia, J., dissenting) ("[P]erhaps Congress assumed that the FTCA's explicit exclusions would bar those suits most threatening to military discipline, such as claims based upon combat command decisions, 28 U. S. C. §2680(j); claims based upon performance of 'discretionary' functions, §2680(a); claims arising in foreign countries, §2680(k); intentional torts, §2680(h); and claims based upon the execution of a statute or regulation, §2680(a)").

SUPREME COURT OF THE UNITED STATES

RAMIN KHORRAMI *v.* ARIZONA

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF ARIZONA, DIVISION ONE

No. 21–1553. Decided November 7, 2022

The petition for a writ of certiorari is denied.

JUSTICE KAVANAUGH would grant the petition for a writ of certiorari.

JUSTICE GORSUCH, dissenting from the denial of certiorari.

The State of Arizona convicted Ramin Khorrami of serious crimes before an 8-member jury. On appeal, Mr. Khorrami sought a new trial, arguing that the Sixth and Fourteenth Amendments of the U. S. Constitution guarantee individuals like him a trial before 12 members of the community. The Arizona Supreme Court rejected the appeal, explaining that it considered itself bound by *Williams* v. *Florida*, 399 U. S. 78 (1970). There, for the first time and in defiance of centuries of precedent, this Court held that a 12-member panel "is not a necessary ingredient" of the Sixth Amendment right to trial by jury. *Id.*, at 86. In his petition for certiorari, Mr. Khorrami asks us to reconsider *Williams*. Regrettably, the Court today declines to take up that task. *Williams* was wrong the day it was decided, it remains wrong today, and it impairs both the integrity of the American criminal justice system and the liberties of those who come before our Nation's courts.

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Presently, the laws in 44 States entitle individuals charged with serious crimes to a trial before a 12-member jury. Only 6 States, Arizona included, tolerate smaller panels—and it is difficult to reconcile their outlying practices with the Constitution. The Sixth Amendment protects the

"right to a speedy and public trial, by an impartial jury." And a mountain of evidence suggests that, both at the time of the Amendment's adoption and for most of our Nation's history, the right to a trial by jury for serious criminal offenses *meant* a trial before 12 members of the community—nothing less.

Start with this. We often say that "[t]he interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history." *Smith* v. *Alabama*, 124 U. S. 465, 478 (1888). And while scholars may debate the precise moment when the common-law jury came to be fixed at 12 members, this much is certain: By the time of the Sixth Amendment's adoption, the 12-person criminal jury was "an institution with a nearly four-hundred-year-old tradition in England." R. Miller, Comment, Six of One Is Not a Dozen of the Other: A Reexamination of *Williams* v. *Florida* and the Size of State Criminal Juries, 146 U. Pa. L. Rev. 621, 643 (1998) (Miller). In 1769, Blackstone stated the rule succinctly: No person could be found guilty of a serious crime unless "the truth of every accusation [was] confirmed by the unanimous suffrage of twelve of his equals and neighbours." 4 Commentaries on the Laws of England 343. In the 1790s, James Wilson, both a framer of the Constitution and a Justice of this Court, explained the common-law rule this way: "[T]he unanimous sentiment of the twelve jurors is of indispensable necessity" to "the conviction of a crime." Of Juries, in 2 Collected Works of James Wilson 985 (K. Hall & M. Hall eds. 2007).

From the moment it was adopted, the Sixth Amendment was widely understood to protect this ancient right. In the first few decades following the Amendment's ratification, a "flurry" of state courts interpreted the phrase "trial by an impartial jury" to require the use of a 12-person panel. Miller, 643, and n. 133 (collecting cases). A host of state courts

pursued the same understanding through the balance of the 19th century. Pet. for Cert. 11–12 (collecting cases). The third edition of Story's Commentaries on the Constitution likewise stated that "[a] trial by jury *is* . . . a trial by a jury of *twelve*. . . . Any law therefore, dispensing with [this] requisit[e] may be considered unconstitutional." 2 Commentaries on the Constitution of the United States §1779, p. 588, and n. 3 (3d ed. 1858) (second emphasis in original).

Later American treatises echoed the same refrain. One said that a criminal jury means "a body of twelve. . . . Any less than this number of twelve would not be a common-law jury, and not such a jury as the [C]onstitution preserves to accused parties." T. Cooley, Constitutional Limitations 319 (1868). Another observed that "[a] jury of less than twelve . . . is not a jury; and a statute authorizing a jury of less, in a case in which the Constitution guarantees a jury trial, is void." 1 J. Bishop, Criminal Procedure §897, p. 545 (2d ed. 1872). A third taught that, "where the record shows that the cause was tried by a jury of less than twelve men, the trial will be held to be a nullity." S. Thompson & E. Merriam, Organization, Custody and Conduct of Juries §6, p. 6 (1882).

Nor was this view confined to lower courts and commentators. This Court first addressed the question of jury composition in 1898 when it overturned an 8-person verdict from Utah. *Thompson* v. *Utah*, 170 U. S. 343. Speaking for the Court, Justice Harlan could not have been plainer: "[T]he jury referred to in the original Constitution and in the Sixth Amendment is a jury constituted, as it was at common law, of twelve persons, neither more nor less." *Id.*, at 349. In support of his conclusion, Justice Harlan stressed that "the words 'trial by jury' were placed in the Constitution of the United States with reference to the meaning affixed to them in the law as it was in this country and in England at the time of the adoption of that instrument." *Id.*, at 350.

A year later the Court returned to the area adding that a trial by jury "in the primary and usual sense of the term at the common law and in the American constitutions, is . . . a trial by a jury of twelve." *Capital Traction Co.* v. *Hof*, 174 U. S. 1, 13 (1899). A year later still, the Court professed "no doubt" that "a jury composed, as at common law, of twelve jurors was intended by the Sixth Amendment." *Maxwell* v. *Dow*, 176 U. S. 581, 586 (1900). Five years after that, the Court repeated and reaffirmed *Thompson*'s holding that the Sixth Amendment guarantees "'the right to be tried by a jury of twelve.'" *Rassmussen* v. *United States*, 197 U. S. 516, 527 (1905).

By 1930, the Court declared that it was "not open to question" that the right to trial by jury for serious criminal offenses "means a trial by jury as understood and applied at common law," including the element that it "should consist of twelve" members. *Patton* v. *United States*, 281 U. S. 276, 288. Nor was the Court open to even slight deviations from this rule: "To uphold the voluntary reduction of a jury from twelve to eleven upon the ground that the reduction—though it destroys the jury of the Constitution—is only a slight reduction, is not to interpret that instrument, but to disregard it." *Id.*, at 292. In 1968, the Court seemingly acknowledged all this, quoting Blackstone once more for the principle that "'the truth of every accusation'" must be proved to "'twelve of [the accused's] equals and neighbours.'" *Duncan* v. *Louisiana*, 391 U. S. 145, 151–152.

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Decided against this backdrop, *Williams* was an anomaly the day it issued in 1970. The decision upheld a Florida law permitting the use of 6-member juries in cases involving serious criminal accusations. In doing so, the decision contravened the Sixth Amendment's original meaning and hundreds of years of precedent in both common-law courts and this one. Nor are the three most essential moves *Williams* made to reach its result remotely persuasive.

First, *Williams* sought to sidestep any serious inquiry into the "'intent of the Framers'" of the Sixth Amendment on the ground that their motivations were an "elusive quarry." 399 U. S., at 92. To prove its point, *Williams* observed that James Madison's initial draft guaranteed a jury trial with its "'accustomed requisites,'" but the Senate later dropped this qualifying language. *Id.*, at 94–95. According to the *Williams* majority, Madison's draft surely would have carried with it a guarantee of a 12-member jury, for that was an "accustomed requisite" of criminal trials at common law. *Id.*, at 95–96. But the Senate's editorial change made it at least "plausible" to infer that some Senators may have "intended" to abandon the traditional 12-person rule. *Id.*, at 97.

This argument proves too much. Even *Williams* acknowledged that the bit of drafting history it cited might just as easily support the *opposite* inference it drew. After all, it is equally possible from all we know that Senators omitted the phrase "accustomed requisites" because they understood the right to trial by jury *as* a trial before 12 members of the community and saying anything more risked confusion or surplusage. *Ibid.*; see also *Ramos* v. *Louisiana*, 590 U. S. ___, ___ (2020) (slip op., at 12). Recognizing this point, we have since explained that, "rather than dwelling on text [the Senate] left on the cutting room floor, we are much better served by interpreting the language Congress retained and the States ratified." *Ramos*, 590 U. S., at ___ (slip op., at 12). And when it comes to *that* question, the answer is not nearly so elusive. Whatever the private intentions of the Senate editors, plenty of evidence exists about the original public meaning of the Sixth Amendment—and that evidence strongly indicates that the right to criminal trial by jury meant nothing less than a trial before 12 members of the community.

Second, *Williams* not only had to sidestep evidence of original meaning to reach its result, it also had to find some

way around a battery of this Court's precedents stretching from 1898 to 1968. To accomplish that, *Williams* tersely dismissed the teachings of all these cases as "dict[a]." 399 U. S., at 91–92. But that move, too, undersells history. As we've seen, long before *Williams* this Court stated unequivocally that "the jury referred to in the original Constitution and in the Sixth Amendment is a jury constituted, as it was at common law, of twelve persons." *Thompson*, 170 U. S., at 349. This Court expressed "no doubt" that the Sixth Amendment right to a trial by jury means "a jury composed, as at common law, of twelve." *Maxwell*, 176 U. S., at 586. The Court did not consider the matter "open to question." *Patton*, 281 U. S., at 288. To the contrary, the Court said that even "slight reduction[s]" in the size of juries would not be consistent with a fair "interpret[ation]" of the Sixth Amendment but amount to a "disregard [of] it." *Id.*, at 292. As Justice John Marshall Harlan II highlighted in his separate writing in *Williams*, this extensive line of decisions long ago liquidated the meaning of the Sixth Amendment: "[B]efore today it would have been unthinkable to suggest that the Sixth Amendment's right to a trial by jury is satisfied" by anything less than trial before a panel of 12 members. *Id.*, at 122 (Harlan, J., concurring opinion).

Third, after giving short shrift to original meaning and precedent, *Williams* still had to construct an affirmative case for permitting 6-member juries. To do so, *Williams* first posited that the ancient 12-member jury rule "rest[s] on little more than mystical or superstitious insights." *Id.*, at 88. Next, *Williams* suggested that 6-member juries would "probably" function just as well when it comes to ensuring thoughtful "group deliberation . . . and . . . provid[ing] a fair possibility for obtaining a representative cross-section of the community." *Id.*, at 100. Even *Williams* had to concede, however, that "few experiments" and little evidence existed to support its claims. *Id.*, at 101. In the

end, the best *Williams* could say was that, as of 1970, "neither currently available evidence nor theory" had yet proved that a 12-person jury "is necessarily more advantageous" than a 6-member panel. *Id.*, at 101–102.

None of this supplies a sound basis for judicial tinkering with an ancient tradition. As the Court in *Patton* wrote almost a century ago, "[i]t is not our province to measure the extent to which the Constitution has been contravened and ignore the violation, if in our opinion, it is not, relatively, as bad as it might have been." 281 U. S., at 292. Or as we put the point more recently: "When the American people chose to enshrine [the jury trial] right in the Constitution, they weren't suggesting fruitful topics for future cost-benefit analyses. They were seeking to ensure that their children's children would enjoy the same hard-won liberty they enjoyed." *Ramos*, 590 U. S., at ___ (slip op., at 15). "As judges, it is not our role to reassess whether" the same jury-trial right that Americans enjoyed at the founding "is 'important enough' to retain. With humility, we must accept that th[e] right may serve purposes evading our current notice. We are entrusted to preserve and protect that liberty, not balance it away aided by no more than social statistics." *Ibid.*

Even taken on their own terms, *Williams*'s functionalist claims have not aged well. Before the ink dried on the decision, scholars began criticizing *Williams* for overreading the handful of studies it cited to support its tepid assertion that 6-member panels would "probably" operate as well as 12-member juries. See, *e.g.*, H. Zeisel, . . . And Then There Were None: The Diminution of the Federal Jury, 38 U. Chi. L. Rev. 710, 712–715 (1971). And just 8 years later in *Ballew* v. *Georgia*, 435 U. S. 223 (1978), this Court found itself confronted with more "recent empirical data." *Id.*, at 232–33. As *Ballew* acknowledged, this new data *did* suggest that "smaller juries are less likely to foster effective group deliberation," and *did* "raise doubts about the accuracy of the results achieved by . . . smaller panels." *Id.*, at

232–234. As *Ballew* admitted, this new data also suggested that "as juries become smaller" the "variance [redounds] to the detriment of one side, the defense." *Id.*, at 236. Smaller juries, too, this new research found, are less likely to include members of "minority groups," and thus threaten to deprive defendants of a fair possibility of obtaining a jury composed of a representative cross-section of the community. *Id.,* at 236–237. While *Ballew* declined to overrule *Williams* outright, it refused to extend the decision to permit the use of 5-member juries—and in the process it effectively undermined the entire functionalist rationale on which *Williams* rested.

An array of studies in the years since *Ballew* has done more of the same. These studies suggest that 12-member juries deliberate longer, recall information better, and pay greater attention to dissenting voices. See, *e.g.*, M. Saks & M. Marti, A Meta-Analysis of the Effects of Jury Size, 21 Law & Hum. Behav. 451, 455–466 (1997). This research continues to suggest that smaller juries are less likely to include minorities. See, *e.g.*, *id.*, at 455—457; S. Diamond, et al., Achieving Diversity on the Jury: Jury Size and the Peremptory Challenge, 6 J. Empirical Legal Studies 425, 442 (2009) (summarizing the results of one study: "While 28.1 percent of the six-member juries lacked even one black juror, only 2.1 percent of the 12-member juries were entirely without black representation"). And this research suggests that the absence of minorities can have a striking effect on outcomes. According to one study, "there is a significant gap in conviction rates for black versus white defendants when there are no blacks in the jury pool," while "the gap in conviction rates for black versus white defendants is eliminated" when there is at least one black member of the jury pool. S. Anwar, et al., The Impact of Jury Race in Criminal Trials, 127 Q. J. Econ. 1017, 1019–1020, 1034–1035 (2012); see also S. Sommers & P. Ellsworth, How Much Do We Really Know About Race and Juries? A Review

of Social Science Theory and Research, 78 Chi.-Kent L. Rev. 997, 1028–1029 (2003) (discussing an experiment showing that "White jurors on racially mixed juries were less likely to vote to convict [a] Black defendant than White jurors on all-White juries").

Nor should we need a barrage of statistical studies to tell us this much. During the Jim Crow era, some States restricted the size of juries and abandoned the demand for a unanimous verdict as part of a deliberate and systematic effort to suppress minority voices in public affairs. See, *e.g.*, La. Const., Art. 116 (1898); *Ramos*, 590 U. S., at ___, (slip op., at 1–3) (observing that the 1898 Louisiana Constitution allowed 5-member juries and nonunanimous verdicts alongside "a poll tax, a combined literacy and property ownership test, and a grandfather clause that in practice exempted white residents from the most onerous of these requirements"); S. C. Const. Art. III, §1 (1865) and 1866 S. C. Sess. Laws 493, §3 (providing for 8-member juries in district courts, which have jurisdiction over "all criminal cases wherein the accused is a person of color"). To be sure, some States have adopted smaller criminal juries for different reasons. Arizona, for example, may have been trying to cut costs when it adopted its law permitting 6-member juries in 1972 shortly after this Court decided *Williams*. See S. Diamond & A. Ryken, The Modern American Jury: A One Hundred Year Journey, 96 Judicature 315, 318 (2013). But the reality that smaller panels tend to skew jury composition and impair the right to a fair trial is no new insight. It is sad truth borne out by hard experience.

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For almost all of this Nation's history and centuries before that, the right to trial by jury for serious criminal offenses meant the right to a trial before 12 members of the community. In 1970, this Court abandoned that ancient promise and enshrined in its place bad social science parad-

ing as law. That mistake continues to undermine the integrity of the Nation's judicial proceedings and deny the American people a liberty their predecessors long and justly considered inviolable. Today's case presented us with an opportunity to correct the error and admit what we know the law is and has always been. Respectfully, we should have done just that.

SUPREME COURT OF THE UNITED STATES

DAVEL CHINN *v.* TIM SHOOP, WARDEN

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

No. 22–5058. Decided November 7, 2022

The petition for a writ of certiorari is denied.

JUSTICE JACKSON, with whom JUSTICE SOTOMAYOR joins, dissenting from the denial of certiorari.

This is a capital case involving a violation of *Brady* v. *Maryland*, 373 U. S. 83 (1963). There is no dispute that, during the capital trial of petitioner Davel Chinn, the State suppressed exculpatory evidence indicating that the State's key witness, Marvin Washington, had an intellectual disability that may have affected Washington's ability to remember, perceive fact from fiction, and testify accurately. When affirming on direct appeal, the Ohio Supreme Court said "[i]f the jury accepted Washington's testimony, the jury was certain to convict [Chinn], but if the jury did not believe Washington, it was certain to acquit [Chinn] of all charges." *State* v. *Chinn*, 85 Ohio St. 3d 548, 561, 709 N. E. 2d 1166, 1178 (1999). Similarly, the Ohio Court of Appeals said that Washington was the "key" and "main" witness against Chinn. *State* v. *Chinn*, 2001–Ohio–1550, 2001 WL 788402, *2, *8 (July 13, 2001). Yet, when confronted during state postconviction proceedings with the State's suppression of evidence that would have substantially impeached this key witness, the Ohio courts suddenly concluded that evidence was not "material" enough to have affected the trial.

I write to emphasize the relatively low burden that is "materiality" for purposes of *Brady* and *Strickland* v. *Washington*, 466 U. S. 668 (1984). To prove prejudice under both *Brady* and *Strickland*, a defendant must show "a reasonable probability" of a different outcome. *United States* v.

Dominguez Benitez, 542 U. S. 74, 82 (2004); *United States* v. *Bagley*, 473 U. S. 667, 682 (1985) (opinion of Blackmun, J.). We have repeatedly said that the "reasonable probability" standard is not the same as the "more likely than not" or "preponderance of the evidence" standard; it is a qualitatively lesser standard. *Kyles* v. *Whitley*, 514 U. S. 419, 434 (1995) (collecting cases); see also *Dominguez Benitez*, 542 U. S., at 83, n. 9; *Strickler* v. *Greene*, 527 U. S. 263, 298 (1999) (Souter, J., concurring in part and dissenting in part). In fact, it is "contrary to" our precedent to equate the "'reasonable probability'" materiality standard with the more-likely-than-not standard. *Williams* v. *Taylor*, 529 U. S. 362, 405–406 (2000).

The Sixth Circuit did not appropriately apply the materiality standard. Although the Sixth Circuit purported to recognize that the two standards were different, it simultaneously claimed that "'reasonable probability' for *Brady*'s purposes is *effectively the same* as a more-probable-than-not standard." *Chinn* v. *Warden*, 24 F. 4th 1096, 1103 (2022) (emphasis added). It further said that "[t]he *Brady* question now" before the court was "whether it is more probable than not that the withheld evidence would have created a different result." *Ibid.* That reasoning violated the spirit, if not the letter, of our many cases holding that the two standards are not the same and that "reasonable probability" is a lower standard. Indeed, it is unclear why *Strickland* would have spent the time it did considering but rejecting the "more likely than not" standard in favor of the "reasonable probability" standard for prejudice, 466 U. S., at 693–694, if courts could treat them as "effectively the same," 24 F. 4th, at 1103.

Because Chinn's life is on the line, and given the substantial likelihood that the suppressed records would have changed the outcome at trial based on the Ohio courts' own representations, see *Harrington* v. *Richter*, 562 U. S. 86, 112 (2011), I would summarily reverse to ensure that the Sixth Circuit conducts its materiality analysis under the proper standard.